

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct June 2017

The purpose of this tentative recommendation is to solicit public comment on the Commission's tentative conclusions. A comment submitted to the Commission will be part of the public record. The Commission will consider the comment at a public meeting when the Commission determines what, if any, recommendation it will make to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made to it.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **September 1, 2017.**

The Commission will often substantially revise a proposal in response to comment it receives. Thus, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-4739
650-494-1335
<commission@clrc.ca.gov>

SUMMARY OF TENTATIVE RECOMMENDATION

Mediation is a popular, widely-used dispute resolution technique, in which a neutral person facilitates communication between disputants to assist them in reaching a mutually acceptable agreement. Many sources maintain that robust, uninhibited discussions are crucial to effective mediation.

To promote such discussions, existing law makes mediation communications and writings confidential and generally precludes the use or disclosure of a mediation communication or writing in a subsequent noncriminal case. This gives mediation participants some degree of assurance that what they say in a mediation will not later come back to hurt them.

Occasionally, however, a mediation participant alleges that the participant's attorney committed malpractice or engaged in other misconduct during a mediation. The law protecting mediation communications and writings might impede a court in evaluating such a claim and rendering a just decision.

By resolution (2012 Cal. Stat. res. ch. 108), the Legislature directed the Commission to analyze "the relationship under current law between mediation confidentiality and attorney malpractice and other misconduct" The Legislature asked the Commission to address "the purposes for, and impact of, those laws on public protection, professional ethics, attorney discipline, client rights, the willingness of parties to participate in voluntary and mandatory mediation, and the effectiveness of mediation"

The Legislature also instructed the Commission to consider certain Evidence Code provisions and their predecessors, the availability and propriety of contractual waivers, the law in other jurisdictions (including the Uniform Mediation Act and other statutory acts), scholarly commentary, judicial decisions in California and elsewhere, and any data regarding the impact of differing confidentiality rules on the use of mediation. The Legislature authorized the Commission to "make any recommendations that it deems appropriate for the revision of California law to balance the competing public interests between confidentiality and accountability."

Part I of this report summarizes the Commission's research for this study, including its work on the matters requested by the Legislature. Part II explains the Commission's preliminary conclusions, which are the basis for the proposed legislation presented in Part III of the report.

Based on its review of the relevant law, policy considerations, and empirical evidence, the Commission tentatively recommends the creation of a new exception to mediation confidentiality. The proposed new exception is designed to hold attorneys accountable for misconduct in the mediation process, while also allowing attorneys to effectively rebut meritless misconduct claims.

This recommendation was prepared pursuant to Resolution Chapter 150 of the Statutes of 2016.

Contents

RELATIONSHIP BETWEEN MEDIATION CONFIDENTIALITY AND ATTORNEY MALPRACTICE AND OTHER MISCONDUCT	1
PART I. RESEARCH FINDINGS.....	3
Assembly Bill 2025 and the Inception of the Commission’s Study.....	3
Scope of Study.....	5
Terminology	7
“Mediation Confidentiality”	7
“Mediation Privilege”	8
Key Policy Considerations	9
Key Policy Underlying Mediation Confidentiality.....	9
Special Considerations Relating to Mediator Testimony	14
Key Reasons For Permitting Disclosure of Mediation Communications To Establish Attorney Misconduct	16
Clash of Key Policies.....	22
California Law on Mediation Confidentiality	23
History of California’s Statutory Scheme.....	23
Current Statutory Framework	27
California Supreme Court Decisions on Mediation Confidentiality.....	33
Other Decisions on the Intersection of Mediation Confidentiality and Alleged Attorney Misconduct Under California Law	41
Law of Other Jurisdictions	49
Uniform Mediation Act.....	50
Other States	59
Federal Law	70
Empirical Information	80
Empirical Information on Mediation Confidentiality	80
Empirical Information on the Effects of Mediation.....	89
Empirical Information on Mediation Misconduct	97
Empirical Information on Mediation Usage	102
Conclusions Regarding Empirical Information	105
Scholarly Views.....	107
Scholarly Views on Protection of Mediation Communications in General.....	107
Scholarly Views on Use of Mediation Communications to Prove or Disprove a Misconduct Claim.....	109
Scholarly Views on Use of Mediation Communications to Challenge a Mediated Settlement Agreement.....	113
Scholarly Views on <i>In Camera</i> Proceedings Relating to Mediation Evidence	114
Scholarly Views on Informing Mediation Participants About the Extent of Protection for Mediation Communications	116
Scholarly Views on Other Means of Addressing Mediation Misconduct	117
Possible Approaches.....	119
Create Some Type of Mediation Confidentiality Exception Addressing Attorney Malpractice and Other Misconduct.....	120
Revise the Law on Waiving Mediation Confidentiality or Modifying It By Agreement	125
Add Safeguards Against Attorney Misconduct in the Mediation Process.....	127
Establish Disclosure Requirements.....	129
PART II. PRELIMINARY CONCLUSIONS	133
Proposed New Exception to Mediation Confidentiality.....	133
Limitations to Protect the Policies Underlying Mediation Confidentiality	133

Other Features of the Proposed New Exception	140
Request For Comments	141
PART III. PROPOSED LEGISLATION.....	145
Evid. Code § 1120.5 (added). Alleged misconduct of lawyer when representing client in mediation context	145
Uncodified (added). Operative date	148
APPENDIX: EVIDENCE CODE SECTIONS 703.5 AND 1115-1128 AND CORRESPONDING COMMENTS	149

RELATIONSHIP BETWEEN MEDIATION
CONFIDENTIALITY AND ATTORNEY
MALPRACTICE AND OTHER MISCONDUCT

1 California’s court system is one of the largest in the world, handling millions of
2 cases every year.¹ Many of those cases are resolved through mediation (court-
3 connected or private),² a process in which a neutral person facilitates
4 communication between disputants to assist them in reaching a mutually
5 acceptable agreement.³ Mediation is also widely used to resolve disputes without
6 resorting to litigation.⁴

7 There is broad consensus that open and frank discussion among mediation
8 participants is critical to effective mediation.⁵ To promote such discussion,
9 existing California law provides strong protection for mediation communications
10 and writings: they are considered “confidential” and they are generally
11 inadmissible and protected from disclosure in a noncriminal case.⁶ This gives

1. Judicial Council of California, *2016 Court Statistics Report: Statewide Caseload Trends (2005-2006 Through 2014-2015)*, at Preface & xvii. California courts processed about 6.8 million cases in fiscal year 2014-2015, the most recent year for which data is available.

2. See discussion of “Empirical Evidence” *infra*.

3. Evid. Code § 1115.

4. See, e.g., CLRC Staff Memorandum 2016-58, Exhibit p. 12 (comments of Mary B. Culbert, on behalf of Loyola Law School Center for Conflict Resolution) (“Los Angeles County alone serves around 20,000 people each year in its DRPA-Funded Community-Based Mediation Programs, which we estimate accounts for approximately 1/5 of all those served by DRPA-Funded Mediation Programs throughout the state (100,000 people total — this number is an extrapolation from Los Angeles County data).”).

All staff memoranda and other Commission materials cited in this report are available on its website (www.clrc.ca.gov).

5. See, e.g., *Blackmon-Malloy v. United States Capitol Police Bd.*, 575 F.3d 699, 711 (D.C. Cir. 2009) (“Congress understood what courts and commentators acknowledge, namely, that confidentiality plays a key role in the informal resolution of disputes.”); *Sheldone v. Pennsylvania Turnpike Comm’n*, 104 F. Supp. 2d 511, 513 (W.D. Pa. 2000) (“Both federal and state courts have recognized that confidentiality is essential to the mediation process.... The need for confidence and trust in the mediation process is further evidenced by federal statute, the local rules of federal district courts ..., and state statutes from across the country.”); National Conference of Commissioners on Uniform State Laws, *Uniform Mediation Act (2001)* (hereafter, “UMA”), at Prefatory Note (“Candor during mediation is encouraged by maintaining the parties’ and mediators’ expectations regarding confidentiality of mediation communications.... Virtually all state legislatures have recognized the necessity of protecting mediation confidentiality.”); Sarah Rudolph Cole, *Secrecy and Transparency in Dispute Resolution: Protecting Confidentiality in Mediation: A Promise Unfulfilled?*, 54 Kan. L. Rev. 1419, 1425 (2006) (“Legislators, courts, and commentators generally agree that maintaining confidentiality of mediation communications and documents prepared for mediation is essential to the success of the mediation process.”).

6. See Evid. Code § 1119; see also Evid. Code § 703.5, 1115-1128.

1 mediation participants some degree of assurance that what they say in mediation
2 will not later be used to their detriment.⁷

3 Suppose, however, that a mediation participant wants to prove that the
4 participant’s attorney committed malpractice or engaged in other misconduct
5 during a mediation.⁸ In that situation, the statutory protection for mediation
6 communications and writings may make it difficult for a court to properly assess
7 the merits of the participant’s claim and render a just decision.

8 Due to these competing considerations, the Legislature directed the Commission
9 to analyze “the relationship under current law between mediation confidentiality
10 and attorney malpractice and other misconduct”⁹ The Legislature requested
11 extensive background research on the topic, in specific areas.¹⁰

12 Part I of this report summarizes the Commission’s research for this study so far,
13 including its work on the matters requested by the Legislature. Part II presents the
14 Commission’s preliminary conclusions, which are the basis for the proposed
15 legislation presented in Part III of the report.

16 Based on its review of the relevant law, policy considerations, and empirical
17 evidence, the Commission tentatively recommends the creation of a new exception
18 to California’s mediation confidentiality law. The proposed new exception is
19 designed to hold attorneys accountable for misconduct in the mediation process,
20 while also allowing attorneys to effectively rebut meritless misconduct claims.

21 **The Commission invites interested persons to comment on any aspect of**
22 **this tentative recommendation.** It is just as important to express support for
23 material in the report as it is to indicate areas of disagreement or concern.

24 The Commission will carefully consider any comments and might revise its
25 recommendation in response to them. Thus, this tentative recommendation is not
26 necessarily the recommendation that the Commission will submit to the
27 Legislature.

7. See, e.g., *Cassel v. Superior Court*, 51 Cal. 4th 113, 131, 244 P.2d 1080, 119 Cal. Rptr. 3d 437 (2011) (principal purpose of mediation confidentiality statutes “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.”).

8. See, e.g., *id.* at 118.

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

10. See *id.*

PART I. RESEARCH FINDINGS

In this part of its report, the Commission provides some background information and then describes the extensive research it has conducted for this study. The discussion is organized as follows:

	<i>Page</i>
Assembly Bill 2025 and the Inception of the Commission’s Study	3
Scope of Study	5
Terminology	7
Key Policy Considerations	9
California Law on Mediation Confidentiality	23
Law of Other Jurisdictions	49
Empirical Information	80
Scholarly Views	107
Possible Approaches	119

Assembly Bill 2025 and the Inception of the Commission’s Study

In *Cassel v. Superior Court*,¹¹ the California Supreme Court held that California’s mediation confidentiality statutes must be strictly construed and are not subject to a judicially-crafted exception where a client sues for legal malpractice and seeks disclosure of private attorney-client discussions relating to a mediation.¹² The Court said that the statutory terms “must govern, even though they may compromise” a client’s ability to prove legal malpractice.¹³

Reaction to the *Cassel* ruling in 2011 was decidedly mixed. Some groups and individuals praised the decision, while others sharply criticized it.

In particular, the Conference of California Bar Associations (“CCBA”)¹⁴ concluded that the mediation confidentiality statutes should be amended to overturn the *Cassel* result.¹⁵ At CCBA’s urging, a bill was introduced to create a new statutory exception.¹⁶ The proposed exception stated that the mediation confidentiality statutes *do not limit* the

11. 51 Cal. 4th at 118-19.

12. See *id.* at 123-33.

13. *Id.* at 119. For further information on *Cassel*, see discussion of “California Supreme Court Decisions on Mediation Confidentiality” *infra*.

14. CCBA is a non-profit corporation comprised of numerous local, minority, statewide and specialty voluntary bar associations in California. See <http://calconference.org/html/about-2/ccba-fact-sheet>.

15. See CCBA Resolution 10-06-2011 (reproduced in CLRC Staff Memorandum 2013-39, Exhibit pp. 10-12).

16. See AB 2025 (Wagner), as introduced on Feb. 23, 2012.

1 admissibility, in a State Bar disciplinary action, an action for legal malpractice,
2 and/or an action for breach of fiduciary duty, of communications directly between
3 the client and his or her attorney, only, where professional negligence or
4 misconduct form the basis of the client's allegations against the client's
5 attorney.¹⁷

6 The bill immediately prompted significant opposition.¹⁸ It was therefore
7 amended to direct the Commission to conduct this study.¹⁹ The amended content
8 of the bill was later transferred to the Commission's biennial resolution of
9 authority, which was passed by the Legislature.²⁰

10 The resolution states in pertinent part:

11 *Resolved*, That the Legislature approves for study by the California Law
12 Revision Commission the new topic listed below:

13 (a) Analysis of the relationship under current law between mediation
14 confidentiality and attorney malpractice and other misconduct, and the purposes
15 for, and impact of, those laws on public protection, professional ethics, attorney
16 discipline, client rights, the willingness of parties to participate in voluntary and
17 mandatory mediation, and the effectiveness of mediation, as well as any other
18 issues that the commission deems relevant. Among other matters, the commission
19 shall consider the following:

20 (1) Sections 703.5, 958, and 1119 of the Evidence Code and predecessor
21 provisions, as well as California court rulings, including, but not limited to, Cassel
22 v. Superior Court (2011) 51 Cal.4th 113, Porter v. Wyner (2010) 183 Cal.App.4th
23 949, and Wimsatt v. Superior Court (2007) 152 Cal.App.4th 137.

24 (2) The availability and propriety of contractual waivers.

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

29 (b) In studying this matter, the commission shall request input from experts and
30 interested parties, including, but not limited to, representatives from the California
31 Supreme Court, the State Bar of California, legal malpractice defense counsel,
32 other attorney groups and individuals, mediators, and mediation trade
33 associations. The commission shall make any recommendations that it deems
34 appropriate for the revision of California law to balance the competing public
35 interests between confidentiality and accountability.²¹

17. See *id.* at 2.

18. When the Commission began working on this study, mediator Ron Kelly provided the Commission with a set of the support and opposition letters pertaining to AB 2025 (Wagner), as introduced on Feb. 23, 2012. His cover letter and enclosures are available on the Commission's website (see <http://www.clrc.ca.gov/pub/Misc-Report/AM-K402-9:21:12.pdf>).

19. See AB 2025 (Gorell), as amended in Assembly, May 10, 2012.

20. See ACR 98 (Wagner), 2012 Cal. Stat. res. ch. 108.

21. See *id.* at 4.

1 Scope of Study

2 The legislative resolution asks the Commission to analyze “the relationship
3 under current law between mediation confidentiality and *attorney malpractice and*
4 *other misconduct ...*” To determine the proper scope of this study, the
5 Commission had to resolve (1) which types of misconduct to consider and (2)
6 whether to focus only on misconduct *in a mediation context*, as opposed to
7 misconduct more generally.

8 Many different types of bad behavior could theoretically occur during a
9 mediation.²² In addition, mediation communications might provide evidence
10 relating to misconduct that occurred earlier than, or separate and apart from, the
11 mediation process.²³

12 The legislative resolution directing this study contains several references to
13 attorneys, attorney misconduct, and attorney organizations. It also refers
14 specifically to “professional ethics” and “client rights,” suggesting a focus on
15 misconduct in a professional capacity.²⁴ In addition, the resolution refers to
16 Evidence Code Section 958, which relates to “an issue of breach, by the *lawyer* or
17 by the client, of a duty arising out of the *lawyer-client* relationship.”²⁵

22. At one extreme, a mediation participant could commit a criminal act while attending a mediation session (such as assaulting another participant or stealing something from another participant’s unattended briefcase). Importantly, the code provisions that restrict the admissibility and disclosure of mediation communications and writings only apply in a noncriminal proceeding (see Evid. Code § 1119(a), (b)), and only apply to conduct that is intended as an assertion (see, e.g., *Radford v. Shehorn*, 187 Cal. App. 4th 852, 857, 114 Cal. Rptr. 3d 499 (2010)).

At another extreme, a mediation participant might be faulted for failing to comply with a court order requiring mediation. Some types of noncompliance with such an order (such as failing to attend a mediation or bring a required representative) might be subject to proof without delving into mediation communications. See, e.g., *Foxgate Homeowners’ Ass’n v. Bramalea California, Inc.*, 26 Cal. 4th 1, 15, 25 P.3d 1117, 128 Cal. Rptr. 2d 642 (2001). Other times, a charge of noncompliance might be based on a participant’s failure to make a settlement offer. Such a charge would be groundless, because a mediated settlement agreement must be voluntary and a mediation participant is entitled to withdraw from mediation at any time. See Evid. Code § 1115(a); Cal. R. Ct. 3.853; see generally *Gaines v. Fidelity Nat’l Title Ins. Co.*, 62 Cal. 4th 1081, 1103, 365 P.3d 904, 199 Cal. Rptr. 3d 137 (2016); *Jeld-Wen, Inc. v. Superior Court*, 146 Cal. App. 4th 536, 540-41, 53 Cal. Rptr. 3d 115 (2007); 6 B. Witkin, *Cal. Procedure Proceedings Without Trial* § 486, p. 942 (5th ed. 2008).

In between these extremes, a mediation participant might engage in nonviolent behavior that could be subject to criminal penalties but usually is only pursued civilly (e.g., fraud or some types of extortion). A mediation participant could also engage in noncriminal misconduct at a mediation, such as negligence.

Of particular note, a professional attending a mediation might violate a professional duty or rule, or fail to comply with a professional standard of care. Depending on the applicable professional requirements, this type of misconduct could be committed by any type of professional: The mediator, the attorneys representing clients at the mediation, or a doctor, accountant, insurer, contractor, engineer, or other professional providing advice or otherwise acting in a professional capacity.

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

24. For the text of the resolution with the pertinent terms italicized, see Commission Staff Memorandum 2015-34, pp. 5-6.

25. Evid. Code § 958 (emphasis added).

1 Importantly, the resolution singles out *Cassel* and two other California cases for
2 particular attention. Each of those cases involved the intersection of mediation
3 confidentiality and alleged *attorney* misconduct in a *professional* capacity in a
4 *mediation context*.²⁶

5 The history of the resolution provides further insight into the intended scope of
6 study. Like the cases just discussed, that history suggests that the Commission
7 should study and provide a recommendation on the relationship between
8 mediation confidentiality and alleged *attorney* misconduct in a *professional*
9 capacity in a *mediation context* (including, but not limited to, legal malpractice).²⁷

10 This tentative recommendation focuses on that topic. In taking that approach,
11 the Commission recognized that the Legislature gave it wide rein to choose the
12 best means of addressing the topic.²⁸ Because the area is controversial, it seemed
13 prudent to stick closely to the assigned topic.

14 Of necessity, however, the Commission’s research for this study has been more
15 wide-ranging. The available research materials are not organized in a manner
16 facilitating a focus on alleged professional misconduct of attorneys in a mediation
17 setting. In addition, materials involving other types of mediation misconduct (such
18 as alleged mediator misconduct or alleged misconduct by other mediation
19 participants, particularly professionals) could be instructive by way of analogy.
20 Thus, this tentative recommendation describes some research in those areas, as
21 well as research on the specific topic at hand.²⁹

26. In *Cassel*, the plaintiff “sued his attorneys for malpractice, breach of fiduciary duty, fraud, and breach of contract” in representing him in a mediation. 51 Cal. 4th at 118. He alleged that “by bad advice, deception, and coercion, the attorneys, who had a conflict of interest, induced him to settle for a lower amount than he had told them he would accept, and for less than the case was worth.” *Id.*

Similarly, in *Porter v. Wyner*, the plaintiffs sued their law firm for “legal malpractice, breach of fiduciary duty, constructive fraud, negligent misrepresentation, breach of fee agreement, rescission, unjust enrichment and liability for unpaid wages.” 107 Cal. Rptr. 3d 653, 658 (2010) (footnote omitted) (formerly published at 183 Cal. App. 4th 949). The plaintiffs claimed that the firm gave them incorrect tax advice in connection with a mediated settlement agreement, failed to pay them part of the attorney fee portion of the settlement proceeds as promised during the mediation, and failed to compensate one of the plaintiffs for services rendered as a paralegal. See *id.* at 655-57.

The third case cited in the legislative resolution is *Wimsatt v. Superior Court*, 152 Cal. App. 4th 137, 61 Cal. Rptr. 3d 200 (2007). This was another attorney-client dispute relating to a mediation. The plaintiff alleged that his law firm breached its fiduciary duty by making a low settlement demand against his wishes on the eve of a mediation, which ultimately compromised the plaintiff’s ability to obtain a satisfactory settlement. See *id.* at 202-04, 206.

These cases are described in greater detail later in this tentative report. See the discussions of “California Supreme Court Decisions on Mediation” and “Other Decisions on the Intersection of Mediation Confidentiality and Attorney Misconduct Under California Law” *infra*.

27. See CLRC Staff Memorandum 2015-34 & sources cited therein.

28. The last sentence of the legislative resolution authorizes the Commission to “make *any recommendations that it deems appropriate* for the revision of California law to balance the competing public interests between confidentiality and accountability.” See ACR 98 (Wagner), 2012 Cal. Stat. res. ch. 108 (emphasis added).

29. For further analysis regarding the scope of this study, see CLRC Staff Memorandum 2015-34.

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Terminology

A few words about terminology may be helpful before turning to the substance of this study. In particular, there are some complexities relating to the terms “mediation confidentiality” and “mediation privilege.”

“Mediation Confidentiality”

Courts and commentators often use the term “mediation confidentiality” loosely, to refer to one or more of the following types of protection for mediation communications (oral or written):

- (1) A statute or rule making mediation communications inadmissible in a legal proceeding.
- (2) A statute or rule preventing compelled discovery or disclosure of mediation communications in a legal proceeding.
- (3) A statute or rule providing that mediation communications must be kept confidential and not disclosed to anyone (i.e., true confidentiality).
- (4) A statute or rule precluding a mediator from testifying about a mediation.
- (5) A contractual agreement between mediation participants to keep mediation communications confidential to a specified extent.³⁰

Such usage may result in confusion about the type of protection at stake.³¹

Ideally, it might be best to use the term “mediation confidentiality” only for a true confidentiality requirement (Item #3 or Item #5). In practice, however, the looser usage is so widespread, engrained, and comparatively convenient that it is hard to avoid.³²

For that reason, this tentative recommendation often uses the term “mediation confidentiality” in the broader sense. Nonetheless, the Commission tried to be

30. Among other things, such an agreement might prohibit a mediator from telling other mediation participants what a person said during a private caucus with the mediator.

31. For example, the New York State Bar Association’s Committee on Alternative Dispute Resolution had the following comments about the Uniform Mediation Act:

Despite its name, the UMA is an Act that addresses only whether mediation communications are discoverable or admissible in legal proceedings. Other than preserving the rights of parties to contract for confidentiality, it does not prescribe any rules governing confidentiality generally. Although it is debatable whether the UMA should be more comprehensive, the important fact for legislators and others in the legal community to remember is that the UMA is a very narrow Act addressing only the issue of privilege. *That many of those who would be impacted by the Act had and likely still have a misperception about the scope and purpose of the Act, was one of the first indications to the ADR Committee that a thorough and detailed analysis of the Act was needed.*

N.Y. State Bar Ass’n Committee on ADR, *The Uniform Mediation Act and Mediation in New York*, p. 3 (Nov. 1, 2001) (emphasis added).

32. There does not seem to be another commonly-accepted, shorthand way to refer to Items #1-#5. The phrase “protection of mediation communications” is a possible alternative, but it can be prohibitively cumbersome.

1 mindful of the potential for confusion and to employ more precise language when
2 that appeared necessary.

3 **“Mediation Privilege”**

4 A second terminological issue concerns references to a “mediation privilege.” In
5 California, Division 8 of the Evidence Code³³ contains the state’s evidentiary
6 privileges, such as the lawyer-client privilege and the physician-patient privilege.
7 Certain general rules apply to those privileges.³⁴

8 Importantly, the statutory provisions protecting mediation communications are
9 not located with the evidentiary privileges. Rather, most of them are located in
10 Division 9 of the Evidence Code,³⁵ which is entitled “Evidence Affected or
11 Excluded by Extrinsic Policies.”³⁶

12 Consequently, it is improper to refer to those provisions as California’s
13 “mediation privilege.”³⁷ Likewise, the general rules that apply to California’s
14 evidentiary privileges do not necessarily apply to its mediation confidentiality
15 provisions.³⁸

16 In some contexts, however, California’s mediation confidentiality provisions are
17 functionally equivalent to an evidentiary privilege and are treated as such. For
18 example, federal courts have taken that approach in analyzing choice-of-law issues
19 under Federal Rule of Evidence 501.³⁹

20 It is also important to bear in mind that the consequences of being classified as
21 an evidentiary “privilege” may vary from jurisdiction to jurisdiction. In
22 jurisdictions using the Uniform Mediation Act, for example, the protection for
23 mediation communications is denominated a “privilege,”⁴⁰ yet the circumstances

33. Evid. Code §§ 900-1070.

34. For example, there is an implied waiver provision, under which almost every evidentiary privilege is implicitly waived if the holder of the privilege voluntarily discloses, or consents to disclosure of, a significant part of an otherwise privileged communication. See Evid. Code § 912. For additional examples, see Evid. Code §§ 911, 913-920.

35. Evid. Code §§ 1100-1161.

36. See Evid. Code §§ 1115-1128. The provision governing a mediator’s competency to testify (Evid. Code § 703.5) is located in Division 6 of the Evidence Code, which is entitled “Witnesses.”

37. See, e.g., *Cassel*, 51 Cal. 4th at 132 (“[T]he mediation confidentiality statutes do not create a ‘privilege’ in favor of any particular person.”); *Wimsatt*, 152 Cal. App. 4th at 150 n.4 (“[T]he mediation confidentiality rules are not ‘privileges’ in the traditional sense ...”).

38. For example, a waiver of mediation confidentiality under California law must be express, not implied. See *Simmons v. Ghaderi*, 44 Cal. 4th 570 187 P.3d 934, 80 Cal. Rptr. 3d 83 (2008).

39. See, e.g., *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110, 1120 n.15 (N.D. Cal. 1999) (“We decline to accept ... the notion that the proviso of F.R.E. 501 does not apply whenever a state fails formally to label the protection it offers to mediation communications a ‘privilege’ using instead language that promises and mandates confidentiality. We would view such an analytical out as little more than a semantic [sleight] of hand.”).

40. See UMA § 4 & Comment.

1 under which it can be implicitly waived by disclosure are more limited than the
2 circumstances for implicitly waiving one of the privileges in Division 8 of the
3 Evidence Code.⁴¹ It is thus necessary to use great care in describing and discussing
4 the effects of a “privilege” in the mediation context.

Key Policy Considerations

5 Before examining existing law on mediation confidentiality, it may be helpful to
6 identify some of the key policy considerations at stake in this study of the
7 relationship between mediation confidentiality and attorney misconduct. This
8 section of the Commission’s report describes some of those policy considerations,
9 without attempting to weigh them or otherwise assess their merits. A later section
10 of the report focuses on the availability of empirical evidence relating to the
11 pertinent policy considerations (or lack thereof).⁴² At the end of this report (Parts
12 II and III), the Commission explains its balancing and proposed treatment of the
13 competing considerations.

14 **Key Policy Underlying Mediation Confidentiality**

15 It is first important to understand the policy basis underlying the existing
16 protections for mediation confidentiality. The main policy argument for mediation
17 confidentiality rests on four key premises:

- 18 (1) Confidentiality promotes candor in mediation.
- 19 (2) Candid discussions lead to successful mediation.
- 20 (3) Successful mediation encourages future use of mediation to resolve
21 disputes.
- 22 (4) The use of mediation to resolve disputes is beneficial to society.

23 Each premise is discussed in order below.

24 ***Confidentiality Promotes Candor in Mediation***

25 Like the constitutional guarantees of free speech, mediation confidentiality is
26 meant to foster productive debate and discussion, but only in a particular setting
27 among a select group of participants. As the Uniform Law Commission (“ULC”)
28 explains in the Uniform Mediation Act,

29 mediators typically promote a candid and informal exchange regarding events in
30 the past, as well as the parties’ perceptions of and attitudes toward these events,

41. Compare UMA § 5 & Comment (UMA privilege cannot be implicitly waived by disclosure unless disclosure prejudices another mediation participant) with Evid. Code § 912 (establishing less stringent standard for waiver by disclosure, as described in *supra* note 34).

In contrast to those provisions, California’s mediation confidentiality protections cannot be implicitly waived, regardless of the circumstances. See *supra* note 38.

42. See discussion of “Empirical Evidence” *infra*.

1 and ... encourage parties to think constructively and creatively about ways in
2 which their differences might be resolved. This frank exchange can be achieved
3 only if the participants know that what is said in the mediation will not be used to
4 their detriment through later court proceedings and other adjudicatory processes.⁴³

5 Numerous other sources likewise maintain that assurance of confidentiality is
6 crucial to promote frank discussion among mediation participants.⁴⁴ They explain
7 that without such assurance, participants may be reluctant to speak freely, for fear
8 of later having their words used against them.⁴⁵

9 ***Candid Discussions Lead To Successful Mediation***

10 It is also widely believed that the more candid and open parties are during a
11 settlement discussion, the more likely a successful settlement becomes.⁴⁶ Talking
12 freely may help disputants understand each other's position, which may in turn
13 promote settlement.⁴⁷ Similarly, a forthright apology or other honest gesture of
14 conciliation may help lead to a settlement.⁴⁸

43. UMA, *supra* note 5, at Prefatory Note.

44. See, e.g., *Fair v. Bakhtiari*, 40 Cal. 4th 189, 194, 147 P.3d 653, 51 Cal. Rptr. 3d 871 (2006) (mediation confidentiality provisions of Evidence Code “were enacted to encourage mediation by permitting the parties to frankly exchange views, without fear that disclosures might be used against them in later proceedings”); *Foxgate*, 26 Cal. 4th at 15 (purpose of confidentiality is to promote candid and informal exchange regarding past events); Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 Geo. L.J. 2663, 2663-64 (1995) (when representatives in dispute have constituencies with widely different views of case, and meeting with “enemy” itself is considered signal of weakness, negotiations will not occur unless they can be held in privacy); CLRC Staff Memorandum 2015-54, Exhibit pp. 1-2 (comments of Donald Proby, on behalf of Ass’n for Dispute Resolution of Northern California) (Mediation confidentiality provisions “allow the parties to be open and transparent during negotiations without fear of later repercussions.”).

45. “If participants cannot rely on the confidential treatment of everything that transpires during [mediation] sessions then counsel of necessity will feel constrained to conduct themselves in a cautious, tight-lipped manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution of a civil dispute.” *Sheldone v. Pennsylvania Turnpike Comm’n*, 104 F. Supp. 2d 511, 513 (W.D. Pa. 2000), *quoting* *Lake Utopia Paper Ltd. v. Connelly Containers, Inc.*, 608 F.2d 928, 930 (2d Cir. 1979).

46. See, e.g., *Cassel*, 51 Cal. 4th at 132-33 (Mediation confidentiality assures mediation participants that “their interests will not be damaged ... by making and communicating the candid disclosures and assessments that are most likely to produce a fair and reasonable mediation settlement.”); Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 Hastings L.J. 955, 959 (1988) (hereafter, “Brazil (1988)”) (“Rationality promotes settlement and respect for the system, and openness of communication is essential to rationality.”); Kerwin, Note, *The Discoverability of Settlement and ADR Communications: Federal Rule of Evidence 408 and Beyond*, 12 Rev. Litig. 665, 665 (1983) (“It is only natural that the more candid and open parties are during settlement proceedings, the more likely their efforts are to be successful.”).

47. See, e.g., *Admissibility, Discoverability, and Confidentiality of Settlement Negotiations*, 29 Cal. L. Revision Comm’n Reports 345, 351 (1999) (“A frank settlement discussion can help disputants understand each other’s position and improve prospects for a successful, mutually satisfactory settlement of the dispute.”); see also Brazil (1988), *supra* note 46, at 959 (broad protection of settlement negotiations may “enhance the rationality of the negotiation process and improve the likelihood that litigants will understand

1 It might not be enough for parties to communicate frankly with the mediator; it
2 might also be necessary for them to be frank with each other.⁴⁹ Unless they can
3 overcome their wariness about disclosing information to each other, they might
4 not be able to find common ground and resolve their dispute.⁵⁰

5 Similarly, reaching a resolution might require candid, robust discussion from
6 other mediation participants. For example, an attorney might learn new
7 information in a mediation or see a client start to accept unpleasant realities. When
8 caucusing in private, the attorney might encourage the client to settle for less than
9 what the client thought was reasonable before the mediation. Such blunt advice
10 might lead the client to accept a settlement that is in the client’s best interest.⁵¹
11 Without assurance of confidentiality, however, the attorney might be reluctant to
12 recommend such a settlement,⁵² for fear that the client will later have buyer’s
13 remorse and blame the attorney.⁵³

the basis for the proposals that are put on the table; litigants would thus feel good about the terms they finally accept.”).

48. See, e.g., *id.*; CLRC Staff Memorandum 2015-45, Exhibit p. 26 (comments of Shawn Skillin) (“Mediated settlements often come about after discussion of issues that would be inadmissible and prejudicial in court. For instance, a party may make an admission, or make an apology in order to move toward settlement. An attorney would not advise that in another setting, but in mediation it may be appropriate.”).

49. See, e.g., *Foxgate*, 26 Cal. 4th at 14, quoting Note, *Protecting Confidentiality in Mediation*, 98 Harv. L. Rev. 441, 445 (1984) (hereafter, “Harvard Note”) (“Mediation demands ... that the parties feel free to be frank not only with the mediator but also with each other.”)

50. See, e.g., *Foxgate*, 26 Cal. 4th at 14, quoting Harvard Note, *supra* note 49, at 445 (“Agreement may be impossible if the mediator cannot overcome the parties’ wariness about confiding in each other during these sessions.”).

51. See, e.g., CLRC Staff Memorandum 2015-46, Exhibit p. 205 (comments of Daniel Yamshon) (“Confidentiality allows experienced counsel to give sound advice that clients may not want to hear.”).

52. An attorney cannot rely on the attorney-client privilege, because the attorney is not a holder of that privilege. See Evid. Code §§ 953, 954.

53. See, e.g., CLRC Staff Memorandum 2015-46, Exhibit p. 205 (comments of Daniel Yamshon) (“I can imagine a disputant, a few days after settlement, getting sage advice from their next-door neighbor, great uncle or astrologer about how they settled too low, immediately creating buyer’s remorse and immediately seeking representation to sue the original lawyer for misconduct, malpractice or worse. The public reads headlines; not every slip and fall is a multi-million dollar case.”); CLRC Staff Memorandum 2015-46, Exhibit p. 58 (comments of Paul Glusman) (“[W]ith the prospect of any dissatisfied litigant suing a lawyer for malpractice over what happened in mediation, it’s going to be very hard to get any lawyers to bring cases to mediators if they can no longer be candid.”); CLRC Staff Memorandum 2015-45, Exhibit p. 26 (comments of Shawn Skillin) (Attorneys “should be able to represent their clients in mediation and assist them in exploring strategies that can lead to settlement without being concerned that advice appropriate under mediation conditions, can later be used against them in a malpractice action.”).

As the Court stated in *Cassel*,

the Legislature might reasonably believe that protecting [private attorney-client conversations] 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.

1 Mediation confidentiality might also embolden an attorney to disclose a
2 sensitive personal matter in a mediation, in hopes of helping achieve a favorable
3 settlement for the client. For example, an attorney might tell the mediator about a
4 stupid mistake the attorney once made, to help persuade the mediator that the
5 mediation opponent might have made a similar stupid mistake in the dispute at
6 hand. Absent mediation confidentiality, the attorney might prefer to keep quiet
7 about this embarrassing personal experience.

8 Similar considerations might apply to a mediator, an expert attending the
9 mediation (e.g., a tax accountant or a doctor), or a party's spouse or other
10 mediation participant. A mediator with many years of experience put it this way:

11 There is a magic involved in how mediated disputes resolve — and the
12 resolutions can only occur when the participants believe their discussions are
13 confidential and positions will be handled with respect and thoughtfulness It is
14 extremely important to the process that participants understand that when they
15 make suggestions and proposals that their ideas will not come back to bite them
16⁵⁴

17 ***Successful Mediation Encourages Future Use of Mediation to Resolve Disputes***

18 Another premise underlying mediation confidentiality is that successful
19 mediation of a dispute will promote future use of mediation to resolve other
20 disputes. This premise is often left unstated, but it is an implicit assumption of the
21 many rules and statutes protecting mediation communications.

22 The idea is that whether disputants choose to mediate is tied to what they know
23 about mediation success rates. If disputants view mediation as a costly, useless
24 procedure, few disputants will want to mediate;⁵⁵ if disputants view mediation as
25 an effective means of achieving a satisfactory settlement, many disputants will
26 choose to mediate. Perceptions of the effectiveness of mediation (or lack thereof)
27 presumably correlate with actual success rates, and thus with the volume of future
28 mediations.

29 ***The Use of Mediation To Resolve Disputes Is Beneficial to Society***

30 The final premise underlying mediation confidentiality is a widespread belief
31 that encouraging mediation is beneficial to the public.⁵⁶ In establishing a mediation
32 pilot project, the Legislature succinctly explained this point:

51 Cal. 4th at 136.

54. CLRC Staff Memorandum 2015-46, Exhibit p. 80 (comments of Vivian Holly); see also *id.* at Exhibit p. 145 (comments of Larry Rosen).

55. See generally CLRC Staff Memorandum 2015-46, Exhibit pp. 80 (comments of Vivian Holly) (“Losing confidentiality protections will turn into the death knell for mediation.”), 182 (comments of Monika Tippie) (“[E]liminating confidentiality will mean that the number of people who choose mediation will plummet.”).

56. See, e.g., Code Civ. Proc. § 1775(c) (“It is in the public interest for mediation to be encouraged and used where appropriate by the courts.”).

1 In the case of many disputes, litigation culminating in a trial is costly, time
2 consuming and stressful for the parties involved. Many disputes can be resolved
3 in a fair and equitable manner through less formal processes.

4 ... Alternative processes for reducing the cost, time, and stress of dispute
5 resolution, such as mediation, have been effectively used in California and
6 elsewhere. In appropriate cases mediation provides parties with a simplified and
7 economical procedure for obtaining prompt and equitable resolution of their
8 disputes and a greater opportunity to participate directly in resolving these
9 disputes. Mediation may also assist to reduce the backlog of cases burdening the
10 judicial system.⁵⁷

11 Mediation is thus thought to have multiple benefits:

- 12 • *Self-determination.* Mediation is consistent with democratic ideals of self-
13 determination, because disputants directly participate in the process and
14 strive to reach a mutually acceptable agreement.⁵⁸ Although a court can
15 compel disputants to mediate,⁵⁹ any settlement must be voluntary.⁶⁰
- 16 • *Party satisfaction.* Because parties participate in mediation and have control
17 over the result, they tend to be well-satisfied with the process.⁶¹ The
18 resolution is amicable, so mediation may be less stressful than litigation,
19 further enhancing party satisfaction.⁶² This stress reduction effect may be
20 especially important in family disputes, particularly ones involving
21 children.⁶³ Mediation also allows for creativity that may result in a win-win

57. Code Civ. Proc. § 1775(b), (c); see also *Wimsatt*, 152 Cal. App. 4th at 150.

58. See Evid. Code § 1115(a).

59. See, e.g., Code Civ. Proc. §§ 1775-1775.15.

60. See Evid. Code § 1115(a); Cal. R. Ct. 3.853; see generally *Gaines v. Fidelity Nat'l Title Ins. Co.*, 62 Cal. 4th 1081, 1103, 365 P.3d 904, 199 Cal. Rptr. 3d 137 (2016); *Jeld-Wen, Inc. v. Superior Court*, 146 Cal. App. 4th 536, 540-41, 53 Cal. Rptr. 3d 115 (2007); 6 B. Witkin, *Cal. Procedure Proceedings Without Trial* § 486, p. 942 (5th ed. 2008).

61. UMA, *supra* note 5, at Prefatory Note.

62. See, e.g., CLRC Staff Memorandum 2015-45, Exhibit p. 16 (comments of Bruce Edwards, past Chairman of the Board of JAMS) (“We can all agree that we live in a world with increasing stressors and conflict ... We desperately need any and all processes that encourage dialogue, find compromise and ultimately resolve conflict.”); CLRC Staff Memorandum 2015-46, Exhibit p. 84 (comments of Betsy Johnson) (mediation “de-escalates conflict”).

63. See, e.g., CLRC Staff Memorandum 2015-54, Exhibit p. 3 (comments of Collaborative Practice California) (“Family law matters hold a special place in jurisprudence in that traditional adversarial litigation is clearly harmful to families and children.”); First Supplement to CLRC Staff Memorandum 2015-54, Exhibit p. 17 (comments of Hon Isabel Cohen (ret.)) (“The advantages of even a bad settlement ... are ... most importantly, to the emotional lives of children, which most recent studies now show are wrecked by the conflict between their parents, and not by the shared parenting plans.”); First Supplement to CLRC Staff Memorandum 2015-46, Exhibit p. 7 (comments of Hon. Susan Finlay (ret.)) (“Mediation has been particularly helpful to divorcing parents since it enables them to preserve their co-parent relationship which benefits the children. If they do not have this option, then they are forced to litigate which destroys families, seriously damaging the children in the process.”).

1 solution for the disputants, in which both sides are able to attain their key
2 objectives and thus are likely to be satisfied.⁶⁴

- 3 • *Cost reduction.* A successful mediation allows disputants to avoid
4 prohibitive litigation expenses.⁶⁵ As the Legislature has noted, mediation
5 “can have the greatest benefit for the parties in a civil action when used
6 early, before substantial discovery and other litigation costs have been
7 incurred.”⁶⁶ Cost savings attributable to mediation may further contribute to
8 party satisfaction.
- 9 • *Delay reduction.* Through mediation, parties may be able to resolve a
10 dispute more quickly than through the litigation process.⁶⁷ The early
11 elimination of disputes might not only contribute to party satisfaction, but
12 might also be beneficial to society generally.
- 13 • *Conservation of judicial resources and alleviation of court congestion.* Each
14 successful mediation may conserve judicial resources and help to reduce
15 court congestion. This in turn may allow judges to resolve the remaining
16 cases more promptly and with a greater degree of care, thus promoting
17 equitable results.⁶⁸

18 Attaining these societal benefits is the ultimate goal of, and justification for,
19 provisions that protect mediation confidentiality.

20 **Special Considerations Relating to Mediator Testimony**

21 One final point is worth noting before turning to the countervailing policy
22 interests in this study. Specifically, mediator testimony and mediator
23 communications trigger special considerations with respect to mediation
24 confidentiality, because it is critical for a mediator to be perceived as impartial.⁶⁹

64. R. Fisher & W. Ury, *Getting to Yes* 56-80 (2d ed. 1991).

65. See, e.g., Third Supplement to CLRC Staff Memorandum 2015-46, Exhibit p. 5 (comments of Amy Newman, on behalf of Alternative Dispute Resolution Centers) (Mediation “clearly mitigates the costs of protracted litigation.”).

66. Code Civ. Proc. § 1775(d).

67. See, e.g., Code Civ. Proc. § 1775(b), (c).

68. See, e.g., CLRC Staff Memorandum 2015-46, Exhibit pp. 1 (comments of Ron Kelly) (“Our budget-starved courts rely on confidential mediation to resolve a large part of their pending civil cases.”), 141 (comments of Hon. Diane Ritchie (ret.)) (“Mediation drastically reduces the number of cases that go to trial. If part of the ... confidentiality for mediation is removed, this will not be possible.... The courts cannot take on the burden of a massive increase in the number of trials without increasing the time a case gets to trial by many years.”); Second Supplement to CLRC Staff Memorandum 2015-46, Exhibit p. 5 (comments of Daniel J. Kelly) (“The actual effect of [mediation] confidentiality is that it has served us well in the mediation process and, indeed, is the linchpin in bringing disputes to resolution prior to going to Court. Doing away with confidentiality in mediation will result in fewer resolutions and will ultimately mean hanging one more albatross around the neck of an already strained and grossly underfunded judicial apparatus.”).

69. See, e.g., Third Supplement to CLRC Staff Memorandum 2015-46, Exhibit p. 7 (comments of Loretta Van Der Pol and J. Felix De La Torre, on behalf of Public Employment Relations Board (hereafter, “PERB”) (“While confidentiality serves the important role of fostering candid dialogue between the parties

1 The concern is that no one will want to use a mediator who appears to be biased
2 against them, yet it might be impossible for a mediator to maintain a reputation for
3 impartiality if the mediator is forced to testify against a party, or the mediator’s
4 statements are used at a trial.⁷⁰ This effect may be particularly pronounced where
5 the same attorneys and parties repeatedly use a particular mediation service to
6 resolve disputes of a certain type.⁷¹

7 A further concern is that the potential burdens of having to testify or provide
8 evidence about a mediation may deter some mediators from continuing to serve as
9 such. This is perhaps most likely to occur when mediators serve on a pro bono or
10 poorly-compensated basis, as in some court-connected or community-based
11 programs.⁷²

12 The problem could also arise in other settings, however. As a federal court put
13 it, forcing mediators to “give evidence that hurts someone from whom they

and the mediator, it is also a critical element for maintaining a mediator’s impartiality. Were SMCS to lose the promise of absolute confidentiality, it risks losing its neutrality in the eyes of our constituents.”); Second Supplement to CLRC Staff Memorandum 2014-60 (comments of Hon. Paul Aiello (ret.)) (“[A]ny possibility that a mediator might be called to testify in subsequent proceedings affects and diminishes the vital appearance of impartiality that must be preserved if the integrity of the ADR processes is not to be compromised.”).

70. See, e.g., *In re Anonymous*, 283 F.3d 627, 639 (4th Cir. 2001) (“[G]ranting of consent for the mediator to participate in any manner in a subsequent proceeding would encourage perceptions of bias in future mediation sessions involving comparable parties and issues ...”); *N.L.R.B. v. Macaluso*, 618 F.2d 51, 55 (9th Cir. 1980), quoting Tomlinson of High Point, Inc., 74 N.L.R.B. 681, 688 (1947) (“[C]onciliators must maintain a reputation for impartiality.... If conciliators were permitted or required to testify about their activities, or if the production of notes or reports of their activities could be required, not even the strictest adherence to purely factual matters would prevent the evidence from favoring or seeming to favor one side or the other.”); Third Supplement to CLRC Staff Memorandum 2015-46, Exhibit p. 8 (comments of Loretta Van Der Pol and J. Felix De La Torre, on behalf of PERB), quoting Ellen Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 Marquette L. Rev. 79, 82 (2001) (hereafter, “Deason (2001, re quest for uniformity)”) (“A mediator who testifies will inevitably be seen as acting contrary to the interests of one of the parties, which necessarily destroys her neutrality.”).

71. See Third Supplement to CLRC Staff Memorandum 2015-46, Exhibit p. 9 (comments of Loretta Van Der Pol and J. Felix De La Torre, on behalf of PERB) (“In the context of PERB’s mediations, the damage to a mediator’s neutrality is exacerbated because our mediators routinely work with many of the same labor attorneys and/or representatives for labor and management.”).

72. See, e.g., *Olam*, 68 F. Supp. 2d at 1133 (“[O]rdering mediators to participate in proceedings arising out of mediations imposes economic and psychic burdens that could make some people reluctant to agree to serve as a mediator, especially in programs where that service is pro bono or poorly compensated.”); CLRC Staff Memorandum 2016-58, Exhibit p. 13 (comments of Mary B. Culbert, on behalf of Loyola Law School Center for Conflict Resolution) (“[S]ubjecting mediators to subpoena disrupts the delivery of services and is particularly detrimental to community mediation programs because of their shoe-string budgets and reliance on volunteer mediators.... [T]he costly, time-consuming, and anxiety-provoking activity of fighting off subpoenas, for organizations with limited funding, could significantly impact the availability of volunteers to staff these community mediation programs.”).

1 actively solicited trust ... rips the fabric of their work and can threaten their sense
2 of the center of their professional integrity.”⁷³

3 In many jurisdictions, concerns like the ones described above have led to special
4 rules governing mediator testimony and mediator communications.⁷⁴ California is
5 among these.⁷⁵

6 **Key Reasons For Permitting Disclosure of Mediation Communications To Establish**
7 **Attorney Misconduct**

8 The policy analysis for permitting disclosure of mediation communications
9 bearing on attorney misconduct has several key components:

- 10 • Mediation confidentiality may deprive a party of evidence that would help
11 prove that an attorney committed malpractice or engaged in other
12 misconduct.
- 13 • Because mediation confidentiality may result in exclusion of relevant
14 evidence, attorney misconduct may go unpunished.
- 15 • Allowing attorney misconduct to go unpunished may chill future use of
16 mediation and deprive the public of its benefits.
- 17 • Allowing attorney misconduct to go unpunished may undermine attorney-
18 client relations and the administration of justice.

19 Each point is discussed in order below.

20 ***Exclusion of Evidence of Attorney Misconduct***

21 By accepting employment to provide legal advice or other legal services, an
22 attorney “impliedly agrees to use such skill, prudence, and diligence as lawyers of
23 ordinary skill and capacity commonly possess and exercise in the performance of
24 the tasks which they undertake.”⁷⁶ The attorney-client relationship is a fiduciary
25 relationship “of the very highest character,” in which the attorney must serve the
26 client with the “most conscientious fidelity.”⁷⁷ An attorney is also “an officer of
27 the court and is bound to work for the advancement of justice.”⁷⁸

28 In representing a client at a mediation, an attorney might not always comply
29 with those professional duties.⁷⁹ Sometimes an attorney may make a significant
30 mistake in the course of a mediation, one stemming from failure to exercise due

73. *Olam*, 68 F. Supp. 2d at 1133.

74. See discussion of “Law of Other Jurisdictions” *infra*.

75. See Evid. Code §§ 703.5, 1121.

76. *Lucas v. Hamm*, 56 Cal. 2d 583, 591, 364 P.2d 685, 15 Cal. Rptr. 821 (1961).

77. *Cox v. Delmas*, 99 Cal. 104, 123, 33 P. 836 (1892).

78. *Hickman v. Taylor*, 329 U.S. 495, 511 (1947).

79. See, e.g., CLRC Staff Memorandum 2015-36, Exhibit pp. 1-2 (comments of Gwire Law Firm) (estimating that about 50-150 potential clients contact law firm each year “about attorney conduct issues or communications that occurred during a mediation”).

1 care on a client’s behalf.⁸⁰ For example, an attorney might give a client erroneous
2 advice on the tax implications of a particular settlement approach,⁸¹ or might
3 inadvertently disclose a trade secret or damaging evidence. An attorney might also
4 fail to exercise due care in recommending that a client accept a settlement offer
5 made during a mediation, causing the client to settle a dispute for less than it is
6 worth, or on unduly unfavorable terms.⁸²

7 An unscrupulous attorney might even be dishonest in a mediation, to a client’s
8 detriment.⁸³ For example, an attorney might promise to reduce a client’s fee to
9 convince the client to settle a case, and then later renege on that promise.⁸⁴

80. See, e.g., *Horner v. Carter*, 981 N.E.2d 1210 (Ind. S.Ct. 2013) (husband sought to use mediation communications to prove mistake in drafting of mediated settlement agreement, but mediation confidentiality requirement barred use of such evidence); *Wimsatt*, 152 Cal. App. 4th at 142-44 (mediation party sought to use mediation brief to prove attorney made unauthorized settlement demand and thus impaired party’s ability to obtain satisfactory settlement, but mediation confidentiality requirement barred use of that brief); *Gossett v. St. John*, 2011 Cal. App. Unpub. LEXIS 3586, at *12 (2011) (client alleged that his attorneys failed to inform him that he would be personally liable under mediated settlement agreement).

81. See, e.g., *Porter*, 107 Cal. Rptr. 3d at 955 (superseded opinion) (after mediation, dispute arose between attorney and clients over attorney’s “alleged rendering of incorrect tax advice to the [clients] regarding settlement proceeds”); CLRC Staff Memorandum 2015-36, Exhibit p. 5 (comments of Gwire Law Firm) (potential client sought to bring malpractice suit alleging that in mediation “[l]awyer claimed, without having any valid basis for doing so, that settlement proceeds would be nontaxable”).

82. See, e.g., *Amis v. Greenberg Traurig LLP*, 235 Cal. App. 4th 331, 185 Cal. Rptr. 3d 322 (2015) (client contended that his former attorney failed to adequately advise him of risks of mediated settlement agreement); *Cassel*, 51 Cal. 4th at 118 (plaintiff alleged that “by bad advice, deception, and coercion, the attorneys, who had a conflict of interest, induced him to settle for a lower amount than he had told them he would accept, and for less than the case was worth.”).

83. See, e.g., *Hadley v. The Cochran Firm*, 2012 Cal. App. Unpub. LEXIS 5743 (2012) (plaintiffs claimed that their former attorneys had “tricked them into settling their claims against [a third party] by inducing them to sign a supposed confidentiality agreement at a mediation, and later appending the signature sheet to a settlement agreement.”).

In citing to *Hadley* and other unpublished or superseded decisions in this tentative recommendation, the Commission does not mean to imply that those decisions have any precedential value. Rather, the Commission is merely citing them for illustrative purposes in assessing the optimal legislative approach.

84. See, e.g., *In re Bolanos*, Case No. 12-O-12167 (Review Dep’t of State Bar Ct., filed May 18, 2015), pp. 4-5 (available at <http://www.statebarcourt.ca.gov/Portals/2/documents/opinions/Bolanos.pdf>). In this unpublished opinion, the Review Department of the State Bar Court says:

[The attorney/defendant] admits he agreed to modify his fee agreement at the mediation so that [the client/plaintiff] would receive \$250,000, rather than a percentage, from the settlement....

The hearing judge found that, after the mediation, [the attorney/defendant] “came to the conclusion that the modification was invalid because there was no consideration for the alteration of the ... fee agreement.”

Id.

See also *Porter*, 107 Cal. Rptr. 3d at 655 (superseded opinion) (“The instant lawsuit arose as a result of [an attorney’s] failure to follow through on a promise that was allegedly made to the [clients] during a mediation ... wherein [the attorney] promised to pay the [clients] certain proceeds from their attorney fees.”); CLRC Memorandum 2013-47, pp. 10-13 & Exhibit pp. 3-4 (comments of Sidney Tinberg); Second Supplement to CLRC Memorandum 2013-47, pp. 8-9 (comments of Jerome Sapiro).

1 Alternatively, an attorney might threaten a client in a mediation or otherwise
2 attempt to coerce a client to settle,⁸⁵ as by threatening to abandon the client on the
3 eve of trial,⁸⁶ hounding a client’s every move and unduly pressuring the client,⁸⁷ or
4 threatening to expose embarrassing or otherwise harmful information about a
5 client.⁸⁸

6 In the mediation process, an attorney might also say something that reveals or
7 otherwise tends to suggest that the attorney engaged in prior misconduct.⁸⁹ For
8 example, an attorney might admit to having lost a critical piece of evidence that
9 the client entrusted to the attorney.

10 In each of these situations, a strict mediation confidentiality requirement might
11 preclude a client from introducing evidence of the attorney’s culpable or
12 incriminating mediation communications in a later proceeding against the
13 attorney. In other words, such a requirement might deprive a victimized client of
14 valuable evidence of an attorney’s wrongdoing.⁹⁰

By properly memorializing an attorney’s promise to reduce a fee, made in the course of a mediation, a client could guard against having the attorney renege on the promise, at least in California. The mediation confidentiality statutes would not prevent proof of the attorney’s promise, so long as it is properly memorialized in accordance with Evidence Code Section 1123 or 1124. An unsophisticated client may not know enough to take this step.

85. *Provost v. Regents*, 201 Cal. App. 4th 1299, 1302, 135 Cal. Rptr. 3d 591 (2011) (party claimed that mediated settlement agreement was unenforceable because his attorney, opposing counsel, and mediator coerced him into signing it through threats of criminal prosecution).

86. See, e.g., *Chan v. Lund*, 188 Cal. App. 4th 1159, 1164, 116 Cal. Rptr. 3d 122 (2011) (attorney “allegedly threatened on the eve of trial to withdraw from the case if [client] refused to participate in a further session with [the mediator] or if [client] refused to make concessions to settle the matter.”); *Cassel*, 51 Cal. 4th at 120 (to convince client to accept offer made in mediation, attorneys allegedly “threatened to abandon [client] at the imminently pending trial”).

87. See, e.g., *Cassel*, 51 Cal. 4th at 120 (Attorneys “even insisted on accompanying [client] to the bathroom, where they continued to ‘hammer’ him to settle. Finally, at midnight, after 14 hours of mediation, when he was exhausted and unable to think clearly, attorneys presented a written draft settlement agreement and evaded his questions about its complicated terms. Seeing no way to find new counsel before trial, and believing he had no other choice, he signed the agreement.”).

Some clients may be able to protect themselves from such misconduct by walking out of the mediation. Other clients might be too intimidated to leave, or might not be sophisticated enough to realize that they are entitled to do so.

88. See, e.g., *Rabe v. Dillard’s, Inc.*, 214 S.W.3d 767 (Tex. Ct. App. 2006) (mediation party claimed that during mediation, opposing counsel threatened to contact worker’s compensation carrier to advise that party had prior injury and was “doctor-shopping” for narcotics).

89. See, e.g., Fla. Mediator Ethics Advisory Committee Opin. No. 2006-005, *available at* <http://www.flcourts.org/core/fileparse.php/283/urlt/MEACOpinion2006-005.pdf> (in course of mediation, attorney told mediator that attorney misspent funds held in escrow).

90. See, e.g., *Cassel*, 51 Cal. 4th at 136 (mediation confidentiality requirement may “result in the unavailability of valuable civil evidence”); see also *id.* at 135.

1 ***Loss of Evidence May Mean Culpable Conduct Goes Unpunished or Another Inequitable***
2 ***Result Occurs***

3 In general, our justice system seeks truth by permitting parties to present all
4 relevant evidence to the trier-of-fact.⁹¹ Because mediation confidentiality can lead
5 to exclusion of relevant evidence, in some instances it might mean that attorney
6 misconduct goes unpunished or another inequitable result occurs.⁹² Excluded
7 evidence may be critical to proving alleged misconduct, yet the bar against using it
8 may shield an attorney from liability.⁹³ It is also possible that excluded mediation
9 evidence may be critical to *disproving* alleged misconduct, yet the bar against
10 using it could prevent such exoneration.⁹⁴

11 Inequitable results like these would not necessarily occur every time a mediation
12 confidentiality requirement precludes a client from introducing evidence against
13 an attorney, or vice versa. In some cases, the proponent of such evidence may not
14 have a valid claim or defense; not every allegation of attorney misconduct is true

91. See, e.g., Evid. Code § 351; *Steiny & Co. v. California Electric Supply Co., Inc.*, 79 Cal. App. 4th 285, 291, 93 Cal. Rptr. 2d 920 (2000).

92. See, e.g., *Olam*, 68 F. Supp. 2d at 1137 (“[R]efusing to compel the mediator to testify might well deprive the court of the evidence it needs to rule reliably on the plaintiff’s contentions — and thus might either cause the court to impose an unjust outcome on the plaintiff or disable the court from enforcing the settlement.”).

If an attorney misbehaves at a mediation, even a strict mediation confidentiality requirement would not prevent the client from telling others that the attorney did not do a good job for the client and discouraging them from hiring the attorney. Likewise, the attorney could deny as much.

A strict mediation confidentiality requirement would, however, prevent both sides from using mediation communications to support and explain their positions. Without either side being able to provide some specificity, it may be difficult for market forces to properly respond to the situation. The impact on the attorney might not correlate with the attorney’s degree of culpability, if any.

93. See, e.g., *Cassel*, 51 Cal. 4th at 119 (mediation confidentiality “may compromise [a client’s] ability to prove his claim of legal malpractice.”); *id.* at 138 (Chin, J., concurring) (mediation confidentiality “will effectively shield an attorney’s actions during mediation ... from a malpractice action even if those actions are incompetent or even deceptive.”); *Wimsatt*, 152 Cal. App. 4th at 162 (“Preventing Kausch from accessing mediation-related communications may mean he must forgo his legal malpractice lawsuit against his own attorneys.”); *Kausch v. Wimsatt*, 2009 Cal. App. Unpub. LEXIS 8566, at *2 (“[A]n attorney is immunized from any negligent and intentional torts committed in mediation when said torts are the result of communications made for the purpose of, in the course of, or pursuant to a mediation, or a mediation consultation. The bottom line is that Kausch is foreclosed from litigating his allegation that Magaña lowered Kausch’s settlement demand without authorization, resulting in a settlement far below the reasonable value of his personal injury lawsuit.”).

94. See, e.g., *Grubaugh v. Blomo*, 238 Ariz. 264, 359 P.3d 1008 (Ariz. Ct. App. 2015) (attorney sought to use mediation communications in defending against legal malpractice claim); *In re Teligent*, 640 F.3d 53 (2d Cir. 2011) (involving unsuccessful attempt by law firm accused of malpractice to obtain discovery of information from mediation it did not attend, which it claimed was critical to issues in malpractice case); First Supplement to CLRC Staff Memorandum 2013-47, pp. 8-9 (comments of Jeffrey W. Erdman) (explaining that “existing law, particularly as applied in *Cassel*, creates a hornet’s nest for attorneys seeking to defend against professional negligence claims related to their conduct at mediation.”).

1 or a valid basis for recovery.⁹⁵ In other cases, the proponent may be able to
2 successfully establish a claim or defense without using the excluded mediation
3 evidence.⁹⁶

4 The most problematic situation appears to be misconduct that allegedly occurs
5 *in a mediation context*. In that situation, much if not all of the relevant evidence
6 for both sides may fall within the scope of a mediation confidentiality requirement
7 and thus be unavailable in resolving whether misconduct actually occurred.⁹⁷ As a
8 result, a client may be left without a remedy for a meritorious legal malpractice
9 claim, an unscrupulous or incompetent attorney may remain in practice without
10 remedial measures to protect the public, or an attorney may be deprived of a valid
11 defense to a malpractice claim or disciplinary proceeding. In contrast, if
12 misconduct allegedly occurs before a mediation or in a non-mediation context,
13 there appears to be a greater likelihood of properly resolving the allegation without
14 using mediation evidence.

15 ***Allowing Attorney Misconduct to Go Unpunished May Chill Future Use of Mediation and***
16 ***Deprive the Public of Its Benefits***

17 In addition to leaving a client without a remedy or allowing an unscrupulous or
18 incompetent attorney to remain in practice without remedial measures to protect
19 the public, a failure to provide accountability for attorney misconduct in a
20 mediation context could have other harmful effects. If potential mediation parties
21 learn that culpable conduct in mediation could go unpunished due to a mediation

95. See, e.g., *FDIC v. White*, 76 F. Supp. 2d 736 (N.D. Tex. 1999) (defendants claimed that opposing counsel and mediator threatened criminal prosecution to coerce settlement, but court rejected that claim after considering mediation communications.); *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110 (N.D. Cal. 1999) (After considering mediation communications, court concluded that there was “absolutely no basis” for finding that any action by plaintiff’s attorney or defense counsel overbore plaintiff’s will at mediation); *Porter*, 107 Cal. Rptr. 3d at 658 n.7 (superseded opinion) (trial court sustained demurrer to legal malpractice claim because clients “admitted they suffered no injury from [attorney’s] allegedly incorrect tax advice” provided during mediation); *Conwell v. Mallen*, 2015 Cal. Super. LEXIS 11140 (No. CIV 488713), Aug. 18, 2015) (after considering mediation communications, court rejects legal malpractice claim, which alleged that attorneys engaged in mediation misconduct); First Supplement to CLRC Memorandum 2015-46, Exhibit p. 51 (comments of Gerald Klein) (mediation confidentiality could preclude attorney from introducing “evidence to demonstrate what really happened during the settlement process”).

96. See, e.g., *Benesch v. Green*, 2009 U.S. Dist. LEXIS 117641, at *25 (2009) (denying summary judgment on legal malpractice claim because plaintiff had not yet had an opportunity to explore “the question of what evidence would be left after application of the mediation confidentiality statutes”); *In re Malcolm*, 2004 Cal. App. Unpub. LEXIS 10675, at *12 (2011) (husband “made no showing” that exclusion of mediation communications prejudiced his substantive rights to pursue malpractice action against his former attorneys, so husband was still “free to prosecute his malpractice action ... using the property settlement and other nonconfidential evidence.”); CLRC Staff Memorandum 2013-47, pp. 2-9 & Exhibit p. 2 (comments of Elizabeth Moreno & CLRC staff analysis thereof).

97. See, e.g., *Fehr v. Kennedy*, 2010 U.S. App. LEXIS 16953, at *4 (9th Cir. 2010) (“Without admitting confidential mediation communications, the record is devoid of any evidence of legal malpractice.”).

1 confidentiality requirement, they might become reluctant to use the mediation
2 process. As one mediator puts it,

3 protecting malpractice will not instill confidence in the mediation process. There
4 is a greater probability that fewer people will want to mediate, when they learn
5 malpractice is protected.⁹⁸

6 Assuming that such a chilling effect occurs to some degree, it would tend to
7 deprive the public of the benefits of mediation previously discussed. In other
8 words, if the effect were sufficiently significant, it would undermine the very
9 purpose of the mediation confidentiality requirement.

10 ***Letting Culpable Conduct Go Unpunished or Other Inequitable Results Occur Undermines the***
11 ***Effective Administration of Justice***

12 Letting attorney misconduct go unpunished due to mediation confidentiality can
13 also have other ramifications. In particular, the state has an interest in enforcing
14 the professional responsibility requirements for attorneys, because it needs to
15 safeguard the integrity of the judiciary and protect the public from incompetent
16 and dishonest attorneys.⁹⁹ Honesty is “absolutely fundamental in the practice of
17 law”¹⁰⁰ and an attorney’s good moral character is essential for the protection of
18 clients and for the proper functioning of the judicial system itself.”¹⁰¹

19 Whenever the judicial system fails to render justice in a case, that will tend to
20 shake the public’s faith in the system, and thus a fundamental underpinning of our
21 form of government.¹⁰² The more often such a result occurs, and the more harsh

98. CLRC Staff Memorandum 2014-6, Exhibit p. 15 (comments of Nancy Yeend); see also *Porter*, 107 Cal. Rptr. 3d at 662 (superseded opinion) (“[E]xpanding the mediation privilege to also cover communications between a lawyer and his client would ... create a chilling effect on the use of mediation.”); First Supplement to CLRC Memorandum 2014-60, Exhibit p. 1 (comments of Edward Mason) (disclosing that he has “serious reservations about ever utilizing the mediation process as currently constructed” because he would not be protected from malpractice and could be “left holding the ‘empty bag.’”); CLRC Staff Memorandum 2014-36, Exhibit p. 6 (comments of Karen Mak) (explaining that if she had been aware of possibility of not being able to introduce evidence of mediation misconduct, “there is *no conceivable way* [she] would have considered participating in mediation”) (emphasis in original); First Supplement to CLRC Staff Memorandum 2013-47, Exhibit p. 5 (comments of Bill Chan) (stating that he “will never again use mediation so long as it is a ‘get out of jail free’ card for attorneys that commit malpractice”).

99. *Wimsatt*, 152 Cal. App. 4th at 153, quoting *Foxgate*, 26 Cal. 4th at 17 n.13.

100. *In re Glass*, 58 Cal. 4th 500, 524, 316 P.3d 1199, 167 Cal. Rptr. 3d 87 (2014).

101. *Id.* at 520.

102. See, e.g., *Olam*, 68 F. Supp. 2d at 1136 (“Confidence in our system of justice as a whole, in our government as a whole, turns in no small measure on confidence in the courts’ ability to do justice in individual cases. So doing justice in individual cases is an interest of considerable magnitude.”); Sarah Brand, *Caution to Clients: California’s Mediation Confidentiality Statutes Protect Attorneys From Legal Malpractice Claims Arising Out of Mediation*, 37 T. Jefferson L. Rev. 369, 372 (2015) (inequitable result under mediation confidentiality statute “runs afoul of ensuring the administration of justice”); Wayne Brazil, *A Broad Brush Interpretive History of ADR in the United States and an Exploration of the Sources*,

1 and obvious the injustice, the greater the damage to public confidence in the
2 judicial system.

3 When the unjust result favors an attorney, who is considered an officer of the
4 court,¹⁰³ the impact may be especially damaging. The California Supreme Court
5 has constitutional authority over the practice of law in this state.¹⁰⁴ Consequently,
6 a failure to control attorney misconduct may reflect particularly badly on the Court
7 and the entire judicial system. In this way, a strict mediation confidentiality
8 requirement could have a severe negative impact on the administration of
9 justice.¹⁰⁵

10 Damage to public confidence can occur not only when there is actual injustice,
11 but also when there is an appearance of injustice or even a possibility of it.¹⁰⁶ For
12 instance, if a mediation confidentiality requirement prevents a client from using
13 mediation communications to show attorney misconduct, the public is left
14 wondering what would have happened otherwise. It is unclear whether actual
15 attorney wrongdoing occurred, but nevertheless there is likely to be some degree
16 of negative impact on the administration of justice.

17 **Clash of Key Policies**

18 This study thus involves a direct clash between two strong policies: (1) attaining
19 the societal benefits of mediation confidentiality and (2) furthering public
20 confidence in the justice system and the pursuit of justice for all.¹⁰⁷ As a result, the

Character, and Implications of Formalism in a Court-Sponsored ADR Program (hereafter, “Brazil (2014)”), at 27 (“Courts who view their ADR programs and the neutrals who serve in them as instrumentalities of the system of justice understand that parties and lawyers who are ordered or encouraged to participate will draw inferences about the character and quality of that system based on how the program is designed and administered and the way the neutrals perform their roles.”), in Joachim Zekoll, et al., eds., *Formalisation and Flexibilisation in Dispute Resolution* (Brill Nijhoff 2014).

103. See *Hickman*, 366 U.S. at 511.

104. *In re Garcia*, 58 Cal. 4th 440, 452, 315 P.3d 117, 165 Cal. Rptr. 3d 855 (2014).

105. See, e.g., *Wimsatt*, 152 Cal. App. 4th at 162 (California’s mediation confidentiality requirement means that when clients participate in mediation “they are, in effect, relinquishing all claims for new and independent torts arising from mediation We believe that the purpose of mediation is not enhanced by such a result because wrongs will go unpunished and the administration of justice is not served.”); see also Jonnette Hamilton, *Protecting Confidentiality in Mandatory Mediation: Lessons From Ontario and Saskatchewan*, 24 Queen’s L.J. 561, 634 (1999) (“There are some circumstances where the public interest in the proper administration of justice outweighs the interests in maintaining mediation confidentiality.”).

106. See, e.g., *Offutt v. United States*, 348 U.S. 11, 14 (1954) (“justice must satisfy the appearance of justice”); *Rex v. Sussex Justices*, 1 K.B. 256, 259 (1924) (“... a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”) (per Lord Hewart).

107. The problem of excluding evidence that might be needed to ensure justice is not unique to mediation confidentiality requirements. The same problem also arises, for example, with regard to the various evidentiary privileges recognized in the Evidence Code (Evid. Code §§ 930-1063). Each evidentiary privilege is based on a legislative determination that the societal benefits of excluding a particular type of evidence outweigh the potential for injustice stemming from exclusion of that evidence. See, e.g., Third

1 area is unusually divisive and attaining a satisfactory compromise is
2 challenging.¹⁰⁸

3 A number of other policy considerations are also important in assessing the
4 merits of various approaches to the topic at hand. Those policy considerations are
5 described at appropriate points in the remainder of this tentative recommendation.

California Law on Mediation Confidentiality

6 California has a well-developed statutory scheme for protection of mediation
7 communications. The discussion below begins by briefly recounting the history of
8 such protection in California. The Commission then describes the current statutory
9 framework and case law interpreting those statutes.

10 **History of California’s Statutory Scheme**

11 California’s statutory scheme governing mediation confidentiality developed
12 gradually, becoming more extensive and detailed as mediation grew in popularity.
13 The key events are described below.

14 ***Protection of Settlement Negotiations***

15 The California Evidence Code was enacted on Commission recommendation in
16 1965, a decade before the Federal Rules of Evidence were approved.¹⁰⁹ From its
17 inception, the Evidence Code has included some provisions (Evidence Code
18 Sections 1152 and 1154) that restrict the admissibility of evidence of settlement
19 negotiations.¹¹⁰

20 Those provisions remain in place today. They are based on the public policy
21 favoring settlement of disputes without litigation.¹¹¹ They are intended to help
22 foster “the complete candor between the parties that is most conducive to
23 settlement.”¹¹²

Supplement to CLRC Staff Memorandum 2013-47, Exhibit p. 2 (comments of Paul Glusman). This type of legislative determination may be hard to accept when faced with a specific injustice occurring as a cost of the evidentiary rule.

Unsurprisingly, such rules have always been controversial. Historically, that is why the Federal Rules of Evidence do not include any privileges. See Sen. Rep. No. 93-12377, 93rd Cong. 2d Session (Oct. 18, 1974) (Note on Privilege).

108. This is true not only in California, but also elsewhere. See, e.g., CLRC Staff Memorandum 2014-44, pp. 18-23 (describing controversy over UMA in Texas); CLRC Staff Memorandum 2014-43, pp. 4-6 (describing controversy over UMA in Pennsylvania); CLRC Staff Memorandum 2014-35, pp. 30-32 (describing controversy over UMA in Massachusetts), 36-39 (describing controversy over UMA and other mediation confidentiality proposals in New York).

109. 1965 Cal. Stat. ch. 299 (operative Jan. 1, 1967); see also *Recommendation Proposing an Evidence Code*, 7 Cal. L. Revision Comm’n Reports 1 (1965).

110. See Evid. Code §§ 1152, 1154.

111. See Evid. Code § 1152 Comment (1965); see also Evid. Code § 1154 Comment.

112. Evid. Code § 1152 Comment (1965); see also Evid. Code § 1154 Comment.

1 Although Sections 1152 and 1154 are intended to promote settlement by
2 fostering candid negotiations, they provide only limited assurance that comments a
3 party makes in such negotiations will not later be turned against the party. The
4 provisions make evidence of such comments inadmissible to prove or disprove
5 liability, but an opponent can still introduce the evidence for other purposes, such
6 as to show bias, motive, undue delay, or knowledge.¹¹³

7 ***The Advent of Special Evidentiary Protection for Mediation***

8 In the early 1980's, mediation was beginning to gain acceptance as a means of
9 resolving disputes in California. After studying means of making mediation a
10 more useful alternative to a court or jury trial, the Commission recommended the
11 enactment of a new evidentiary provision, which would protect oral and written
12 information disclosed in a mediation from subsequent disclosure in a judicial
13 proceeding.¹¹⁴

14 This proposed new provision would supplement, rather than replace, the existing
15 provisions protecting settlement negotiations.¹¹⁵ Unlike those provisions, it would
16 apply regardless of the proponent's purpose in proffering mediation
17 communications as evidence in a later case.¹¹⁶ It would, however, only apply to a
18 mediation if the participants agreed in advance and in writing that the protection
19 would apply.¹¹⁷ Further, the proposed provision could not be used to exclude
20 evidence offered in a criminal case.¹¹⁸

21 The new provision was enacted as the Commission recommended.¹¹⁹ Like the
22 provisions protecting settlement negotiations, it was based on the public policy
23 favoring settlement of disputes without litigation.¹²⁰

113. See, e.g., *White v. Western Title Ins. Co.*, 40 Cal. 3d 870, 889, 710 P.2d 309, 221 Cal. Rptr. 509 (1985); *Campisi v. Superior Court*, 17 Cal. App. 4th 1833, 1838, 22 Cal. Rptr. 2d 335 (1993); *Young v. Keele*, 188 Cal. App. 3d 1090, 1093-94, 233 Cal. Rptr. 850 (1987).

The possibility of offering a piece of evidence for a purpose other than proving liability constitutes a significant limitation on the effectiveness of Sections 1152 and 1154, because opponents can be quite creative in conceiving purposes for introduction of such evidence, and, once admitted, the evidence might influence the determination of liability despite a limiting instruction. See *Admissibility, Discoverability, and Confidentiality of Settlement Negotiations*, 29 Cal. L. Revision Comm'n Reports 345, 353-54, 359-61 (1999) & sources cited therein.

114. See *Recommendation Relating to Protection of Mediation Communications*, 18 Cal. L. Revision Comm'n Reports 241, 245 (1985) (hereafter, "CLRC Mediation Recommendation #1").

115. See *id.* at 245.

116. See *id.* at 246-47.

117. See *id.* at 245-46.

118. See *id.* at 243, 246.

119. See 1985 Cal. Stat. ch. 731, § 1 (former Evid. Code § 1152.5).

120. See former Evid. Code § 1152.5 Comment (reproduced in *Communication From California Law Revision Concerning Assembly Bill 1030*, 18 Cal. L. Revision Comm'n Reports 377, 378 (1985)).

1 ***A Comprehensive Scheme to Promote Use of Mediation***

2 In 1993, a bill was enacted to establish a comprehensive scheme for promoting
3 the use of mediation to resolve civil disputes.¹²¹ That bill was the product of
4 negotiations between key stakeholders;¹²² the Commission was not involved in the
5 process.¹²³

6 As enacted, the bill made a number of important reforms relating to
7 mediation.¹²⁴ In particular, the bill substantially revised the statutory provision
8 restricting use of mediation evidence.¹²⁵ Among other things, the revisions did the
9 following:

- 10 • Eliminated the requirement of a written agreement to invoke the statutory
11 protection for mediation communications and documents.¹²⁶
- 12 • Expressly protected mediation communications and documents from
13 disclosure in civil discovery, not just from being admitted into evidence.¹²⁷
- 14 • Made mediation communications confidential.¹²⁸

15 The 1993 bill also created a mandatory mediation pilot project, which was based
16 on legislative findings recognizing the benefits of mediation.¹²⁹ In addition, the bill

121. See SB 401 (Lockyer), 1993 Cal. Stat. ch. 1261; Senate Committee on Judiciary Analysis of SB 401 (May 25, 1993), p. 2.

122. SB 401 was “the product of a series of discussions between the Judicial Council, the State Bar of California, the California Trial Lawyers Association [now known as the Consumer Attorneys of California], the California Judges Association, the California Defense Counsel, the Los Angeles County Bar Association, representatives of the mediation community, and the author’s staff.” Senate Committee on Judiciary Analysis of SB 401 (May 25, 1993), p. 2. All of those groups “agree[d] that mediation can be an effective tool to resolve civil disputes in a fair, timely, and cost-effective manner.” *Id.*

123. The Commission’s role is to make recommendations for revision of California law on topics assigned by the Legislature, not to take positions on legislation crafted by others. See Gov’t Code §§ 8280-8298.

124. The bill also made some reforms relating to arbitration, which are not pertinent to this study.

125. See 1993 Cal. Stat. ch. 1261, § 6.

126. See *id.* Apparently, the requirement of a written agreement was considered onerous, particularly in disputes involving unsophisticated persons.

127. See former Evid. Code § 1152.5(a)(2), 1993 Cal. Stat. ch. 1261, § 6.

128. See former Evid. Code § 1152.5(a)(3), 1993 Cal. Stat. ch. 1261, § 6 (“When persons agree to conduct or participate in mediation for the sole purpose of compromising, settling, or resolving a dispute, in whole or in part, all communications, negotiations, or settlement discussions by and between participants or mediators in the mediation shall remain confidential.”).

The 1993 bill also revised the provision protecting mediation communications (former Evid. Code § 1152.5) to (1) expressly extend its protection to a mediation that would partially rather than fully resolve a dispute, (2) make clear that a written settlement agreement was “admissible to show fraud, duress, or illegality if relevant to an issue in dispute,” (3) specify that “[e]vidence otherwise admissible or subject to discovery outside of mediation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation,” and (4) add an attorney’s fee provision. See 1993 Cal. Stat. ch. 1261, § 6.

1 revised an evidentiary provision on competency to testify (Evidence Code Section
2 703.5), making it applicable to a mediator, not just to an arbitrator or person
3 presiding at a judicial or quasi-judicial proceeding. Under that provision as so
4 revised, a mediator is generally precluded from testifying about a mediation in any
5 subsequent civil proceeding.¹³⁰

6 ***No Report by a Mediator to a Court***

7 In 1995, the Legislature enacted a new provision relating to mediation
8 confidentiality, which prohibited a mediator from reporting to a court regarding a
9 mediation unless the parties expressly agreed, in writing, to allow such a report
10 before the mediation began.¹³¹ That provision was intended to prevent a mediator
11 from coercing a party to settle a case by threatening to tell the judge negative
12 things about the party's behavior at a mediation (e.g., the party unreasonably
13 refused to settle or took an untenable position on a particular issue).¹³² The
14 provision thus focused on ensuring that any settlement agreement reached in
15 mediation was truly voluntary.

16 ***Protection of Mediation Intake Communications***

17 The following year, the provision on admissibility, discoverability, and
18 confidentiality of mediation communications was amended to expressly apply not

129. See 1993 Cal. Stat. ch. 1261, § 4. The mandatory mediation pilot project operated in Los Angeles County, and in any other county electing to participate. The pilot project was scheduled to sunset on January 1, 1999, but the sunset provision was later repealed and the program continued in Los Angeles until it was discontinued due to budget cuts in 2013. See *id.* (former Code Civ. Proc. § 1775.16); 1998 Cal. Stat. ch. 618, § 1 (repealing former Code Civ. Proc. § 1775.16).

130. Section 703.5 currently provides:

703.5. No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure. However, this section does not apply to a mediator with regard to any mediation under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

131. See 1995 Cal. Stat. ch. 576, § 8 (former Evid. Code § 1152.6), which read as follows:

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

132. See R. Kelly, *New Law Takes Effect to Protect Mediation Rights*, N. Cal. Mediation Ass'n News. (Spring 1996). There was concern that former Section 1152.5 (1993 Cal. Stat. ch. 1261, § 6) alone would not stop such conduct, because some local rules expressly deemed participation in a mediation program as a waiver of the protections of that section with regard to having the mediator submit an evaluation to the court. See Kelly, *supra*; Contra Costa Sup. Ct., Loc. R. 207 (1996).

1 only when parties agree to mediate, but also when a person consults a mediator or
2 mediation service for the purpose of retaining the mediator or mediation service.¹³³
3 According to the author of the bill, this change was needed to fill a significant gap
4 in coverage.¹³⁴

Current Statutory Framework

5 Following a study by this Commission, a bipartisan¹³⁵ bill relating to mediation
6 confidentiality was enacted in 1997,¹³⁶ resulting in the current statutory scheme.¹³⁷
7 The section below describes the structural effect and objectives of that bill. The
8 next section describes the core substance of existing law. For convenient
9 reference, the key provisions and corresponding Commission Comments are
10 reproduced in the appendix.

11 *Structural Effect and Objectives*

12 As recommended by the Commission, the 1997 bill created a new chapter in the
13 Evidence Code (Sections 1115-1128), entitled “Mediation.” The bill also repealed
14 the provision on admissibility, discoverability, and confidentiality of mediation
15 communications¹³⁸ and the provision restricting a mediator from reporting to a
16 court regarding a mediation.¹³⁹ Most of the substance of those two provisions was

133. See 1996 Cal. Stat. ch. 174, § 1.

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

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

135. The bill was authored by Assembly Member Ortiz (a Democrat), and co-authored by Assembly Member Ackerman (a Republican). The bill received extensive support, not a single vote was cast against it during the legislative process, and Governor Wilson signed it into law. See 1997 Cal. Stat. ch. 772 (AB 939 (Ortiz)); see also Assembly Committee on Judiciary Analysis of AB 939 (April 16, 1997); Senate Committee on Judiciary Analysis of AB 939 (Aug. 26, 1997).

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

136. See 1997 Cal. Stat. ch. 722; see also *Report of the California Law Revision Commission on Chapter 722 of the Statutes of 1997 (Assembly Bill 939)*, 27 Cal. L. Revision Comm’n Reports 595 (1997); *Mediation Confidentiality*, 26 Cal. L. Revision Comm’n Reports 407 (1996) (hereafter, “CLRC Mediation Recommendation #2”).

137. Only a few minor revisions have been made since 1997. See 2010 Cal. Stat. ch. 328, § 64; 2009 Cal. Stat. ch. 88, § 35; 2007 Cal. Stat. ch. 130, § 84.

138. Former Evid. Code § 1152.5 (1996 Cal. Stat. ch. 174, § 1).

139. Former Evid. Code § 1152.6 (1995 Cal. Stat. ch. 576, § 8).

1 continued, with some revisions, in the new chapter.¹⁴⁰ Section 703.5 (governing a
2 mediator’s competency to testify) and Sections 1152 and 1154 (restricting the
3 admissibility of evidence of settlement negotiations) were left unchanged; they
4 remain as previously described.

5 A major objective of the 1997 reform was to resolve a conflict between two
6 court of appeal decisions on the enforceability of an oral compromise that parties
7 reach in mediation but never convert to a fully executed settlement agreement
8 because the parties cannot agree on the terms.¹⁴¹ Prompt resolution of that conflict
9 was crucial, because a mediating disputant must be able to determine when an
10 opponent is effectively bound.¹⁴²

11 The 1997 bill also revised the law on the enforceability of a *written* agreement
12 reached through mediation, in two key respects.¹⁴³ Those two reforms, plus
13 resolution of the conflict on enforceability of an oral compromise reached in

140. See Evid. Code §§ 1115(c), 1119, 1120, 1121, 1123 & 1127 & Comments.

141. One of those decisions held that such an oral compromise was inadmissible pursuant to former Section 1152.5 and therefore unenforceable. See *Ryan v. Garcia*, 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (1994). The other decision held that mediation ended once the parties reached an oral compromise, so former Section 1152.5 did not apply to the compromise and it was enforceable. See *Regents of the University of California v. Sumner*, 42 Cal. App. 4th 1209, 50 Cal. Rptr. 2d 200 (1996).

142. CLRC Mediation Recommendation #2, *supra* note 136, at 427. The new chapter on mediation confidentiality addressed the conflict by (1) specifying a statutory procedure for orally memorializing an agreement, in the interest of efficiency (see Evid. Code § 1118 & Comment), (2) creating an exception to mediation confidentiality when parties follow that statutory procedure or certain other requirements are satisfied (see Evid. Code § 1124 & Comment), (3) providing specific guidance on when mediation ends for purposes of applying mediation confidentiality (see Evid. Code § 1125), and (4) making clear that “[a]nything said, any admission made, or any writing that is inadmissible, protected from disclosure, and confidential under this chapter before a mediation ends, shall remain inadmissible, protected from disclosure, and confidential to the same extent after the mediation ends” (Evid. Code § 1126).

The Commission’s Comment to Section 1124 explains:

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

143. Those two reforms were:

(1) Under prior law, unless it was offered to prove fraud, duress, or illegality, a written agreement reached in mediation was admissible (and therefore enforceable) only if it expressly provided that it was admissible or subject to disclosure. See former Evid. Code § 1152.5(a)(2) (1996 Cal. Stat. ch. 174, § 1). The Commission considered that requirement overly rigorous; the law was thus revised to also make such an agreement admissible if it provides that it is “enforceable” or “binding” or words to that effect. See Evid. Code § 1123 & Comment; see also CLRC Mediation Recommendation #2, *supra* note 136, at 423.

(2) Prior law was unclear regarding whose assent had to be obtained to disclose a written settlement agreement that *did not* contain the “magic language” described in the preceding paragraph. The 1997 bill made clear that it was only necessary to obtain assent from the parties, not from the mediator or other mediation participants. See Evid. Code § 1123 Comment; see also CLRC Mediation Recommendation #2, *supra* note 136, at 423.

1 mediation, were the “most crucial” aspect of the legislation.¹⁴⁴ The bill made
2 various other revisions as well.¹⁴⁵

3 ***Core Substance of Existing Law***

4 The chapter on mediation confidentiality begins by defining “mediation” as “a
5 process in which a neutral person or persons facilitate communication between the
6 disputants to assist them in reaching a mutually acceptable agreement.”¹⁴⁶ The
7 chapter also defines “mediator”¹⁴⁷ and “mediation consultation.”¹⁴⁸

8 The key provision in the chapter is Evidence Code Section 1119, which restricts
9 the admissibility and discoverability of mediation communications, and also
10 provides for confidentiality. It provides:

11 1119. Except as otherwise provided in this chapter:

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

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

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

27 Contrary to what some sources say,¹⁴⁹ the protection under this provision is not
28 absolute. There are not many exceptions and limitations, however, and the ones
29 that exist are relatively clear-cut and easy to apply.

144. CLRC Mediation Recommendation #2, *supra* note 136, at 424.

145. For a description of those revisions, see CLRC Staff Memorandum 2013-39, pp. 13-15.

146. Evid. Code § 1115(a). “The definition focuses on the nature of a proceeding, not its label.” Evid. Code § 1115 Comment. Thus, a proceeding may be a “mediation” for purposes of the chapter on mediation confidentiality, even though it is denominated differently.” *Id.*

147. A “mediator” is “a neutral person who conducts a mediation.” Evid. Code § 1115(b). The term encompasses “any person designated by a mediator either to assist in the mediation or to communicate with the participants in preparation for a mediation.” *Id.*

148. A “mediation consultation” is “a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator.” Evid. Code § 1115(c).

149. See, e.g., Cole, *supra* note 5, at 1454 (“[F]or some states, creation of an absolute mediation privilege for mediation communications is a preferable policy choice. In 2002, for example, California enacted a very broad mediation privilege statute shortly before the UMA was finalized.”).

1 Of particular importance, the protection of Section 1119 applies *only* in a
2 *noncriminal* proceeding. It does *not* restrict the use of mediation communications
3 in a *criminal* case.¹⁵⁰

4 Other exceptions and limitations include:

- 5 • **Preexisting evidence.** Evidence that was admissible or subject to discovery
6 before a mediation does not become inadmissible or protected from
7 disclosure upon being used in a mediation.¹⁵¹
- 8 • **Specified agreements.** The rule does not restrict the admissibility of an
9 agreement to mediate a dispute, an agreement not to take a default, or an
10 agreement for an extension of time in a pending civil action.¹⁵²
- 11 • **Mediator background.** The rule does not prevent disclosure of the mere
12 fact that a mediator has served, is serving, will serve, or was contacted about
13 serving as a mediator in a dispute.¹⁵³
- 14 • **Financial disclosure declarations exchanged in a divorce proceeding.** An
15 appellate court recently explained that such declarations are required by the
16 Family Code, not because of mediation, and thus they are *not* mediation
17 communications even though they are exchanged during mediation.¹⁵⁴
- 18 • **Excluded proceedings.** The rule does not apply to a court settlement
19 conference, a family conciliation proceeding, or a court-connected
20 mediation of child custody and visitation issues.¹⁵⁵
- 21 • **Constitutional rights.** The rule does not apply if it conflicts with a
22 constitutional right, such as the right of due process,¹⁵⁶ or a juvenile’s
23 constitutional right of confrontation in a juvenile delinquency proceeding.¹⁵⁷
- 24 • **Absurd results.** The rule does not apply if it would “lead to absurd results
25 that clearly undermine the statutory purpose.”¹⁵⁸
- 26 • **Express agreement to waive protection.** The rule does not prevent
27 admissibility or disclosure of mediation materials if *all* of the participants in
28 a mediation expressly agree in writing (or orally, pursuant to a specified
29 procedure) to waive the protection.¹⁵⁹ In recommending this approach, the

150. See, e.g., *Cassel*, 51 Cal. 4th at 135 n.11.

151. Evid. Code § 1120(a); see also *Rojas v. Superior Court*, 33 Cal. 4th 407, 423 n.8, 93 P.3d 260, 15 Cal. Rptr. 3d 643 (2004); *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 132, 85 Cal. Rptr. 3d 20 (2008).

152. Evid. Code § 1120(b)(1)-(2).

153. Evid. Code § 1120(b)(3).

154. *Lappe v. Superior Court*, 232 Cal. App. 4th 774, 181 Cal. Rptr. 3d 510 (2014). A bill to codify the holding of *Lappe* is pending. See SB 217 (Wieckowski) (as introduced Feb. 1, 2017). The Commission takes no position on that bill or any other pending bill. See *supra* note 123.

155. Evid. Code § 1117(b).

156. *Cassel*, 51 Cal. 4th at 119, 127.

157. See *Rinaker v. Superior Court*, 62 Cal. App. 4th 155, 72 Cal. Rptr. 2d 464 (1998).

158. *Cassel*, 51 Cal. 4th at 119.

159. Evid. Code § 1122(a)(1).

1 Commission explained that “[a]ll persons attending a mediation, parties as
2 well as nonparties, should be able to speak frankly, without fear of having
3 their words turned against them.”¹⁶⁰ If a communication or writing was
4 prepared by or on behalf of fewer than all of the mediation participants, only
5 an express waiver by those participants is needed.¹⁶¹

- 6 • **Settlement agreement.** The rule does not prevent admissibility or
7 disclosure of a written settlement agreement signed by the settling parties if
8 certain requirements are met.¹⁶² An oral settlement agreement may also be
9 used, but only if it was prepared in accordance with a statutory procedure
10 and meets certain requirements.¹⁶³
- 11 • **Conduct not intended as an assertion.** The rule does not protect conduct at
12 a mediation, only mediation communications.¹⁶⁴

13 To help persons determine whether their statements are protected by Section
14 1119, the chapter on mediation confidentiality includes a provision specifying
15 when a mediation ends.¹⁶⁵ Among other circumstances, a mediation ends when the
16 parties execute a written settlement fully resolving the mediated dispute, or
17 complete a statutory procedure for orally agreeing to fully resolve the dispute.¹⁶⁶
18 Anything made inadmissible or otherwise protected by the chapter on mediation
19 confidentiality *before* a mediation ends remains so protected *after* the mediation
20 ends.¹⁶⁷

21 Another important provision in the chapter on mediation confidentiality is
22 Section 1121, which generally precludes a mediator or anyone else from reporting
23 to a court regarding the substance of a mediation. That provision is similar to the
24 earlier provision on the same topic, but more clear in a number of respects.¹⁶⁸

160. CLRC Mediation Recommendation #2, *supra* note 136, at 425.

161. Evid. Code § 1122(a)(2).

162. Evid. Code § 1123.

163. Evid. Code § 1124.

164. See, e.g., *Foxgate*, 25 Cal. 4th at 18 n.14; *Radford v. Shehorn*, 187 Cal. App. 4th 852, 857, 114 Cal. Rptr. 3d 499 (2010); *Campagnone v. Enjoyable Pools & Spas Service & Repairs, Inc.*, 163 Cal. App. 4th 566, 571-72, 77 Cal. Rptr. 3d 551 (2008); see also *Ellerbee v. County of Los Angeles*, 187 Cal. App. 4th 1206, 1216-17, 114 Cal. Rptr. 3d 756 (2010).

165. Evid. Code § 1125.

166. Evid. Code § 1125(a)(1)-(2).

167. Evid. Code § 1126.

168. Section 1121 provides:

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

The focus of this provision is on preventing coercion. As the Commission’s Comment explains, “a mediator should not be able to influence the result of a mediation or adjudication by reporting or

1 If a mediator is subpoenaed to testify or produce a writing, and a court or other
2 adjudicative body determines that the evidence is inadmissible under the chapter
3 on mediation confidentiality, the mediator is entitled to attorney’s fees.¹⁶⁹
4 Similarly, any reference to a mediation in a subsequent trial or other adjudication
5 is an irregularity in the proceedings.¹⁷⁰

6 ***Additional Sources of Protection for Mediation Communications***

7 The mediation confidentiality statutes described above (Sections 1115-1128) are
8 not the only potential source of evidentiary protection for mediation
9 communications. Other provisions that may limit the admissibility or disclosure of
10 such communications include California’s constitutional right of privacy,¹⁷¹
11 various specialized mediation confidentiality provisions,¹⁷² Section 1160 (relating
12 to benevolent conduct),¹⁷³ and the previously discussed provisions on a mediator’s
13 competency to testify (Section 703.5) and the admissibility of evidence of
14 settlement negotiations (Sections 1152 and 1154).

15 In addition, mediation participants sometimes enter into contractual agreements
16 restricting disclosure of mediation communications.¹⁷⁴ Issues might arise,
17 however, regarding enforcement as to third parties and protection of public
18 policies.

19 California’s mediation statutes do not address the validity of a contractual
20 requirement to keep settlement terms confidential. That issue (sometimes referred

threatening to report to the decisionmaker on the merits of the dispute or reasons why mediation failed to resolve it.” Likewise, “a mediator should not have authority to resolve or decide the mediated dispute, and should not have any function for the adjudicating tribunal with regard to the dispute, except as a non-decisionmaking neutral.” Section 1121 Comment.

169. Evid. Code. § 1127.

170. Evid. Code. § 1128.

171. Cal. Const. art. I, § 1; see also *Garstang v. Superior Court*, 39 Cal. App. 4th 526, 532, 46 Cal. Rptr. 2d 84 (1995).

172. See, e.g., Fam. Code §§ 1818 (family conciliation court), 3177 (child custody); Gov’t Code §§ 12984-12985 (housing discrimination).

173. Section 1160 states in part: “The portion of statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of a person involved in an accident and made to that person or to the family of that person shall be inadmissible as evidence of an admission of liability in a civil action.”

174. See, e.g., *Facebook, Inc. v. Pacific Northwest Software, Inc.*, 640 F.3d 1034, 1041 (9th Cir. 2011) (District court “was right to exclude” proffered evidence of “what was said and what was not said during the mediation” because confidentiality agreement precluded introduction of such evidence); *ZVI Construction Co., LLC v. Levy*, 90 Mass. App. Ct. 412, 60 N.E. 3d 368, 377 (2016) (“[T]he mediation agreement merely precluded the parties from disclosing mediation communications [T]he mediation agreement, and the confidentiality provision therein, are enforceable.”).

1 to as “settlement in sunshine”) arises with regard to all settlements, not just
2 mediated settlements. It is governed by other law.¹⁷⁵

California Supreme Court Decisions on Mediation Confidentiality

3 Since the enactment of the chapter on mediation confidentiality, the California
4 Supreme Court has issued five decisions interpreting provisions within the
5 chapter. Those decisions are described in chronological order below. The first four
6 cases are described only briefly;¹⁷⁶ the last decision (*Cassel*) is discussed in greater
7 detail because it most directly concerns the topic of this study.

8 *Foxgate*

9 *Foxgate Homeowners’ Ass’n v. Bramalea California, Inc.*¹⁷⁷ involved a
10 mediation conducted pursuant to a case management order, which directed the
11 parties to make their best efforts to cooperate during the mediation process. The
12 plaintiffs’ attorney came to the mediation with nine experts, but the defense
13 showed up late and without any experts, despite a court notice to bring experts
14 along. The mediation did not result in an agreement; the mediator ended it earlier
15 than expected, concluding that mediation without defense experts would be
16 fruitless.

17 Thereafter, the plaintiff sought sanctions from the defense for failing to
18 cooperate at the mediation. In connection with the plaintiff’s motion, the mediator
19 filed a report that described the mediation session in detail, accused the defense of
20 obstructive and bad faith tactics, and recommended awarding sanctions.¹⁷⁸

21 The defense contended that the mediation confidentiality statutes barred
22 consideration of the mediator’s report. The trial court disagreed and awarded
23 sanctions, but the court of appeal reversed and remanded, ruling that the some but
24 not all of the mediator’s report was admissible pursuant to an implied exception to
25 the mediation confidentiality statutes.

26 On further appeal, the California Supreme Court determined that “there are no
27 exceptions to the confidentiality of mediation communications or to the statutory
28 limits on the content of mediator’s reports.”¹⁷⁹ The Court explained:

29 Because the language of sections 1119 and 1121 is clear and unambiguous,
30 judicial construction of the statutes is not permitted unless they cannot be applied

175. See, e.g., Code Civ. Proc. § 2017.310 (“Notwithstanding any other provision of law, it is the policy of the State of California that confidential settlement agreements are disfavored in any civil action the factual foundation for which establishes a cause of action for a violation of the Elder Abuse and Dependent Adult Civil Protection Act (Chapter 11 (commencing with Section 15600) of Part 3 of Division 9 of the Welfare and Institutions Code).”).

176. For more detailed discussions of those decisions, see CLRC Staff Memorandum 2013-39, pp. 18-25.

177. 26 Cal. 4th 1, 15, 25 P.3d 1117, 128 Cal. Rptr. 2d 642 (2001).

178. *Id.* at 6.

179. *Id.* at 4.

1 according to their terms or doing so would lead to absurd results, thereby
2 violating the presumed intent of the Legislature. Moreover, a judicially crafted
3 exception to the confidentiality mandated by sections 1119 and 1121 is not
4 necessary either to carry out the legislative intent or to avoid an absurd result.

5 The legislative intent underlying the mediation confidentiality provisions of the
6 Evidence Code is clear. The parties and all amici curiae recognize the purpose of
7 confidentiality is to promote “a candid and informal exchange regarding events in
8 the past This frank exchange is achieved only if the participants know that
9 what is said in the mediation will not be used to their detriment through later court
10 proceedings and other adjudicatory processes.”¹⁸⁰

11 The Court also distinguished two decisions in which other courts found
12 exceptions to mediation confidentiality: *Rinaker v. Superior Court*¹⁸¹ and *Olam v.*
13 *Congress Mortgage Co.*¹⁸² The Court explained that in *Rinaker*, the statutory right
14 of mediation confidentiality was trumped by a juvenile delinquency defendant’s
15 constitutional right to confront a witness with inconsistent mediation statements,
16 but *Foxgate* involved “no comparable supervening due-process-based right to use
17 evidence of statements and events at the mediation session.”¹⁸³

18 The Court further explained that in *Olam*, both sides (but not the mediator) had
19 waived mediation confidentiality and mediation evidence was crucial to achieve
20 justice. In contrast, the *Foxgate* defendants had not waived confidentiality, so
21 *Olam* was inapposite.¹⁸⁴

22 The Court therefore concluded that the order imposing sanctions was based on
23 wrongfully admitted mediation communications and had to be set aside.¹⁸⁵ The
24 Court made clear, however, that “neither section 1119 nor section 1121 prohibits a
25 party from revealing or reporting to the court about noncommunicative conduct,
26 including violation of the orders of a mediator or the court during mediation.”¹⁸⁶
27 Thus, the plaintiff could renew its sanctions motion on remand, so long as that
28 motion was based on noncommunicative conduct rather than mediation
29 communications.¹⁸⁷

30 ***Rojas***

31 Three years after *Foxgate*, the California Supreme Court again considered the
32 mediation confidentiality statutes, in *Rojas v. Superior Court*.¹⁸⁸ This time, the

180. *Id.* at 14 (citations omitted).

181. 62 Cal. App. 4th 155, 74 Cal. Rptr. 2d 464 (1998).

182. 68 F. Supp. 2d 1110 (N.D. Cal. 1999).

183. *Foxgate*, 26 Cal. 4th at 15-16.

184. *Id.* at 16-17.

185. *Id.* at 18.

186. *Id.* at 18 n.14.

187. *Id.* at 18.

188. 33 Cal. 4th 407, 93 P.3d 260, 15 Cal. Rptr. 3d 643 (2004).

1 case concerned the discoverability of materials that had been prepared in
2 connection with an earlier dispute, which had settled through mediation.

3 The trial court denied discovery of certain materials on grounds of mediation
4 confidentiality. The court of appeal reached a different result, interpreting the
5 mediation confidentiality statutes to be implicitly subject to the same three-prong
6 analysis as the work product privilege: (1) material reflecting *only* an attorney’s
7 impressions, conclusions, opinions, or legal research or theories is absolutely
8 protected, (2) material that does not reflect an attorney’s impressions, conclusions,
9 opinions, or legal research or theories is *not* protected, and (3) derivative material
10 (material that contains an amalgamation of factual information and an attorney’s
11 impressions, conclusions, opinions, or legal research or theories) is discoverable
12 only upon a showing of good cause, which involves balancing the need for the
13 material against the purposes served by mediation confidentiality.

14 The California Supreme Court disagreed with that interpretation of the
15 mediation confidentiality statutes, stating that it was contrary to both the statutory
16 language and the legislative intent.¹⁸⁹ The Court’s lengthy analysis quoted heavily
17 from *Foxgate* and relied extensively on Commission materials.¹⁹⁰ Among other
18 things, the Court explained:

19 In *Foxgate*, we stated that “to carry out the purpose of encouraging mediation
20 by ensuring confidentiality, [our] statutory scheme ... unqualifiedly bars
21 disclosure of” specified communications and writings associated with a mediation
22 “absent an *express statutory* exception.” We also found that the “judicially crafted
23 exception” to section 1119 there at issue was “not necessary either to carry out the
24 legislative intent or to avoid an absurd result.” We reach the same conclusion
25 here; as [the trial judge] observed, “the mediation privilege is an important one,
26 and if courts start dispensing with it by using the [test governing the work-product
27 privilege], you may have people less willing to mediate.”¹⁹¹

28 The Court thus again interpreted Section 1119 strictly, refusing to imply a
29 “judicially crafted exception.” In so doing, however, the Court recognized that
30 Section 1120 creates an express (not implied) exception to mediation
31 confidentiality for preexisting materials.¹⁹² The Court also pointed out that
32 physical samples do not constitute “writings” and thus do not fall within the
33 protection of the mediation confidentiality statutes.¹⁹³

189. *Id.* at 411.

190. *Id.* at 415-24.

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

192. *Id.* at 417 (“under section 1120, a party cannot secure protection for a writing — including a photograph, a witness statement, or an analysis of a test sample — that was not ‘prepared for the purpose of, in the course of, or pursuant to, a mediation’ ... simply by using or introducing it in a mediation or even including it as part of a writing — such as a brief or a declaration or a consultant’s report — that was ‘prepared for the purpose of, in the course of, or pursuant to, a mediation.’”).

193. *Id.* at 416.

1 **Fair**

2 The next California Supreme Court decision relating to mediation
3 confidentiality was *Fair v. Bakhtiari*,¹⁹⁴ in which the Court considered how to
4 construe the exception for a written settlement agreement that is signed by the
5 settling parties and provides that it is “enforceable or binding or words to that
6 effect.”¹⁹⁵ The agreement in question did not include language along those lines,
7 but did include an arbitration clause.

8 The Court determined that inclusion of an arbitration clause was not sufficient to
9 satisfy the statutory requirement.¹⁹⁶ The Court thus interpreted the mediation
10 confidentiality exception narrowly, not broadly.

11 In so doing, the Court noted that confidentiality “is essential to effective
12 mediation”¹⁹⁷ and explained:

13 A tentative working document may include an arbitration provision, without
14 reflecting an actual agreement to be bound. If such a typical settlement provision
15 were to trigger admissibility, parties might inadvertently give up the protection of
16 mediation confidentiality during their negotiations over the terms of settlement.
17 Disputes over those terms would then erupt in litigation, escaping the process of
18 resolution through mediation. Durable settlements are more likely to result if the
19 statute is applied to require language directly reflecting the parties’ awareness that
20 they are executing an “enforceable or binding” agreement.¹⁹⁸

21 The Court further explained that under its interpretation of the exception, “the
22 parties are free to draft and discuss enforcement terms such as arbitration clauses
23 without worrying that those provisions will destroy the confidentiality that protects
24 mediation discussions.”¹⁹⁹ Thus, as in *Foxgate* and *Rojas*, the Court was sensitive
25 to the legislative policy of protecting mediation confidentiality, and careful to
26 interpret the statutory protection so as to be effective.

27 **Simmons**

28 In 2008, the California Supreme Court considered mediation confidentiality yet
29 again, in *Simmons v. Ghaderi*.²⁰⁰ The key question before the Court was whether a
30 waiver of mediation confidentiality had to be express or could also be implied
31 from a person’s conduct.

194. 40 Cal. 4th 189, 147 P.3d 653, 51 Cal. Rptr. 3d 871 (2006).

195. Evid. Code § 1123(b).

196. *Fair*, 40 Cal. 4th at 197 (“[W]e hold that to satisfy the ‘words to that effect’ provision of section 1123(b), a writing must directly express the parties’ agreement to be bound by the document they sign.”).

197. *Id.*, quoting *Foxgate*, 26 Cal. 4th at 14.

198. *Fair*, 40 Cal. 4th at 197-98.

199. *Id.* at 199.

200. 44 Cal. 4th 570, 187 P.3d 934, 80 Cal. Rptr. 3d 83 (2008).

1 The Court determined that the mediation confidentiality statutes unambiguously
2 require any waiver of mediation confidentiality to be express, not implied.²⁰¹ The
3 Court further noted that except where due process is implicated or there is an
4 express waiver, those statutes must be “strictly enforced.”²⁰²

5 The Court therefore refused to create a waiver-by-conduct exception to the
6 mediation confidentiality statutes. It explained:

7 [T]he legislative history of the mediation confidentiality statutes as a whole
8 reflects a desire that section 1115 et seq. be strictly followed in the interest of
9 efficiency. By laying down clear rules, the Legislature intended to reduce
10 litigation over the admissibility and disclosure of evidence regarding settlements
11 and communications that occur during mediation. Allowing courts to craft judicial
12 exceptions to the statutory rules would run counter to that intent.

13 Both the clear language of the mediation statutes and our prior rulings support
14 the preclusion of an implied waiver exception. The Legislature chose to promote
15 mediation by ensuring confidentiality rather than adopt a scheme to ensure good
16 behavior in the mediation and litigation process. The mediation statutes provide
17 clear and comprehensive rules reflecting that policy choice.²⁰³

18 The Court thus stuck to its firm approach prohibiting courts from judicially
19 crafting exceptions to the mediation confidentiality rules.

20 *Cassel*

21 The most recent California Supreme Court decision on mediation confidentiality
22 is *Cassel v. Superior Court*,²⁰⁴ which prompted the Commission’s current study. In
23 that case, a man agreed in mediation to settle a lawsuit to which he was a party. He
24 later sued his attorneys for malpractice, breach of fiduciary duty, fraud, and breach
25 of contract. He claimed that at the mediation, his attorneys “by bad advice,
26 deception, and coercion” persuaded him to settle for less than he had told them he
27 would accept and less than the case was worth.²⁰⁵

28 *Trial court proceedings.* The defendant attorneys moved, under the mediation
29 confidentiality statutes, to exclude all evidence of private attorney-client
30 discussions, made immediately preceding or during the mediation, concerning
31 mediation settlement strategies or the attorneys’ efforts to persuade their client to
32 reach a settlement in the mediation.²⁰⁶ The trial court granted the motion and the
33 plaintiff appealed.²⁰⁷

201. *Id.* at 586.

202. *Id.* at 582.

203. *Id.* at 588 (emphasis added; citation omitted).

204. 51 Cal. 4th 113, 244 P.3d 1080, 119 Cal. Rptr. 3d 437 (2011).

205. *Id.* at 118.

206. *Id.*

207. *Id.*

1 *Court of Appeal decision.* The court of appeal reversed, ruling that mediation
2 confidentiality did not apply. It reasoned that the mediation confidentiality statutes
3 are “not intended to prevent a client from proving, through private
4 communications outside the presence of all other mediation participants, a case of
5 legal malpractice against the client’s own lawyers.”²⁰⁸ It further reasoned that an
6 attorney and client are a single “participant” for purposes of mediation
7 confidentiality, and thus the attorney cannot preclude the client from waiving the
8 statutory protection.²⁰⁹

9 *California Supreme Court decision.* The defendant attorneys petitioned for
10 review in the California Supreme Court, maintaining that their mediation-related
11 discussions with their client were inadmissible in his malpractice action against
12 them, “even if those discussions occurred in private, away from any other
13 mediation participant.”²¹⁰ The Court granted review and, consistent with its
14 previous decisions, held that the mediation confidentiality statutes must be strictly
15 construed and are not subject to a judicially crafted exception where a client sues
16 for legal malpractice and seeks disclosure of private attorney-client discussions
17 relating to a mediation.²¹¹

18 Preliminarily, the Court explained that it had to apply the plain terms of the
19 mediation confidentiality statutes unless the result would violate due process or
20 lead to absurd results that would clearly undermine the statutory purpose.²¹² The
21 plain terms of Section 1119(a)-(b) cover all oral or written communications made
22 “for the purpose of,” “in the course of,” or “pursuant to” a mediation.²¹³ The Court
23 thus concluded that such communications include those between a mediation
24 disputant and the disputant’s own attorney, even if the communications do not
25 occur in the presence of the mediator or other disputants.²¹⁴

26 The Court also explained that an attorney and client are not a single
27 “participant” for purposes of the mediation confidentiality statutes, because those
28 statutes mention “participants” several times, under circumstances making clear
29 that the term encompasses more than just the mediation parties and disputants.²¹⁵
30 Consequently, the Court ruled that the mediation confidentiality protection could

208. *Id.* at 122.

209. *Id.* Justice Perluss dissented, “argu[ing] that the majority had crafted a forbidden judicial exception to the clear requirements of mediation confidentiality.” *Id.*

210. *Id.* at 123.

211. *Id.* at 123-33.

212. *Id.* at 119.

213. *Id.* at 128.

214. *Id.*

215. *Id.* at 130.

1 not be waived without the attorney’s consent; the client’s consent alone was not
2 sufficient.²¹⁶

3 The Court also rejected the idea that Section 958, which expressly creates an
4 exception to the attorney-client privilege for legal malpractice suits, compels
5 recognition of a similar exception to mediation confidentiality.²¹⁷ The Court
6 explained:

7 [T]he mediation confidentiality statutes do not create a “privilege” in favor of
8 any particular person. Instead, they serve the public policy of encouraging the
9 resolution of disputes by means short of litigation. The mediation confidentiality
10 statutes govern only the narrow category of mediation-related communications,
11 but they apply broadly within that category, and are designed to provide
12 maximum protection for the privacy of communications in the mediation context.
13 A principal purpose is to assure prospective participants that their interests will
14 not be damaged, first, by attempting this alternative means of resolution, and then,
15 once mediation is chosen, by making and communicating the candid disclosures
16 and assessments that are most likely to produce a fair and reasonable mediation
17 settlement. To assure this maximum privacy protection, the Legislature has
18 specified that all mediation participants involved in a mediation-related
19 communication must agree to its disclosure.

20 Neither the language nor the purpose of the mediation confidentiality statutes
21 supports a conclusion that they are subject to an exception, similar to that
22 provided for the attorney-client privilege, for lawsuits between attorney and
23 client. The instant Court of Appeal’s contrary conclusion is nothing more than a
24 judicially crafted exception to the unambiguous language of the mediation
25 confidentiality statutes in order to accommodate a competing policy concern —
26 here, protection of a client’s right to sue his or her attorney. We and the Courts of
27 Appeal have consistently disallowed such exceptions, even when the equities
28 appeared to favor them.²¹⁸

29 The Court further explained that applying the mediation confidentiality statutes
30 to a legal malpractice case “does not implicate due process concerns so
31 fundamental that they might warrant an exception on constitutional grounds.”²¹⁹ In
32 its view, “the mere loss of evidence pertinent to the prosecution of a lawsuit for
33 civil damages does not implicate such a fundamental interest.”²²⁰

34 The Court expressly refrained from passing judgment on the wisdom of the
35 mediation confidentiality statutes.²²¹ It concluded, however, that applying the plain

216. *Id.* at 131.

217. *Id.* at 131-33.

218. *Id.* at 131 (citations & footnotes omitted).

219. *Id.* at 135.

220. *Id.*

221. *Id.* at 136.

1 terms of those statutes to the case before it did not produce a result that was either
2 absurd or contrary to the legislative intent.²²² The Court explained:

3 Inclusion of private attorney-client discussions in the mediation confidentiality
4 scheme addresses several issues about which the Legislature could rationally be
5 concerned. At the outset, the Legislature might determine, such an inclusion gives
6 maximum assurance that disclosure of an ancillary mediation-related
7 communication will not, perhaps inadvertently, breach the confidentiality of the
8 mediation proceedings themselves, to the damage of one of the mediation
9 disputants.

10 Moreover, as real parties observe, the Legislature might reasonably believe that
11 protecting attorney-client conversations in this context facilitates the use of
12 mediation as a means of dispute resolution by allowing frank discussions between
13 a mediation disputant and the disputant’s counsel about the strengths and
14 weaknesses of the case, the progress of negotiations, and the terms of a fair
15 settlement, without concern that the things said by either the client or the lawyers
16 will become the subjects of later litigation against either. The Legislature also
17 could rationally decide that it would not be fair to allow a client to support a
18 malpractice claim with excerpts from private discussions with counsel concerning
19 the mediation, while barring the attorneys from placing such discussions in
20 context by citing communications within the mediation proceedings
21 themselves.²²³

22 The Court therefore reversed the decision of the court of appeal, but noted that
23 “the Legislature is free to reconsider whether the mediation confidentiality statutes
24 should preclude the use of mediation-related attorney-client discussions to support
25 a client’s civil claims of malpractice against his or her attorneys.”²²⁴

26 *Justice Chin’s concurrence.* Justice Chin concurred in the result, “but
27 reluctantly.”²²⁵ He warned that the court’s holding would

28 effectively shield an attorney’s actions during mediation, including advising the
29 client, from a malpractice action even if those actions are incompetent or even
30 deceptive. Attorneys participating in mediation will not be held accountable for
31 any incompetent or fraudulent actions during that mediation unless the actions are
32 so extreme as to engender a *criminal* prosecution against the attorney. This is a
33 high price to pay to preserve total confidentiality in the mediation process.²²⁶

34 Justice Chin regarded it as a close call whether the result required by the literal
35 language of the mediation confidentiality statutes was so absurd as to warrant a
36 judicial deviation from the literal language.²²⁷ For several reasons, he agreed with

222. *Id.*

223. *Id.*

224. *Id.* at 137.

225. *Id.* at 138 (Chin, J., concurring).

226. *Id.* (citations and footnotes omitted; emphasis in original).

227. *Id.* at 139.

1 the majority that the Court had to give effect to the statutory language.²²⁸ He was
2 unsure, however, whether the Legislature had “fully considered whether attorneys
3 should be shielded from accountability in this way.”²²⁹

4 He thought there might be better ways to balance the competing interests than
5 “simply providing that an attorney’s statements during mediation may never be
6 disclosed.”²³⁰ In particular, he suggested permitting use of mediation
7 communications in a legal malpractice action to the extent they are relevant to that
8 action, but preventing use of those communications for any other purpose.²³¹ He
9 thus urged the Legislature to reconsider the statutory scheme.²³²

10 **Other Decisions on the Intersection of Mediation Confidentiality and Alleged Attorney**
11 **Misconduct Under California Law**

12 In its resolution assigning this study to the Commission,²³³ the Legislature
13 specifically directed the Commission to consider *Cassel* and two other California
14 cases: *Wimsatt v. Superior Court*²³⁴ and *Porter v. Wyner*.²³⁵ Both of those
15 decisions involved the intersection of California’s mediation confidentiality
16 statutes and allegations of attorney misconduct.

17 This section of the Commission’s report describes *Wimsatt* and *Porter*. The
18 Commission then discusses some other decisions that involved the intersection of
19 California’s mediation confidentiality statutes and allegations of attorney
20 misconduct.²³⁶

21 ***Wimsatt***

22 *Wimsatt* was a legal malpractice case in which the client alleged that his
23 attorneys lowered the settlement demand in a personal injury case without his
24 authorization, impairing his ability to obtain a satisfactory settlement of the
25 personal injury case. The client claimed to have learned of this misconduct from a
26 confidential mediation brief prepared by his opponents in the personal injury case.

27 *Discovery dispute.* To support his malpractice allegations, the client first
28 deposed one of the attorney defendants, who denied having lowered the settlement

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *See id.*

233. 2012 Cal. Stat. res. ch. 108.

234. 152 Cal. App. 4th 137, 61 Cal. Rptr. 3d 200 (2007).

235. 107 Cal. Rptr. 3d 653 (2010) (formerly published at 183 Cal. App. 4th 949).

236. For discussion of cases involving the intersection of mediation confidentiality and allegations of misconduct by a mediator, party, or other non-attorney participant, see CLRC Staff Memorandum 2015-4, pp. 19-28; see also CLRC Staff Memorandum 2015-36, pp. 1-2.

1 demand in the personal injury case.²³⁷ The client then sought discovery of the
2 mediation briefs, some emails written shortly before the mediation in which the
3 personal injury case settled, and any evidence showing there was a conversation in
4 which his attorney lowered his settlement demand without authorization. The
5 attorney defendants sought a protective order, contending that the information
6 sought was protected from disclosure under the mediation confidentiality statutes.

7 The trial judge denied the application for a protective order. He reasoned that (1)
8 the client was trying to show that the deposed attorney had lied under oath, and (2)
9 the mediation confidentiality statutes did not apply because the Legislature did not
10 intend to have them shield perjury or inconsistent statements.²³⁸

11 The defendant attorneys sought review in the court of appeals, which issued an
12 opinion describing California’s strict mediation confidentiality scheme and the
13 California Supreme Court’s decisions in *Foxgate* and *Rojas*.²³⁹ The opinion also
14 pointed out that mediation briefs “are part and parcel of the mediation negotiation
15 process” and “epitomize the types of writings which the mediation confidentiality
16 statutes have been designed to protect from disclosure.”²⁴⁰ The court further
17 explained that the requested emails “were materially related to the mediation that
18 was to be held the next day” and “would not have existed had the mediation briefs
19 not been written.”²⁴¹

20 The court of appeals therefore held that the mediation briefs and eve-of-
21 mediation emails were protected by the mediation confidentiality statutes.²⁴² It
22 considered that result necessary because the California Supreme Court had
23 repeatedly “refused to judicially create exceptions to the statutory scheme, even in
24 situations where justice seems to call for a different result.”²⁴³

25 The court of appeals further held, however, that the trial judge should *not* grant a
26 protective order with regard to the conversation in which the deposed attorney
27 purportedly lowered the client’s settlement demand without authorization.²⁴⁴ It
28 explained that the attorney defendants were required to show that the conversation

237. The client waived the attorney-client privilege. *Wimsatt*, 152 Cal. App. 4th at 144.

238. *Id.* at 148. In recognizing such an exception to the mediation confidentiality statutes, the trial judge relied on *Rinaker*, 62 Cal. App. 4th 155, which held that those statutes must yield when they conflict with a juvenile’s constitutional right of confrontation in a juvenile delinquency proceeding. On appeal, the *Wimsatt* court distinguished *Rinaker*, explaining that *Rinaker* involved vindication of constitutionally protected rights, whereas the case before it was “no different from the thousands of civil cases routinely resolved through mediation.” *Wimsatt*, 152 Cal. App. 4th at 162.

239. *Wimsatt*, 152 Cal. App. 4th at 149-58.

240. *Id.* at 158.

241. *Id.* at 159.

242. *Id.* at 149, 158-59.

243. *Id.* at 152.

244. *Id.* at 165.

1 was protected by mediation confidentiality, but they had not demonstrated that the
2 conversation was linked to mediation.²⁴⁵

3 Having reached those conclusions, the court of appeals made clear that it was
4 uncomfortable with its ruling precluding discovery of the mediation briefs and
5 eve-of-mediation emails. Among other things, the court said:

6 The stringent result we reach here means that when clients ... participate in
7 mediation they are, in effect, relinquishing all claims for new and independent
8 torts arising from mediation, including legal malpractice causes of action against
9 their own counsel. Certainly clients, who have a fiduciary relationship with their
10 lawyers, do not understand that this result is a by-product of an agreement to
11 mediate. We believe that the purpose of mediation is not enhanced by such a
12 result because wrongs will go unpunished and the administration of justice is not
13 served.²⁴⁶

14 After referring to negative commentary and various cases involving California's
15 mediation confidentiality statutes, the court urged the Legislature to reconsider the
16 statutory scheme:

17 Given the number of cases in which the fair and equitable administration of
18 justice has been thwarted, perhaps it is time for the Legislature to reconsider
19 California's broad and expansive mediation confidentiality statutes and to craft
20 ones that would permit countervailing public policies be considered.²⁴⁷

21 The *Wimsatt* court also suggested that given "the harsh and inequitable results of
22 the mediation confidentiality statutes ... the parties and their attorneys should be
23 warned of the unintended consequences of agreeing to mediate a dispute."²⁴⁸

24 *Later developments.* After the court of appeals resolved the discovery dispute,
25 the malpractice case returned to the trial court. The judge eventually granted a
26 motion in limine precluding the client from introducing all evidence in his case-in-
27 chief "because mediation confidentiality precluded the introduction of vital
28 evidence."²⁴⁹ The trial court thus entered judgment against the client, who
29 appealed.

30 The court of appeal affirmed the judgment in an unpublished decision,
31 explaining that when it ruled on the discovery motion "the record lacked sufficient
32 information" from which it could conclude that the statements allegedly lowering
33 the settlement demand were linked to the mediation."²⁵⁰ In contrast, in the later
34 appeal it was clear that the client would not be able to address issues regarding

245. *Id.* at 160.

246. *Id.* at 163 (footnote omitted).

247. *Id.* at 163.

248. *Id.*

249. *Kausch v. Wimsatt*, 2009 Cal. App. Unpub. LEXIS 8566, at **26.

250. *Id.* at *17.

1 whether the settlement was appropriate because doing so “would require facts that
2 are inextricably connected to the mediation and the settlement reached therein.”²⁵¹

3 In reaching that decision, the court of appeal made clear that it was *not* holding
4 that “*all* plaintiffs are foreclosed from pursuing all legal malpractice-related
5 lawsuits when the client’s case is settled in mediation.”²⁵² Instead, said the court,
6 the key “is whether the accusations can be proven *without delving into what*
7 *occurred in the mediation* and without using any communication made ‘for the
8 purpose of, in the course of, or pursuant to, a mediation or mediation consultation
9’”²⁵³

10 In circumstances like the ones before it, the court was “forced to conclude that
11 an attorney is immunized from any negligent and intentional torts committed in
12 mediation when said torts are the result of communications made for the purpose
13 of, in the course of, or pursuant to a mediation, or a mediation consultation.”

14 ***Porter***

15 The history of the *Porter* litigation is long and complicated. To the best of the
16 Commission’s knowledge, the matter still is not fully resolved. For present
17 purposes, it seems sufficient to concentrate on certain events.²⁵⁴

18 In particular, *Porter* is a legal malpractice case in which the clients alleged that
19 their attorney (1) gave them incorrect tax advice in the underlying case, (2) failed
20 to reimburse them for certain payments they made to him before the underlying
21 case settled, and (3) failed to pay one of the clients for services she rendered as a
22 paralegal in the underlying case. The clients sued their attorney for legal
23 malpractice, breach of fiduciary duty, constructive fraud, negligent
24 misrepresentation, breach of the fee agreement, rescission, unjust enrichment, and
25 liability for unpaid wages.²⁵⁵

26 The trial court sustained a demurrer to the clients’ malpractice claim because the
27 clients admitted that they suffered no injury from their attorney’s allegedly
28 incorrect tax advice.²⁵⁶ The other claims proceeded to a jury trial, at which both
29 sides testified about what occurred at a mediation in the underlying case. The jury
30 found for the clients on some claims and for the attorney on other claims.

31 Shortly after the jury verdict, the California Supreme Court decided *Simmons*,
32 holding that any waiver of mediation confidentiality must be express, not implied,
33 and must either be written or orally memorialized in accordance with a statutory

251. *Id.* at *43-*44.

252. *Id.* at *42 n.12 (emphasis added).

253. *Id.*, quoting Evid. Code § 1119 (emphasis added).

254. For a more detailed discussion of the *Porter* litigation, see CLRC Staff Memorandum 2015-4, pp. 6-12.

255. 107 Cal. Rptr. 3d at 658 (superseded opinion).

256. *Id.* at 658 n.7.

1 procedure.²⁵⁷ Based on *Simmons*, the attorney defendant in *Porter* moved for a
2 new trial, arguing that mediation evidence was improperly placed before the jury.
3 The trial court agreed and vacated the judgment, but the clients appealed.

4 *Majority opinion.* In a split decision, the court of appeals reversed the order
5 granting a new trial. The majority opinion distinguished between attorney-client
6 discussions and other mediation communications:

7 The confidentiality aspect which protects and shrouds the mediation process
8 should not be extended to protect anything other than a frank, candid and open
9 exchange regarding events in the past by and between disputants. It was not meant
10 to subsume a secondary and ancillary set of communications by and between a
11 client and his own counsel, irrespective of whether such communications took
12 place in the presence of the mediator or not.²⁵⁸

13 The majority explained that extending mediation confidentiality to attorney-
14 client conversations would be inconsistent with Evidence Code Section 958,²⁵⁹
15 which says there is no attorney-client privilege “as to a communication relevant to
16 an issue of breach, by the lawyer or by the client, of a duty arising out of the
17 lawyer-client relationship.” According to the majority, extending mediation
18 confidentiality to the attorney-client relationship would render Section 958 a
19 nullity, because then the “mediation process and its attendant confidentiality
20 would trump the attorney-client privilege and preclude the waiver of it by the very
21 holder of the privilege.”²⁶⁰ The majority did not think the Legislature intended for
22 “a well-established and recognized privilege and waiver process” to be “thwarted
23 by a nonprivileged statutory scheme designed to protect a wholly different set of
24 disputants.”²⁶¹

25 In the majority’s view,

26 To expand the mediation privilege to also cover communications between a
27 lawyer and his client would seriously impair and undermine not only the attorney-
28 client relationship but would likewise create a chilling effect on the use of
29 mediations. In fact, clients would be precluded from pursuing any remedy against
30 their own counsel for professional deficiencies occurring during the mediation
31 process as well as representations made to the client to induce settlement.²⁶²

257. *Simmons* is further described in the discussion of “California Supreme Court Decisions on Mediation Confidentiality” *supra*.

258. *Porter*, 107 Cal. Rptr. at 662 (superseded opinion).

259. *Id.* at 661-62.

260. *Id.* at 661.

261. *Id.* at 661-62.

262. *Id.* at 662.

1 The majority “decline[d] to extend the confidentiality component to a relationship
2 neither envisioned nor contemplated by statute.”²⁶³

3 *Dissent.* In dissent, Justice Flier noted that the only reason the attorney-client
4 discussion in question occurred was “because a mediation was taking place and
5 efforts were being made to settle the case in this mediation.”²⁶⁴ He therefore
6 concluded that the discussion was “for the purpose of, in the course of, and
7 pursuant to a mediation,” as contemplated by the key provision on mediation
8 confidentiality.²⁶⁵

9 Justice Flier also pointed out that the majority opinion “sweepingly exempts all
10 client-lawyer communications from mediation confidentiality.”²⁶⁶ In his view, that
11 approach was mistaken; instead, “such a drastic exception must be made by the
12 Legislature under carefully crafted statutory standards.”²⁶⁷

13 *Review by the California Supreme Court.* After the court of appeal issued its
14 decision, the attorney defendant petitioned the California Supreme Court for
15 review. The Court granted review, but deferred briefing pending its consideration
16 and disposition of *Cassel*.²⁶⁸

17 Upon deciding *Cassel* in 2011, the Court transferred the *Porter* case back to the
18 court of appeal. The Court instructed the court of appeal to vacate its earlier
19 decision and reconsider the cause in light of *Cassel*.²⁶⁹ To the best of the
20 Commission’s knowledge, the case has not yet been retried.

21 ***Other Lower Court Decisions***

22 *Cassel*, *Wimsatt*, and *Porter* are not the only judicial decisions that involve the
23 intersection of California’s mediation confidentiality statutes and allegations of
24 attorney misconduct. The Commission found two other published decisions²⁷⁰ and
25 six unpublished decisions²⁷¹ in which a court of appeal held that the mediation

263. *Id.* at 665.

264. *Id.* at 665 (Flier, J., dissenting).

265. *Id.* at 666-67.

266. *Id.* at 667.

267. *Id.*

268. See 2010 Cal. LEXIS 7269, 233 P.3d 1088, 111 Cal. Rptr. 3d 693 (2010).

269. See 2011 Cal. LEXIS 3636, 250 P.3d 180, 123 Cal. Rptr. 3d 577 (2011); see also 2011 Cal. LEXIS 10768 (2011).

270. See cases cited in notes 274 & 275 *infra*. In another published decision, a client alleged that his attorney wrongfully coerced him into entering into a mediated settlement agreement by threatening to withdraw on the eve of trial. The court of appeal ruled against the client on grounds unrelated to mediation confidentiality. See *Chan*, 188 Cal. App. 4th 1159; see also *Chan v. Packard*, 2015 Cal. App. Unpub. LEXIS 6899 (2015).

271. See cases cited in notes 276-81 *infra*. In another unpublished decision, a client alleged that her attorneys committed malpractice in the course of a mediation that settled both an underlying tort case and a

1 confidentiality statutes prevented a litigant from using mediation communications
2 to support allegations that an attorney engaged in misconduct in the mediation
3 process.²⁷² The Commission also found an unpublished decision in which a federal
4 district court reached a similar conclusion in a case under California law.²⁷³

5 Those decisions involved the following types of allegations, the merits of which
6 are unclear:

- 7 • A party's claim that a mediated settlement agreement was unenforceable
8 because the party's attorney, his opponent's attorney, and the mediator
9 coerced him into signing it through threats of criminal prosecution.²⁷⁴
- 10 • A client's claim that his attorney failed to adequately advise him of the risks
11 of a mediated settlement agreement, drafted that agreement and the
12 judgment such that corporate obligations became his personal obligations,
13 and breached a conflict waiver by failing to negotiate a settlement with
14 certain terms.²⁷⁵
- 15 • A legal malpractice case in which the clients alleged that their attorneys
16 tricked them into settling the underlying case by inducing them to sign a
17 supposed confidentiality agreement at a mediation, and later appending the
18 signature sheet to a settlement agreement.²⁷⁶
- 19 • A legal malpractice case in which the client alleged that his attorneys failed
20 to prepare for trial, agreed to a dispute resolution process (mediation-
21 arbitration) that disfavored him, agreed to an unreasonable settlement, and
22 negligently allowed defaults of other defendants to be taken, leaving him
23 exposed as the only defendant.²⁷⁷
- 24 • A legal malpractice case in which the client alleged that his attorneys failed
25 to inform him that (1) he would be personally liable under a mediated

related workers' compensation claim. The trial court sustained a demurrer with leave to amend; it entered judgment against the client when the client failed to amend. The court of appeal upheld that result, but did not resolve any mediation confidentiality issues because the client failed to supply an adequate record for review. *Spanos v. Dreyer*, 2016 Cal. App. Unpub. LEXIS 4752 (2016).

272. These totals do not include cases involving an alleged failure to comply with a court order to mediate. For discussion of cases in that category, see CLRC Staff Memorandum 2015-4, pp. 28-31. See also *supra* note 22 (describing different types of noncompliance with a court order to mediate) and the description of *Foxgate* in the discussion of "California Supreme Court Decisions on Mediation Confidentiality" *supra*.

273. See *Benesch v. Green*, 2009 U.S. Dist. LEXIS 117641.

274. See *Provost*, 201 Cal. App. 4th 1289. For further discussion of this case, see CLRC Staff Memorandum 2015-4, p. 14.

275. See *Amis v. Greenberg Traurig LLP*, 235 Cal. App. 4th 331, 185 Cal. Rptr. 3d 322 (2015). For further discussion of this case, see CLRC Staff Memorandum 2015-4, pp. 15-16.

276. See *Hadley v. The Cochran Firm*, 2012 Cal. App. Unpub. LEXIS 5743 (2012).

277. See *Mellor v. Oaks*, 2011 Cal. App. Unpub. LEXIS 8797 (2011). Apparently, the client sought to prove these allegations solely through mediation communications. The trial court granted a nonsuit and the court of appeal affirmed, explaining that mediation communications were inadmissible and thus there was a "paucity of evidence" that the client could present. *Id.* at *12.

1 settlement agreement and (2) he should obtain separate counsel before
2 signing the agreement.²⁷⁸

- 3 • A legal malpractice case in which the client alleged that his attorneys failed
4 to include a general statement of release from his wife in a mediated
5 settlement agreement and failed to obtain his new spouse’s consent to the
6 settlement.²⁷⁹
- 7 • A legal malpractice case in which the client alleged that his attorney made
8 numerous misrepresentations to him, neglected to show him working drafts
9 of a mediated settlement agreement in the underlying case, failed to explain
10 certain things, neglected to take certain steps, and failed to advise the client
11 to seek expert tax advice.²⁸⁰
- 12 • A legal malpractice case in which a creditor alleged that its attorneys
13 negligently caused it to enter into a mediated settlement agreement for far
14 less than the full amount of the debt.²⁸¹
- 15 • A legal malpractice case in which the client alleged that during a mediation
16 her attorney induced her to sign a settlement term sheet that failed to meet
17 her goal of protecting her daughter’s inheritance rights.²⁸²

18 The Commission also found two decisions (a published decision by a federal
19 district court and an unpublished opinion by a superior court) in which evidence of
20 mediation communications was used in resolving whether an attorney engaged in
21 misconduct. In both cases, the court determined that the misconduct allegations
22 were meritless.²⁸³

278. See *Gossett v. St. John*, 2011 Cal. App. Unpub. LEXIS 3586 (2011).

279. See *In re Malcolm*, 2004 Cal. App. Unpub. LEXIS 10675 (2004). The court of appeals made clear that although the client could not use mediation communications to support his allegations, he was still “free to prosecute his malpractice action ... using the property settlement and other nonconfidential evidence.” *Id.* at *12.

280. See *Biller v. Faber*, 2016 Cal. App. Unpub. LEXIS 3017 (2016).

281. See *Shaozing City Maolong Wuzhong Down Products, Ltd. v. Landsberg & Associates*, 2015 Cal. App. Unpub. LEXIS 4492 (2015).

282. See *Benesch*, 2009 U.S. Dist. LEXIS 117641. The plaintiff argued that California’s mediation confidentiality statutes do not encompass attorney-client communications. The federal district court disagreed, concluding that “[c]ommunications between counsel and client that are materially related to the mediation, even if they are not made to another party or the mediator, are ‘for the purpose of’ or ‘pursuant to’ mediation” within the meaning of the California statutes. *Id.* at *22. The district court nonetheless denied the summary judgment motion without prejudice, because the plaintiff had not yet had an opportunity to explore “the question of what evidence would be left after application of the mediation confidentiality statutes ...” *Id.* at *25.

Benesch preceded the California Supreme Court’s decision in *Cassel*. The California Supreme Court described *Benesch* carefully in its *Cassel* opinion, see 51 Cal. 4th at 134-35, and expressly stated that it “agreed with” the district judge’s analysis regarding mediation-related attorney-client communications, 51 Cal. 4th at 135.

283. See *Olam*, 68 F. Supp. 2d at 1151 (party sought to avoid obligations under mediated settlement agreement by alleging she was subjected to undue influence; court considered mediator’s testimony and concluded there was “no evidence that [party] was subjected to anything remotely close to undue pressure”); *Conwell v. Mallen*, 2015 Cal. Super. LEXIS 11140 (2015) (client sought to avoid mediated

1 In contrast, in a state bar disciplinary proceeding a client alleged (among other
2 things) that during a mediation her lawyer agreed to reduce his fee, yet he later
3 reneged. Relying on *Cassel*, the Hearing Department ruled that “mediation
4 confidentiality applied to preclude the discussion and the exact terms of the
5 modification.”²⁸⁴ At the same time, however, it did consider evidence that there
6 was a modification (the attorney admitted as much) and that the attorney
7 subsequently took certain settlement funds for himself because he did not think the
8 modification was valid.²⁸⁵ That was sufficient for the Hearing Department to
9 determine that the attorney had wrongfully failed to maintain disputed funds in
10 trust, a ruling which was upheld on appeal.²⁸⁶ The merits of the attorney’s
11 challenge to the validity of the modification are not clear to the Commission, but a
12 legal malpractice case involving the same facts settled and the client “testified that
13 she was ‘made whole.’”²⁸⁷

14 In addition to the various published and unpublished cases described above, the
15 Commission has received comments indicating that there are other disputes
16 involving alleged attorney misconduct in the mediation process. It appears that due
17 to *Cassel*, not all such disputes proceed to litigation.²⁸⁸

18 Law of Other Jurisdictions

19 The legislative resolution requesting this study directs the Commission to
20 consider the law in other jurisdictions, including the Uniform Mediation Act
21 (“UMA”). The Commission did extensive research in response to that request. Its
22 findings on the topic are summarized below, in the following order:

- 23 (1) Uniform Mediation Act.
- 24 (2) Other states.
- 25 (3) Federal law.

settlement by blaming his attorneys; court considered evidence of mediation proceedings in resolving malpractice claim and ultimately granted judgment against client).

284. *In re* Bolanos, Case No. 12-O-12167-PEM (Hearing Dep’t of State Bar Ct. filed Sept. 16, 2013), n.7.

285. *Id.*

286. See *In re* Bolanos, Case No. 12-O-12167 (Review Dep’t of State Bar Ct., filed May 18, 2015), pp. 4-6, 8 (available at <http://www.statebarcourt.ca.gov/Portals/2/documents/opinions/Bolanos.pdf>).

287. See *id.* at 7.

288. See, e.g., First Supplement to CLRC Staff Memorandum 15-46, Exhibit p. 52 (comments of Robert Sall) (“Many times since the *Cassel* decision in 2011, I have had to inform prospective clients that they would most likely be unable to prove [an] otherwise viable claim due to the impact of mediation confidentiality.”); Memorandum 2015-36, Exhibit pp. 2-7 (comments of Gwire Law Firm) (“[W]e have had to decline too many compelling malpractice and fiduciary breach claims on the sole basis that the wrongdoing occurred during mediation. Indeed, turning away clients who have otherwise viable cases based on attorney negligence and false representations because the law has tied our (and their) hands is one of the most tragic and morally wrong things we face in our practice.”); see also First Supplement to Memorandum 2014-27, Exhibit pp. 1-2 (comments of Howard Fields).

1 **Uniform Mediation Act**

2 Drafting of the UMA began soon after California enacted its current statutory
3 scheme governing protection of mediation communications. The project was
4 prompted by the rising popularity of mediation across the country.²⁸⁹ Experts in
5 the area felt the time was ripe to assess which mediation approaches worked best,
6 prepare legislation based on them, and attempt to attain a degree of nationwide
7 uniformity.²⁹⁰

8 ***Drafting Process***

9 The UMA was drafted over a period of four years, through collaboration
10 between (1) a drafting committee of the National Conference of Commissioners
11 on Uniform State Laws (“NCCUSL,” now known as the “Uniform Law
12 Commission” or “ULC”) and (2) a drafting committee sponsored by the American
13 Bar Association (“ABA”), working through its Section of Dispute Resolution.²⁹¹
14 Although both organizations had a long history of working to improve the law,
15 this was the first time they participated jointly in drafting proposed legislation for
16 state consideration.²⁹²

17 With the assistance of a grant from the William and Flora Hewlett Foundation,
18 the drafting committees had academic support from many mediation scholars.²⁹³
19 Numerous bar groups, mediators, and organizations of mediation professionals
20 also participated in the drafting process. According to one of the reporters for the
21 project, drafting the UMA “was an intense national dialogue on the mediation
22 process — the nature of the process, its goals and values, its practices and
23 experience, and its relationship to law — on a scale that the field of mediation had
24 never before engaged so publicly.”²⁹⁴

25 NCCUSL approved the UMA in the summer of 2001, and the ABA approved it
26 six months later.²⁹⁵ According to the ULC’s website, the UMA has been endorsed
27 by the American Arbitration Association (“AAA”), the Judicial Arbitration and
28 Mediation Service (“JAMS”), the CPR Institute for Dispute Resolution, and the
29 National Arbitration Forum.²⁹⁶

289. See UMA, *supra* note 5, Prefatory Note at introduction.

290. See UMA, *supra* note 5, Prefatory Note at #4 (ripeness of uniform law).

291. See UMA, *supra* note 5, Prefatory Note at #5 (product of consensual process).

292. Richard Reuben, *The Sound of Dust Settling: A Response to Criticisms of the UMA*, 2003 J. Disp. Resol. 99, 103 (2003). “The leadership of both organizations agreed to share resources, meet together, and work collaboratively but independently” in drafting the UMA. *Id.*

293. See UMA, *supra* note 5, Prefatory Note at #5 (product of consensual process).

294. Reuben, *supra* note 292, at 106.

295. In 2003, the UMA was amended to address international commercial mediation.

296. See <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Mediation%20Act>.

1 **Objectives**

2 The Prefatory Note to the UMA explains the objectives of the legislation. A key
3 objective was to promote uniformity in treatment of mediation issues across the
4 country.²⁹⁷ In addition, the drafters sought to:

- 5 • promote candor of parties through confidentiality of the mediation process,
6 subject only to the need for disclosure to accommodate specific and
7 compelling societal interests ...;
- 8 • encourage the policy of fostering prompt, economical, and amicable
9 resolution of disputes in accordance with principles of integrity of the
10 mediation process, active party involvement, and informed self-
11 determination by the parties ...; and
- 12 • advance the policy that the decision-making authority in the mediation
13 process rests with the parties.²⁹⁸

14 **General Structure**

15 A “central thrust” of the UMA is on protection of mediation communications.²⁹⁹
16 According to the drafters, mediation involves a frank exchange of information and
17 ideas that “can be achieved only if the participants know that what is said in the
18 mediation will not be used to their detriment through later court proceedings and
19 other adjudicatory processes.”³⁰⁰ The drafters also specifically observed that
20 “public confidence in and the voluntary use of mediation can be expected to
21 expand if people have confidence that the mediator will not take sides or disclose
22 their statements”³⁰¹

23 While emphasizing the importance of protecting mediation communications, the
24 drafters did not consider it necessary to enact a statute making such
25 communications “confidential” in the true sense of that word.³⁰² Rather, they
26 concluded that a statute was needed only to restrict the admissibility or disclosure
27 of evidence in judicial and other legal proceedings.³⁰³

28 The key provisions of the UMA protecting mediation communications are
29 subdivisions (a) and (b) of Section 4, which provide:

297. UMA, *supra* note 5, Prefatory Note at introduction.

298. *Id.* For further discussion of those objectives, see *id.*

299. *Id.* The UMA also addresses a few other aspects of mediation. See UMA §§ 9 (mediator’s disclosure of conflicts of interest; background), 10 (participation in mediation).

300. UMA, *supra* note 5, Prefatory Note at #1 (promoting candor).

301. *Id.*

302. *Id.* For the most part, the matter of confidentiality was left up to the parties to decide. See UMA § 8 (unless mediation is subject to open meetings act or open records act, “mediation communications are confidential to the extent agreed by the parties or provided by other law or rule” of enacting state).

303. UMA, *supra* note 5, Prefatory Note at #1 (promoting candor). According to the drafters, “the major contribution of the Act is to provide a privilege in legal proceedings, where it would otherwise either not be available or would not be available in a uniform way across the States.” *Id.*

1 (a) Except as otherwise provided in Section 6, *a mediation communication is*
2 *privileged* as provided in subsection (b) *and is not subject to discovery or*
3 *admissible in evidence* in a proceeding unless waived or precluded as provided by
4 Section 5.

5 (b) In a proceeding, the following privileges apply:

6 (1) A *mediation party* may refuse to disclose, and may prevent any other person
7 from disclosing, a mediation communication.

8 (2) A *mediator* may refuse to disclose a mediation communication, and may
9 prevent any other person from disclosing a mediation communication of the
10 mediator.

11 (3) A *nonparty participant* may refuse to disclose, and may prevent any other
12 person from disclosing, a mediation communication of the nonparty participant.³⁰⁴

13 These provisions establish “a privilege for mediation communications that, like
14 other communications privileges, allows a person to refuse to disclose and to
15 prevent other people from disclosing particular communications.”³⁰⁵

16 That privilege applies in any “proceeding,” which is defined broadly enough to
17 include both civil and criminal matters.³⁰⁶ In contrast, California’s key statute
18 protecting mediation communications applies only in noncriminal proceedings.

19 Under subdivision (b) of UMA Section 4, every mediation participant is a
20 “holder” of the privilege — i.e., a “person who is eligible to raise and waive the
21 privilege.”³⁰⁷ Unlike California law, however, all mediation participants are not
22 treated equally.

23 Rather, subdivision (b) distinguishes between a “mediation party,”³⁰⁸ a
24 “mediator,”³⁰⁹ and a “nonparty participant.”³¹⁰ A mediation party receives more
25 protection than a mediator, and a mediator receives more protection than a
26 nonparty participant.³¹¹

304. Emphasis added.

The UMA also includes a provision that prohibits a mediator from making, and prohibits a court, administrative agency, or arbitrator from considering, “a report, assessment, evaluation, recommendation, finding, or other communication regarding a mediation to a court, administrative agency, or other authority that may make a ruling on the dispute that is the subject of the mediation.” UMA § 7(a), (c). Evidence Code Section 1121 served as a model in drafting this UMA provision, but differs from it in some respects (see UMA §§ 7(b)(2), (3), which lack California counterparts).

305. UMA § 4 Comment. In classifying its protection as a “privilege,” the drafters of the UMA deliberately chose not to follow certain other approaches (e.g., creating a categorical, policy-based exclusion as in California). For explanation of that decision, see UMA § 4 Comment.

306. See UMA § 2(7) & Comment.

307. UMA § 4(b) & Comment.

308. A mediation party is “a person that participates in a mediation and whose agreement is necessary to resolve the dispute.” UMA § 2(5).

309. A mediator is “an individual who conducts a mediation.” UMA § 2(3).

310. A nonparty participant is “a person, other than a party or mediator, that participates in a mediation.” UMA § 2(4).

311. The UMA drafters explained:

1 In the drafters' view, giving mediation parties the greatest control over the use
2 of mediation communications protects the expectations "of those persons whose
3 candor is most important to the success of the mediation process."³¹² The drafters
4 also believed, however, that mediators should be holders with respect to their own
5 mediation communications, "so that they may participate candidly, and with
6 respect to their own testimony, so that they will not be viewed as biased in future
7 mediations"³¹³ Similarly, the drafters provided a limited privilege for a
8 nonparty participant to "encourage the candid participation of experts and others
9 who may have information that would facilitate resolution of the case."³¹⁴

10 ***Waiver of the Protection Against Admissibility and Disclosure***

11 The UMA privilege for mediation communications can be expressly waived.
12 Unlike California, where an express waiver requires assent of *all* mediation
13 participants, the requirements for an express waiver under the UMA depend on
14 whose mediation communication is at stake and who is being asked to testify.³¹⁵

As with other privileges, a mediation privilege operates to allow a person to refuse to disclose and to prevent another from disclosing particular communications.

.... [*P*]arties have the greatest blocking power and may block provision of testimony about or other evidence of mediation communications *made by anyone* in the mediation, including persons other than the mediator and parties....

Mediators may block *their own provision of evidence*, including their own testimony and evidence provided by anyone else of the mediator's mediation communications, even if the parties consent....

Finally *a nonparty participant* may block evidence of *that individual's mediation communication* regardless of who provides the evidence and whether the parties or mediator consent.

UMA § 4(b) Comment (citation omitted) (emphasis added).

The UMA's complexity on this and other points has been the subject of debate. Some sources have contended that it is overly complex, difficult to explain, and may chill mediation communications. See, e.g., Brian Shannon, *Dancing With the One That "Brung Us" — Why the Texas ADR Community Has Declined to Embrace the UMA*, 2003 J. Disp. Resol. 197, 220 (2003) ("The UMA's backwards approach to confidentiality as well as its maze of privileges, waivers, and exceptions are not an adequate substitute for the current Texas approach"); see also *id.* at 197-200; N.Y. State Bar Ass'n Committee on ADR, *The Uniform Mediation Act and Mediation in New York* 10 (Nov. 1, 2002), available at http://websearch.nysba.org/search?rm_timestamp=1409183470826&SEARCH_query=uniform+mediation+act&FUNCTION=SEARCH&&SELECTEDSERVER=documents&VIEW=summary; "Uniform Mediation Act video," available at http://open.mitchellhamline.edu/dri_mclvideo/40/. Other sources have defended the UMA as a precise balancing of competing interests. See, e.g., Reuben, *supra* note 292, at 109; Maureen Weston, *Confidentiality's Constitutionality: The Incursion on Judicial Powers to Regulate Party Conduct in Court-Connected Mediation*, 8 Harv. Negotiation L. Rev. 29, 52 (2003) ("The UMA's approach in establishing a mediation privilege while enumerating certain exceptions reflects a thoughtful a priori weighing of competing policies between confidentiality and the need for disclosure.").

312. *Id.*

313. *Id.*

314. *Id.*

315. The UMA rules are:

- For testimony about mediation communications made by a party, all parties are the holders and therefore all parties must waive the privilege before a party or nonparty

1 The UMA privilege can also be waived in several other ways.³¹⁶ California has
2 no comparable waiver provisions; any waiver of California’s mediation
3 confidentiality protection must be express.³¹⁷

4 ***UMA Exceptions Generally***

5 The UMA drafters believed that the statutory protection for mediation
6 communications should not be absolute. They explained:

7 As with other privileges, the mediation privilege must have limits, and nearly
8 all existing state mediation statutes provide them. Definitions and exceptions
9 primarily are necessary to give appropriate weight to other valid justice system
10 values They often apply to situations that arise only rarely, but might produce
11 grave injustice in that unusual case if not excepted from the privilege.³¹⁸

12 In the opinion of the drafters, “these exceptions need not significantly hamper
13 candor.”³¹⁹

14 They decided to include ten different exceptions in the UMA.³²⁰ Two of those
15 exceptions are similar to ones that exist in California: an exception for preexisting

participant may testify or provide evidence; if that testimony is to be provided by a mediator, all parties and the mediator must waive the privilege.

- For testimony about mediation communications made by the mediator, both the parties and the mediator are holders of the privilege, and therefore both the parties and the mediator must waive the privilege before a party, mediator, or nonparty participant may testify or provide evidence of a mediator’s mediation communications.
- For testimony about mediation communications that are made by a nonparty participant, both the parties and the nonparty participants are holders of the privilege and therefore both the parties and the nonparty participant must waive before a party or nonparty participant may testify; if that testimony is to be offered through the mediator, the mediator must also waive.

UMA § 5(a) & (b) Comment; see UMA § 4(b)(2) (“mediator may refuse to disclose a mediation communication”); UMA § 5(a) (express waiver requirements).

316. Waiver under the UMA occurs when:

- A person discloses or makes a representation about a mediation communication and that action prejudices another person in a proceeding. UMA § 5(b).
- A person intentionally uses a mediation to plan, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity. UMA § 5(c).
- A mediator fails to comply with the UMA disclosure requirements or its impartiality requirement. UMA § 9(d) & Comment.

317. See *Simmons*, 44 Cal. 4th at 588.

318. UMA, *supra* note 5, Prefatory Note at #1 (promoting candor).

319. *Id.*

320. See UMA §§ 4(c), 6. The UMA is also subject to certain limits on its coverage and scope. See UMA §§ 2(2), 3(b)-(c); see also CLRC Staff Memorandum 2014-14, pp. 24-25 (discussing UMA §§ 2(2), 3(b)-(c)).

1 evidence that is used in a mediation³²¹ and an exception for a fully executed
2 agreement reached in a mediation.³²² Another UMA exception applies only when
3 mediation communications are proffered as evidence in a criminal case, which is
4 beyond the scope of California’s mediation confidentiality law.³²³

5 The remaining seven UMA exceptions have no clear counterpart under
6 California law. Of those, a few seem particularly pertinent to this study, as
7 explained next.³²⁴

8 ***UMA Exceptions for Professional Misconduct and Mediator Misconduct***

9 UMA Section 6(a)(6) directly addresses the intersection of mediation
10 confidentiality and professional misconduct. It creates the following exception to
11 the UMA privilege:

12 (a) There is no privilege under Section 4 for a mediation communication that is:

13

14 (6) except as otherwise provided in subsection (c), sought or offered to prove or
15 disprove a claim or complaint of professional misconduct or malpractice filed
16 against a mediation party, nonparty participant, or representative of a party based
17 on conduct occurring during a mediation....

18 Notably, this exception is not limited to evidence that *an attorney* engaged in
19 legal malpractice or other professional misconduct. The exception also
20 encompasses other types of professional misconduct, such as evidence that a
21 mediation party, nonparty participant, or representative of a party engaged in
22 medical malpractice or accounting malpractice.

23 By its terms, the professional misconduct exception includes both evidence
24 tending to *prove* a claim of professional malpractice, and evidence tending to

321. See UMA § 4(c) & Comment.

322. See UMA § 6(a)(1) & Comment.

323. See UMA § 6(b)(1) & Comment. The UMA provides two alternative versions of this exception. See *id.* & UMA § 6(b)(1) Comment.

324. The other exceptions with no California counterpart are:

- (1) An exception for a mediation communication that is available to the public under an open records act, or is made during a mediation session that is open to the public, or required by law to be open to the public. See UMA § 6(a)(2) & Comment.
- (2) An exception for “a threat or statement of a plan to inflict bodily injury or commit a crime of violence.” UMA § 6(a)(3).
- (3) An exception for a mediation statement that is “intentionally used to plan a crime, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity.” UMA § 6(a)(4).
- (4) An exception for a mediation communication that is “sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party” UMA § 6(a)(7). The UMA provides two alternative versions of this exception. See *id.* & UMA § 6(a)(7) Comment.

1 *disprove* such a claim. Importantly, however, a significant constraint exists with
2 regard to establishing whether professional misconduct actually occurred: In such
3 an inquiry, a mediator cannot be compelled to provide evidence of a mediation
4 communication.³²⁵

5 Further, the professional misconduct exception is restricted to evidence of
6 misconduct that allegedly occurred “during a mediation.”³²⁶ Thus, the exception
7 would not apply to evidence of alleged misconduct in a non-mediation setting.

8 The drafters of the UMA gave the following reasons for their approach to
9 professional misconduct:

10 Sometimes the issue arises whether anyone may provide evidence of
11 professional misconduct or malpractice occurring during the mediation. The
12 failure to provide an exception for such evidence would mean that lawyers and
13 fiduciaries could act unethically or in violation of standards without concern that
14 evidence of the misconduct would later be admissible in a proceeding brought for
15 recourse. This exception makes it possible to use testimony of anyone except the
16 mediator in proceedings at which such a claim is made or defended. Because of
17 the potential adverse impact on a mediator’s appearance of impartiality, the use of
18 mediator testimony is more guarded, and therefore protected by Section 6(c). It is
19 important to note that evidence fitting this exception would still be protected in
20 other types of proceedings, such as those related to the dispute being mediated.³²⁷

21 They included a separate UMA exception for mediator misconduct, which is
22 similar to the one for professional misconduct but without the restriction on
23 mediator testimony.³²⁸

24 ***UMA Exception Relating to the Validity and Enforceability of a Mediated Settlement***
25 ***Agreement***

26 Another noteworthy exception is UMA Section 6(b)(2), which applies when a
27 mediation party challenges the validity of a mediated settlement agreement, as
28 happened in some of the cases that prompted this study. According to the UMA
29 drafters, this exception is “designed to preserve traditional contract defenses to the
30 enforcement of the mediated settlement agreement that relate to the integrity of the
31 mediation process, which otherwise would be unavailable if based on mediation
32 communications.”³²⁹

325. See UMA § 6(a)(6), (c). Although the mediator cannot be compelled to testify under UMA Section 6(a)(6), the mediator may testify voluntarily. See UMA § 6(c) Comment. In contrast, California law provides that a mediator is generally incompetent to testify about a mediation. See Evid. Code § 703.5.

326. UMA § 6(a)(6).

327. UMA § 6(a)(6) Comment (citations omitted).

328. See UMA § 6(a)(5) & Comment.

329. UMA § 6(b)(2) Comment. The drafters further explained:

A recent Texas case provides an example [of when this exception should apply]. An action was brought to enforce a mediated settlement. The defendant raised the defense of duress and sought to introduce evidence that he had asked the mediator to permit him to leave because of chest pains and

1 The exception does not apply every time there is a challenge to a mediated
2 settlement agreement. Rather, it applies only if the proponent of the evidence
3 convinces a judge, at an *in camera* proceeding, “that the evidence is unavailable,
4 and the need for the evidence outweighs the policies underlying the privilege.”³³⁰

5 If the proponent of the evidence provides the required proof of necessity, the
6 evidence may be used in the proceeding to rescind or reform or otherwise avoid
7 liability on a mediated settlement agreement, regardless of whether the evidence
8 tends to support or refute the effort to avoid such liability. The mediator cannot be
9 forced to testify in the proceeding, only the other mediation participants. The
10 UMA drafters imposed this limitation “to protect against frequent attempts to use
11 the mediator as a tie-breaking witness, which would undermine the integrity of the
12 mediation process and the impartiality of the individual mediator.”³³¹

13 *Implementation of the UMA*

14 The UMA has been enacted in the District of Columbia and eleven states:
15 Hawaii, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah,
16 Vermont, and Washington.³³² Efforts to enact the UMA in a number of other states

a history of heart trouble, and that the mediator had refused to let him leave the mediation session. The exception might also allow party testimony in a personal injury case that the driver denied having insurance, causing the plaintiff to rely and settle on that basis, where such a misstatement would be a basis for reforming or avoiding liability under the settlement.

Id. (citation omitted).

California has no comparable exception to its key provision protecting mediation communications. However, a mediated settlement agreement may be introduced “to show fraud, duress, or illegality that is relevant to an issue in dispute.” Evid. Code § 1123(d). The concept is that if a mediation party enters into a settlement agreement in reliance on a statement made during the mediation, that party can protect itself by incorporating the statement into the terms of the settlement agreement. That concept is relevant to the UMA example involving the uninsured driver.

In the duress scenario in which the mediator allegedly refused to let a party leave even though the party had chest pains, California’s statute would preclude introduction of any statements made during the mediation, but would not bar evidence of the mediator’s conduct or the party’s physical condition. See cases cited in note 164 *supra*.

330. UMA Section 6 (b)(2) provides:

(b) There is no privilege under Section 4 if a court, administrative agency, or arbitrator finds, after a hearing *in camera*, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in:

....

(2) except as otherwise provided in subsection (c), a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.

331. UMA § 6(c) Comment.

332. D.C. Code §§ 16-4201 to 16-4213; Haw. Rev. Stat. §§ 658H-1 to 658H-13; Idaho Code Ann. §§ 9-801 to 9-814; Idaho R. Evid. 507; 710 Ill. Comp. Stat. 35/1 to 35/99; Iowa Code §§ 679C.101 to 679C.115; Neb. Rev. Stat. §§ 25-2930 to 25-2542; N.J. Rev. Stat. §§ 2A:23C-1 to 2A:23C-13; N.J. R. Ct. 1:40-4; Ohio Rev. Code Ann. §§ 2710.01 to 2710.10; S.D. Codified Laws §§ 19-13A-1 to 19-13A-15; Utah Code

1 have been unsuccessful;³³³ UMA legislation is currently pending in New York and
2 Massachusetts despite previous defeats in those jurisdictions.³³⁴

3 Nebraska was the first state to implement the UMA. Its version became
4 operative in August 2003. By the end of 2006, the UMA was also enacted in the
5 District of Columbia, Illinois, Iowa, New Jersey, Ohio, Utah, Vermont, and
6 Washington. South Dakota's version of the UMA became operative in 2008, as
7 did Idaho's version. Hawaii just enacted the UMA in 2013.

8 As best the Commission has been able to determine, none of the UMA
9 jurisdictions afforded absolute or near-absolute protection to mediation
10 communications before enacting the UMA. Instead, at the time of enacting the
11 UMA, these jurisdictions appear to have afforded less protection for mediation
12 communications than the UMA, or at least to have had a less well-developed body
13 of law on the subject than the UMA.³³⁵

14 In general, the UMA enactments stick pretty close to the uniform text.³³⁶ It is too
15 early to tell how much variation there will be in interpreting the UMA protections
16 from state to state.³³⁷

17 So far, every UMA jurisdiction has enacted the professional misconduct
18 exception³³⁸ without deviating from the uniform text.³³⁹ The Commission found
19 only one case squarely involving application of that exception: A recent Nebraska
20 legal malpractice case in which a client alleged that at a mediation, her attorney
21 negligently advised her to settle for less than her case was worth and coerced her

Ann. §§ 78B-10-101 to 78B-10-114; Vt. Stat. Ann. tit. 12, §§ 5711 to 5723; Wash. Rev. Code §§ 7.07.010 to 7.07.904.

According to the U.S. Census Bureau, the combined population of the UMA jurisdictions in 2016 was about 54 million people, which was approximately 16.7% of the country's total population. In comparison, California was the most populous state, with about 39 million people or approximately 12.1% of the total population. See <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>.

333. See CLRC Staff Memorandum 2014-35, pp. 30-32 (Massachusetts), 36-39 (New York) & Exhibit pp. 10 (Connecticut), 17 (Maine), 26 (New Hampshire), 36 (South Carolina); see also CLRC Staff Memorandum 2014-44, p. 25 ("The UMA received some attention in Texas, but the legal and mediation community appears to prefer the existing Texas approach. To the [CLRC staff's] knowledge, the UMA has not been introduced in the Texas Legislature at any time."); *id.* at 18-25 (describing Texas reaction to UMA in detail); CLRC Staff Memorandum 2014-43, pp. 4-6 ("[T]he UMA encountered resistance in Pennsylvania Although that opposition was apparently withdrawn for purposes of the ABA vote, [CLRC staff] did not find any current or past legislation seeking to enact the UMA in Pennsylvania"); CLRC Staff Memorandum 2014-35, p. 20 ("Minnesota's legal community participated in the drafting of the UMA.... But Minnesota has not enacted the uniform act.").

334. See HB 49 (Massachusetts); SB 1017 (Comrie) (New York).

335. That finding is consistent with a communication from the ULC on the same point. See First Supplement to CLRC Staff Memorandum 2014-14, Exhibit p. 1 (comments of Casey Gillice on behalf of ULC).

336. See CLRC Staff Memorandum 2014-24, pp. 4-5.

337. See *id.* at 6-7.

338. UMA § 6(a)(6), (c).

339. CLRC Staff Memorandum 2014-24, Exhibit pp. 7-8 & sources cited therein.

1 by threatening to stop advancing litigation costs if she did not settle.³⁴⁰ The trial
2 court granted summary judgment to the attorney, but the appellate court reversed
3 and remanded, concluding that neither side was entitled to summary judgment.
4 The appellate court further concluded that the mediator’s deposition testimony
5 would be admissible on remand, pursuant to Nebraska’s version of UMA Section
6 6(a)(6).³⁴¹

7 Every UMA jurisdiction but one has enacted the mediator misconduct
8 exception³⁴² without deviating from the uniform text; the revisions made by the
9 remaining jurisdiction do not appear significant.³⁴³ There does not yet appear to be
10 any case law interpreting this exception.

11 Three UMA states deviated from the uniform text³⁴⁴ in enacting the exception
12 relating to the validity of a mediated settlement agreement.³⁴⁵ A few written
13 decisions³⁴⁶ discuss that exception to some extent.³⁴⁷

14 **Other States**

15 Like the eleven UMA states, virtually all of the remaining states provide some
16 significant, statewide protection for mediation communications generally.³⁴⁸
17 Kentucky,³⁴⁹ New York,³⁵⁰ and Tennessee³⁵¹ appear to be the only exceptions.

340. *Shriner v. Friedman Law Offices, P.C., L.L.O.*, 23 Neb. App. 869, 877 N.W.2d 272 (Neb. Ct. App. 2016).

The Commission also found an unpublished decision by a federal district court in New Mexico, which referred to UMA Section 6(a)(6) in concluding that a similar New Mexico provision applies to alleged misconduct by an insurer, not just alleged misconduct by an attorney. See *Willis v. Geico General Ins. Co.*, 2016 U.S. Dist. LEXIS 49038, at *23 (April 2016).

341. See *id.* at 290-91. A mediator cannot be compelled to testify under UMA Section 6(a)(6), but the mediator may testify voluntarily. See UMA §6(c) & Comment. Presumably, that is what happened in *Shriner*. For further discussion of *Shriner*, see CLRC Staff Memorandum 2016-30, pp. 12-14.

342. UMA § 6(a)(5).

343. See CLRC Staff Memorandum 2014-24, Exhibit pp. 7-8 & sources cited therein.

344. See *id.*

345. UMA § 6(b)(2).

346. See, e.g., *Addressa v. Addressa*, 392 N.J. Super. 58, 66, 919 A.2d 885 (N.J. Super. Ct. App. Div. 2007); *City of Akron v. Carter*, 190 Ohio App. 3d 420, 942 N.E.2d 409 (Ohio Ct. App. 2010).

347. For further information on the UMA and its implementation, see CLRC Staff Memoranda 2014-14 & 2014-24.

348. Ala. Civ. Ct. Mediation R. 11 & Ala. App. Ct. Mediation R.8 (Alabama); Alaska R. Civ. Proc. 100(g) & Alaska R. Evid. 408 (Alaska); Ariz. Rev. Stat. § 12-2238 (Arizona); Ark. Code Ann. § 16-7-206 (Arkansas); Colo. Rev. Stat. § 13-22-307 & Colo. Rev. Stat. §§ 301 *et seq.* (Colorado); Conn. Gen. Stat. § 52-235d (Connecticut); Del. Super. Ct. Civ. R. 16(b)(4)(d) (for compulsory mediation in Superior Court), Del. Ch. Ct. R. 174 (for mediation resulting from a referral by the Chancellor or a Vice Chancellor) & 6 Del. Code § 7716 (confidentiality under Voluntary ADR Act) (Delaware); Fla. Stat. §§ 44.401 to 44.406 (Florida); Ga. ADR R. VII & Ga. ADR Appendix C (Georgia); Ind. ADR R. 2.11 & Ind. Code Ann. § 4-21.5-3.5-27 (Indiana); Kan. Stat. Ann. § 60-452a (in Kan. Rules of Evidence), Kan. Stat. Ann. § 5-512 (in Kan. Dispute Resolution Act) & Kan. Sup. Ct. R. 903 (Ethical Standards for Mediators) (Kansas); La. Rev. Stat. § 9:4112 (Louisiana); Maine R. Civ. Proc. 16B(k) & Maine R. Evid. 408(b), 514 (Maine); Md. Code,

1 **Statutes and Rules**

2 The statutes and rules protecting mediation communications vary widely from
3 state to state.³⁵² Among other things, they differ in whether, and to what extent,
4 they permit the use of mediation communications in resolving an allegation of
5 attorney misconduct.

6 In seven states (plus the UMA states), a statute or rule protecting mediation
7 communications has one or more exceptions that expressly addresses alleged
8 attorney misconduct or alleged professional misconduct more generally (thus
9

Courts & Judicial Proceedings §§ 3-1801 to 3-1806 & Md. R. 17-105 (Maryland); Mass. Gen. Laws ch. 233, § 23C (Massachusetts); Mich. Ct. R. 2.412 (Michigan); Minn. Gen. R. Prac. 114.08 & Comment (applicable to ADR proceedings, which are required by Minn. Gen. R. Prac. 114.01 in almost all civil cases), Minn. Stat. § 572.36 & Minn. Stat. § 595.02, Subd. 1(m), Subd. 1a (Minnesota); R. VII & XV(E) of the Miss. Court Annexed Mediation Rules for Civil Litigation (Mississippi); Mo. Rev. Stat. § 435.014 & Mo. S.Ct. R. 17.06 (Missouri); Mont. Code Ann. § 26-1-813 (Montana); Nev. Rev. Stat. § 48.109 (Nevada); N.H. Super. Ct. R. 170(E) (New Hampshire); N.M. Stat. Ann. Sections 44-7B-4 & 44-7B-5 (New Mexico); R. III of the N.C. Standards of Professional Conduct for Mediators, R. 8.3 of the Revised Rules of Professional Conduct of the N.C. State Bar, N.C. Settlement Conf. R. 4(F) & N.C. Gen. Stat. §§ 7A-38.1(l), 7A-38.4A(j) (North Carolina); N.D. Cent. Code § 31-04-11, N.D. R. Ct. 8.8 & N.D. Code of Mediation Ethics R. IV (North Dakota); Okla. Stat. tit. 12 § 1805 (applicable to proceedings under the Dispute Resolution Act); R. 10 & Appendices A & C of the Rules & Procedures for the Okla. Dispute Resolution Act & Okla. Stat. tit. 12, §§ 1824, 1836, 1837 (Oklahoma); Or. Rev. Stat. §§ 36.110, 36.220 to 36.238 (Oregon); Pa. Cons. Stat. § 5949 (Pennsylvania); R.I. Gen. Laws § 9-19-44 & R.I. Supreme Ct. Rule 35 (Rhode Island); R. 8 & Appendix B (Part V) of the S.C. Court-Annexed ADR Rules (South Carolina); Tenn. S.Ct. R. 31, §§ 7, 10(d), 11(b)(14)-(18), 12 & Appendix A, §§ 1(c)(4), 7 (Tennessee); Tex. Civ. Prac. & Rem. Code §§ 154.053, 154.073 (Texas); Va. Code Ann. §§ 8.01-576.10, 8.01-581.22 (Virginia); W.Va. Trial Ct. R. 25.12 (West Virginia); Wis. Stat. §§ 802.12(4), 904.085 (Wisconsin); Wyo. Stat. §§ 1-43-102, 1-43-103 (Wyoming).

349. Although Kentucky does not have a statute or statewide rule broadly addressing mediation communications, it does have a model rule on the topic (Ky. Model Ct. Mediation R. 12), which has served as a basis for numerous Kentucky local court rules. See, e.g., Ky. 11th Jud. Cir. L.R. 912.

350. New York just has (1) a few provisions that protect mediation communications in certain contexts, see, e.g., N.Y. Judiciary Law § 849-b(6), and (2) a provision that protects settlement negotiations (similar to Evid. Code §§ 1152 & 1154 in California), see N.Y. C.P.L.R. 4547.

Apparently, many New York mediators use contractual agreements to protect the confidentiality of their mediations. See http://nysbar.com/blogs/ResolutionRoundtable/2013/04/mediation_privilege_in_new_yor.html (New York mediators “have all sought confidentiality in mediation by contract.”). However, contractual confidentiality requirements generally are not binding on third parties.

351. Tennessee has a provision (Tenn. S.Ct. R. 31, § 7) that protects ADR proceedings “to the same extent as conduct or statements are inadmissible under Tennessee Rule of Evidence 408.” Tennessee’s Rule 408 is similar to California’s provisions that protect settlement negotiations (Evid. Code §§ 1152, 1154).

352. See, e.g., CLRC Staff Memorandum 2014-44 (describing Texas law); CLRC Staff Memorandum 2014-43 (describing Pennsylvania law); CLRC Staff Memorandum 2015-35, pp. 4-25 (describing Florida law); *id.* at 25-32 (describing Massachusetts law); *id.* at 32-40 (describing New York law).

1 encompassing attorney misconduct).³⁵³ Those states are Florida,³⁵⁴ Maine,³⁵⁵
2 Maryland,³⁵⁶ Michigan,³⁵⁷ New Mexico,³⁵⁸ North Carolina,³⁵⁹ and Virginia.³⁶⁰

353. Another state, Minnesota, has an exception that *expressly* concerns alleged misconduct of an attorney acting as a mediator (as opposed to an attorney representing a client in a mediation). See Minn. Stat. § 595.02, Subd. 1a, which provides:

Alternative dispute resolution privilege — No person presiding at any alternative dispute resolution proceeding established pursuant to law, court rule, or by an agreement to mediate, shall be competent to testify, in any subsequent civil proceeding or administrative hearing, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to any statement or conduct that could:

....
(2) give rise to disqualification proceedings under the Rules of Professional Conduct for attorneys

354. See Fla. Stat. § 44.405(4)(a)(4) & (6), which provide:

(4)(a) ... there is no confidentiality or privilege ... for any mediation communication:

....
4. Offered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding;

....
6. Offered to report, prove, or disprove professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct.

355. See Maine R. Evid. 514(c)(5), which provides:

(c) **Exceptions.** There is no privilege under this rule:

....
(5) *Party or counsel misconduct.* For communications sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation.

Another Maine provision protecting mediation communications — Maine R. Evid. 408(b) — does not have an exception that expressly addresses professional misconduct.

356. See Md. Code, Courts & Judicial Proceedings § 3-1804(b)(3), which provides:

(b) Disclosures allowed. — In addition to any other disclosure required by law, a mediator, a party, or a person who was present or who otherwise participated in a mediation at the request of the mediator or a party may disclose mediation communications:

....
(3) To the extent necessary to assert or defend against allegations of professional misconduct or malpractice by a party or any person who was present or who otherwise participated in the mediation at the request of a party, except that a mediator may not be compelled to participate in a proceeding arising out of the disclosure

Another Maryland provision protecting mediation communications — Maryland Rule 17-105 — does not have an exception that expressly addresses professional misconduct.

357. See Mich. Ct. R. 2.412(D)(10) & (11), which provide:

(D) **Exceptions to Confidentiality.** Mediation communications may be disclosed under the following circumstances:

....
(10) The disclosure is included in a report of professional misconduct filed against a mediation participant or is sought or offered to prove or disprove misconduct allegations in the attorney discipline process.

(11) The mediation communication occurs in a case out of which a claim of malpractice arises and the disclosure is sought or offered to prove or disprove a claim of malpractice against a mediation participant.

358. See N.M. Stat. Ann. § 44-7B-5(a)(8), which provides:

1 In ten other states, there is no mediation confidentiality exception that expressly
2 addresses *attorney* misconduct or professional misconduct generally, but there is
3 one that expressly addresses *mediator* misconduct.³⁶¹ The remaining seventeen
4 states (plus California) do not have a mediation confidentiality exception that
5 expressly addresses professional misconduct of any type.³⁶²

6 In considering these figures, it is important to bear in mind that they only reflect
7 which jurisdictions have *expressly* addressed professional misconduct in a statute
8 or rule protecting mediation communications. If a jurisdiction has not expressly
9 addressed the subject, a court might still *imply* an exception for evidence of

44-7B-5. A. Mediation communications are not confidential pursuant to the Mediation Procedures Act if they:

....
(8) are sought or offered to disprove a claim or complaint of professional misconduct or malpractice based on conduct during a mediation and filed against a mediation party or nonparty participant

359. See N.C. Gen. Stat. § 7A-38.1(l)(3), which provides:

§ 7A-38.1.... (l) Inadmissibility of negotiations — Evidence of statements made and conduct occurring in a mediated settlement conference or other settlement proceeding conducted under this section, whether attributable to a party, the mediator, other neutral, or a neutral observer present at the settlement proceeding, shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other civil actions on the same claim, except:

....
(3) In disciplinary proceedings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals

N.C. Gen. Stat. § 7A-38.4A(j) (applicable to district court actions) is essentially identical to the provision shown above.

360. See Va. Code Ann. § 8.01-581.22(vii), which provides:

8.01-581.22. All memoranda, work products and other materials contained in the case files of a mediator ... are confidential. Any communication made in or in connection with the mediation, which relates to the controversy being mediated, ... is confidential....

Confidential materials and communications are not subject to disclosure in discovery or in any judicial or administrative proceeding except ... (vii) where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party's legal representative based on conduct occurring during a mediation

Va. Code Ann. § 8.01-576.10(vii), applicable to court-referred dispute resolution proceedings, is similar in content.

361. See Ala. Civ. Ct. Mediation R.11(b)(3)(iii); Ariz. Rev. Stat. § 12-2238(B)(2); Colo. Rev. Stat. § 13-22-307(2)(D); Del. Super. Ct. Civ. R. 16(b)(4)(d)(ii) (but Del. Ch. Ct. R. 174 & 6 Del. Code § 7716 do not include an exception expressly that expressly addresses mediator misconduct); Ga. ADR R. VII(B); Kan. Stat. Ann. § 60-452a(b)(1); Kan. Stat. Ann. § 5-512(b)(1); Mont. Code Ann. § 26-1-813(5)(c); N.D. Cent. Code § 31-04-11(2); Okla. Stat. tit. 12 § 1805(F) (but Okla. Stat. tit. 12, § 1824 does not include an exception that expressly addresses mediator misconduct); Or. Rev. Stat. § 36.222(5).

Some of the states with a mediation confidentiality exception that expressly addresses *attorney* misconduct or professional misconduct generally also have an exception that specifically addresses *mediator* misconduct. See, e.g., Maine R. Evid. 514(c)(4).

362. Those states are Alaska, Arkansas, Connecticut, Indiana, Louisiana, Massachusetts, Missouri, Mississippi, Nevada, New Hampshire, Pennsylvania, Rhode Island, South Carolina, Texas, West Virginia, Wisconsin, and Wyoming.

1 alleged attorney misconduct or for evidence of professional misconduct more
2 generally.

3 Further, if a jurisdiction lacks an exception expressly addressing professional
4 misconduct, that does not necessarily mean that a mediation communication
5 bearing on such misconduct will be inadmissible and protected from disclosure.
6 The communication might still be subject to disclosure because it is beyond the
7 scope of the provision protecting mediation communications, or because it falls
8 within another type of exception.³⁶³ Many of the mediation confidentiality statutes
9 and rules are subject to a number of different exceptions.³⁶⁴ Of particular note,
10 some of them include an exception relating to the enforcement of a mediated
11 settlement agreement, similar to UMA Section 6(b)(2).³⁶⁵

12 ***Extent of Variation in Expressly Addressing Attorney Misconduct and Other Professional***
13 ***Misconduct***

14 In expressly addressing the relationship between mediation confidentiality and
15 professional misconduct, states do not just vary in whether they focus on attorney
16 misconduct, mediator misconduct, or professional misconduct generally. Rather,
17 the statutes and rules differ in various other respects as well. For example:

- 18 • *Disciplinary Proceeding vs. Malpractice Proceeding.* Some states have
19 separate exceptions for a disciplinary proceeding (e.g., a State Bar
20 proceeding seeking suspension of an attorney for extortionate statements in
21 a mediation) and a malpractice proceeding (e.g., a suit by a client against his
22 attorney, seeking to recover damages for providing incorrect tax advice in a
23 mediation).³⁶⁶ Other states lump the two types of proceedings together in a
24 single exception,³⁶⁷ or provide an exception for only one of them.³⁶⁸
- 25 • *Proof of Allegations vs. Defense Against Allegations.* Some of the
26 exceptions are even-handed, permitting use of mediation communications to
27 prove or disprove alleged professional misconduct.³⁶⁹ Florida's exceptions

363. For example, an exception for evidence of fraud (see, e.g., Maine R. Evid. 408(b)), an exception for a disclosure required by statute (see, e.g., Ariz. Rev. Stat. § 12-2238(B)(3)), or a “manifest injustice” exception (see, e.g., Wisc. Stat. § 904.085(4)(e)).

364. See, e.g., Maine R. Evid. 514(c); N.M. Stat. Ann. § 44-7B-5; Wisc. Stat. § 904/085(4)(a).

365. See, e.g., Fla. Stat. § 44.405(4)(b) (giving no confidentiality to a mediation communication that is “[o]ffered for the limited purpose of establishing or refuting legally recognized grounds for voiding or reforming a settlement agreement reached during a mediation.”); La. Rev. Stat. § 9.4112(B)(1)(c) (permitting disclosure of mediation communications with respect to a “judicial determination of the meaning or enforceability of an agreement resulting from a mediation procedure if the court determines that testimony concerning what occurred in the mediation proceeding is necessary to prevent fraud or manifest injustice.”).

366. See, e.g., Fla. Stat. § 44.405(4)(a)(4), (6); Mich. Ct. R. 2.412(D)(10), (11).

367. See, e.g., Maine R. Evid. 514(c)(4), (5); N.M. Stat. Ann. § 44-7B-5(A)(8).

368. See, e.g., N.C. Gen. Stat. § 7A-38.1(I)(2).

369. See, e.g., Kan. Stat. Ann. § 60-452a (Mediation confidentiality and privilege shall not apply to “[i]nformation that is reasonably necessary to allow investigation of or action for ethical violations against

1 expressly extend not only to proving and defending against allegations of
 2 professional misconduct, but also to reporting of such misconduct.³⁷⁰

3 In other states, the statutory exception appears exclusively or primarily
 4 directed at allowing a mediator to defend against allegations of professional
 5 misconduct.³⁷¹

- 6 • *Professional Misconduct During Mediation vs. Other Professional*
 7 *Misconduct*. Some provisions create an exception to mediation
 8 confidentiality only for evidence of professional misconduct that allegedly
 9 occurred *during* mediation.³⁷² In other states, the exception is not expressly
 10 limited to misconduct *during* mediation.³⁷³
- 11 • *In Camera Proceedings*. Some states use *in camera* procedures in handling
 12 mediation communications bearing on professional misconduct. For
 13 example, the Comment to Alabama’s mediation confidentiality provision
 14 explains: “Any review of mediation proceedings as allowed under Rule
 15 11(b)(3) [relating to alleged mediator misconduct] should be conducted in
 16 an *in camera* hearing or by an *in camera* inspection.”³⁷⁴
- 17 • *Limitations on the Extent of Disclosure*. Some states impose explicit
 18 limitations on the extent to which mediation communications can be used to
 19 prove or disprove professional malfeasance. For example, Florida’s
 20 mediation confidentiality exception for professional malpractice applies
 21 “solely for the purpose of the professional malpractice proceeding.”³⁷⁵

the neutral person conducting the proceeding or for the defense of the neutral person or staff of an approved program conducting the proceeding in an action against the neutral person or staff of an approved program if the action is filed by a party to the proceeding.”); Maine R. Evid. 514(c)(4), (5) (There is no mediation privilege for communications sought or offered to “prove or disprove” a claim of professional misconduct or malpractice).

370. Fla. Stat. § 44.405(4)(a)(4), (6).

371. See, e.g., Ga. ADR R. VII(B) (“Confidentiality does not extend to documents or communications relevant to legal claims or disciplinary complaints brought against a neutral or an ADR program and arising out of an ADR process. Documents or communications relevant to such claims or complaints may be revealed only to the extent necessary to protect the neutral or ADR program.”); Okla. Stat. tit. 12, § 1805(F) (“If a party who has participated in mediation brings an action for damages against a mediator arising out of mediation, for purposes of that action the privilege provided for in subsection A of this section shall be deemed to be waived as to the party bringing the action.”).

372. See, e.g., Maine R. Evid. 514(c)(5) (There is no mediation privilege for “communications sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party *based on conduct occurring during a mediation*.”) (emphasis added); Va. Code Ann. § 8.01-581.22 (Mediation communications are confidential and protected from disclosure except “where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party’s legal representative *based on conduct occurring during a mediation*.”) (emphasis added).

373. See, e.g., Mich. Ct. R. 2.412(D)(10) (Mediation communication may be disclosed when “[t]he disclosure is included in a report of professional misconduct filed against a mediation participant or is sought or offered to prove or disprove misconduct allegations in the attorney discipline process.”).

374. Comment to Ala. Civ. Ct. Mediation R.11.

375. Fla. Stat. § 44.405(4)(a)(4); see also Fla. Stat. § 44.405(4)(a)(6) (imposing similar limitation with respect to investigation of professional misconduct).

1 Similarly, an Oregon provision says that “[i]n an action for damages or other
2 relief between a party to a mediation and a mediator or mediation program,
3 confidential mediation communications or confidential mediation
4 agreements may be disclosed *to the extent necessary to prosecute or defend*
5 *the matter.*”³⁷⁶

6 The Commission kept these variables in mind as it crafted its proposed legislation
7 in this study.

8 *Case Law*

9 The Commission is aware of several cases from non-UMA jurisdictions that
10 involve the intersection of a mediation confidentiality rule or statute and
11 allegations of attorney misconduct.³⁷⁷ Some of these cases are framed as a claim
12 against an attorney for legal malpractice or another type of misconduct. Examples
13 from Arizona, Oregon, and Texas reflect differing approaches to this type of
14 situation.

15 *Grubaugh v. Blomo*.³⁷⁸ This is an Arizona case that is similar to *Cassel* in many
16 respects. A client sued her attorney for giving “substandard legal advice” during a
17 family court mediation. In defending against her claim, the attorney sought to
18 introduce some mediation communications. The trial court concluded that
19 Arizona’s mediation privilege had been waived, but the client appealed from that
20 ruling.

21 Relying on the language and legislative history of Arizona’s mediation privilege
22 statute, the appellate court determined that there was no waiver and the attorney
23 could not introduce any mediation communications. It further determined,
24 however, that the client’s complaint could not include “any claim founded upon
25 confidential communications during the mediation process.”³⁷⁹

26 The Arizona appellate court viewed that result as “sound policy.”³⁸⁰ It explained:

27 By protecting all materials created, acts occurring, and communications made
28 as a part of the mediation process, A.R.S. § 12-2238 establishes a robust policy of

376. Or. Rev. Stat. § 36.222(5). The same provision further states that “[a]t the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of the mediation communications or agreements.”

377. The Commission also considered *ZVI Construction Co., LLC v. Levy*, 90 Mass. App. Ct. 412, 60 N.E. 3d 368 (2016), which involves the intersection of a *contractual* mediation confidentiality requirement and allegations of attorney misconduct. The plaintiff brought suit against the attorney who had represented its opponents in a mediation, claiming that he had “engaged in misrepresentation and other wrongdoing” in connection with the mediated settlement agreement. *Id.* at 413. The trial court dismissed the plaintiff’s claims and the appellate court affirmed, explaining that the parties were sophisticated and their contractual mediation confidentiality requirement was not subject to a fraud exception. See *id.* at 420-22.

378. 238 Ariz. 264, 359 P.3d 1008 (Ariz. Ct. App. 2015).

379. *Id.* at 278.

380. *Id.* at 268.

1 confidentiality of the mediation process that is consistent with Arizona’s “strong
2 public policy” of encouraging settlement rather than litigation. The statute
3 encourages candor with the mediator throughout the mediation proceedings by
4 alleviating parties’ fears that what they disclose in mediation may be used against
5 them in the future. The statute similarly encourages candor between attorney and
6 client in the mediation process.

7 Another reason confidentiality should be enforced here is that [the plaintiff] is
8 not the only holder of the privilege. The privilege is also held by [her] former
9 husband, the other party to the mediation. The former husband is not a party to
10 this malpractice action and the parties before us do not claim he has waived the
11 mediation process privilege. It is incumbent upon courts to consider and generally
12 protect a privilege held by a non-party privilege-holder. The former husband has
13 co-equal rights under the statute to the confidentiality of the mediation process.
14 Although the superior court did rule that the privilege was not waived as to
15 communications between the mediator and the former husband, waiving the
16 privilege as to one party to the mediation may have the practical effect of waiving
17 the privilege as to all. In order to protect the rights of the absent party, the
18 privilege must be enforced.

19 Accordingly, we hold that the mediation process privilege applies in this case
20 and renders confidential all materials created, acts occurring, and communications
21 made as a part of the mediation process, in accordance with A.R.S. § 12-
22 2238(B).³⁸¹

23 *Alfieri v. Solomon*.³⁸² In this legal malpractice case, the Oregon Supreme Court
24 took a different approach when interpreting Oregon’s statute protecting mediation
25 communications. The client in *Alfieri* alleged that his attorney mishandled a
26 mediation and other aspects of his case, causing the client to settle for less than the
27 case was worth. The client sought to use various mediation-related
28 communications to support his claim.

29 The Oregon Supreme Court concluded that “[p]rivate communications between
30 a mediating party and his or her attorney outside of mediation proceedings ... are
31 *not* ‘mediation communications’ as defined in the statute, even if integrally related
32 to a mediation.”³⁸³ As in *Grubaugh*, however, the Court excluded certain other
33 evidence because it fell within the scope of the mediation confidentiality statute.

34 In so doing, the Court recognized that its interpretation of Oregon law “may
35 make it difficult, in some circumstances, for clients to pursue legal malpractice
36 claims against their attorneys for work in connection with mediations.”³⁸⁴ Perhaps

381. *Id.* at 268-69 (emphasis in original; citations omitted).

382. 358 Ore. 383, 365 P.3d 99 (2015).

383. *Id.* at 404 (emphasis added).

384. *Id.* at 405 n.10.

An earlier, unpublished legal malpractice case interpreting Oregon law is consistent with *Alfieri*. In *Fehr v. Kennedy*, 2009 U.S. Dist. LEXIS 63748 (D. Oregon 2009), *aff’d*, 2010 U.S. App. LEXIS 16953 (9th Cir. 2010), a couple sued their attorney and his law firm, alleging that they failed to properly represent the couple at a mediation, causing the couple to reject a favorable settlement offer and later obtain a bad result at trial.

1 uncomfortable with that result, it described the UMA exception for professional
2 misconduct and said the Oregon Legislature “may wish to consider statutory
3 changes based on the Uniform Mediation Act.”³⁸⁵

4 *Alford v. Bryant*.³⁸⁶ The court in this Texas legal malpractice case took still
5 another approach. The fact scenario began when a dispute was settled through
6 mediation, except for the allocation of attorney’s fees and costs. A later ruling
7 required each side to bear its own attorney’s fees and costs.

8 One of the mediation parties then sued her attorney, contending that the attorney
9 failed to disclose the risks and benefits of settlement, including the risk that the
10 trial court would deny recovery of her attorney’s fees. In defense, the attorney said
11 that she had made such disclosures to her client, during a discussion that included
12 the two of them and the mediator. The attorney tried to call the mediator to testify
13 about that discussion, but the trial court said the testimony was barred by a Texas
14 mediation confidentiality provision.³⁸⁷

15 The attorney appealed and the Texas Court of Appeals reversed and remanded.
16 Its decision rested in part on what is known in Texas as the “offensive use
17 doctrine.”³⁸⁸ Importantly, however, its decision also relied on *Avary v. Bank of*
18 *America, N.A.*, a professional malpractice case against a bank fiduciary (not an
19 attorney) in which the court construed another Texas mediation confidentiality
20 provision³⁸⁹ to permit the introduction of mediation evidence *for purposes of*
21 *proving an “independent tort” committed during mediation that encompasses a*
22 *duty to disclose, but only if the trial judge conducts an in camera hearing and*
23 *determines that the “facts, circumstances, and context” warrant disclosure.*³⁹⁰

24 The *Alford* court made clear that the *Avary* doctrine applied to the case before it:

25 As in *Avary*, the parties to the original litigation peacefully resolved their
26 dispute. Again, as in *Avary*, one of the parties now seeks to prove a new and
27 independent cause of action that is alleged to have occurred during the mediation
28 process. That party does not propose to discover or use the evidence to obtain

The federal district court granted summary judgment for the attorney and his law firm, because the case depended entirely on mediation communications, which were inadmissible under Oregon’s mediation confidentiality statute. The district court did not have to resolve whether the statute protected the couple’s private communications with their attorney, outside the presence of the mediator and not disclosed to the other mediation parties. See *id.* at *12-13. The Ninth Circuit affirmed, explaining that “[w]ithout admitting confidential mediation communications, the record is devoid of any evidence of legal malpractice.” *Fehr v. Kennedy*, 2010 U.S. App. LEXIS 16953, at *4 (9th Cir. 2010).

385. *Id.*

386. 137 S.W.3d 916 (Tex. Ct. App. 2004).

387. Tex. Civ. Prac. & Rem. Code § 154.053.

388. The Texas offensive use doctrine holds that a plaintiff may not “invoke the jurisdiction of the courts in search of affirmative relief, and yet, on the basis of privilege, deny a party the benefit of evidence that would materially weaken or defeat the claims against her.” *Id.* at 921.

389. Tex. Civ. Prac. & Rem. Code § 154.073(e).

390. 72 S.W. 3d 770 (Tex. Ct. App. 2002).

1 additional funds from the settling roofing contractor in the underlying litigation.
2 The confidential information was offered in this separate and distinct case arising
3 between one of the parties to the underlying litigation and her attorney.

4 The new cause of action asserted by [the client] below involved [her attorney's]
5 alleged legal malpractice during the mediation proceedings. Significant
6 substantive and procedural rights of [the attorney] are implicated, including the
7 opportunity to develop evidence of her defense to the claim of legal malpractice
8 and to submit contested fact issues to the fact-finder. In pursuing her defense, [the
9 attorney] will not disturb the settlement in the underlying litigation. From a policy
10 standpoint, these considerations support disclosure of the confidential
11 communications at issue in this case.³⁹¹

12 *Alford* thus extended the *Avary* doctrine to mediator testimony in a legal
13 malpractice case.³⁹²

14 *Cases that seek to undo mediated settlement agreements.* In non-UMA states,
15 allegations of mediation-related attorney misconduct have surfaced not only in
16 some legal malpractice cases, but also in some cases that seek to enforce or undo a
17 mediated settlement agreement. There are a few examples from Texas. From those
18 cases³⁹³ and some Texas cases involving other types of professionals,³⁹⁴ it appears

391. *Alford*, 137 S.W.3d at 922 (citations omitted).

392. For a more detailed discussion of *Avary* and *Alford*, see CLRC Staff Memorandum 2014-44, pp. 7-15.

Nova Casualty Co. v. Santa Lucia, 2010 U.S. Dist. LEXIS 58693 (M.D. Fla. 2010), is another legal malpractice case that involved a mediation-related allegation of attorney misconduct. In particular, a client alleged that an attorney gave negligent advice about a High-Low agreement during a mediation. The court's decision did not resolve that allegation on the merits or address mediation confidentiality. See *id.* at *1.

Rather, the court explained that the mediation took place before the defendant attorney joined one of the defendant law firms. The court denied that firm's motion for summary judgment, explaining that "[w]hether [the attorney's] alleged negligent acts continued after he joined [the firm] on September 1, 2006, remains an issue of fact to be decided by a jury." *Id.* at *7.

A further example interpreting law from a non-UMA state is *McKissock & Hoffman, P.C. v. Waldron*, 2011 U.S. Dist. LEXIS 86834 (2011), in which a client alleged that its law firm committed malpractice during a mediation by failing to advise the company to accept a particular settlement offer. Due to the posture of the case, the federal district court dismissed it without having to resolve whether permitting the mediator to testify would be a violation of Pennsylvania's mediation confidentiality statute. But the matter sparked discussion within Pennsylvania legal circles about "whether the Pennsylvania mediation privilege statute makes it virtually impossible to prove legal malpractice committed during the mediation." Abraham Gafni, *Does the Mediation Privilege Apply in Legal Malpractice Cases?*, *The Legal Intelligencer* (Oct. 25, 2011), p. 1.

393. See *Rabe v. Dillard's, Inc.*, 214 S.W.3d 767 (Tex. Ct. App. 2007) (upholding summary judgment against woman who claimed she signed mediated settlement agreement under duress due to opposing counsel's threat to tell worker's compensation carrier she had prior injury; mediation communications were confidential, so "there was no competent summary judgment evidence of a threat"); *Lype v. Watkins*, 1998 Tex. App. LEXIS 6626 (Tex. Ct. App. 1998) (party sought to avoid enforcement of mediated settlement agreement due to alleged duress by opposing counsel, but court said settlement agreement cannot be avoided based on actions of attorney for settling party).

1 that the *Avary* exception described above only applies in a suit for an “independent
2 tort,” not in a suit seeking to undo or enforce a mediated settlement agreement.³⁹⁵

3 There are also several examples construing Florida law, which includes a
4 mediation confidentiality exception for evidence relating to the validity and
5 enforcement of a mediated settlement agreement.³⁹⁶ All of those claims against
6 attorneys were unsuccessful; they involved the following situations:

- 7 • An attempt to set aside a mediated settlement agreement on grounds that the
8 opposing attorney engaged in duress or coercion. In a published decision, a
9 Florida appellate court determined that the record (which presumably
10 included mediation communications) adequately supported the trial court’s
11 finding that the opposing attorney was not involved in any duress or
12 coercion.³⁹⁷
- 13 • An unpublished federal district court decision in which the plaintiff alleged
14 that a mediated settlement agreement was obtained through duress. She
15 allegedly felt threatened when the opposing attorney warned (during
16 mediation) that her opponent might seek recovery of attorney’s fees. After
17 considering testimony about the mediation, the court found that the
18 attorney’s warning did “not rise to a level of coercion or support Plaintiff’s
19 claim that she was placed in a state of duress.”³⁹⁸

394. See *Hydroscience Technologies, Inc. v. Hydroscience, Inc.*, 401 S.W.3d 783 (Tex. Ct. App. 2013) (declining to apply *Avary* doctrine to dispute over mediated settlement agreement); *In re Empire Pipeline Co.*, 323 S.W.3d 308 (Tex. Ct. App. 2010) (same); *Allison v. Fire Ins. Exchange*, 98 S.W.3d 227 (Tex. Ct. App. 2002), *pet. granted, judgment vacated w/out reference to the merits* (Tex. S.Ct. 2004) (same).

395. A counterexample is an unpublished 1996 opinion, in which a Texas Court of Appeal said that the trial court erred in excluding mediation communications proffered to show duress with respect to a mediated settlement agreement. See *Randle v. Mid Gulf*, 1996 Tex. App. LEXIS 3451 (Tex. Ct. App. 1996).

A Texas law professor says *Randle* was wrongly decided, because “[t]he Texas ADR Act’s confidentiality provisions do not include an exception for providing evidence of traditional contract defenses.” Brian Shannon, *Confidentiality of Texas Mediations: Ruminations on Some Thorny Problems*, 32 Tex. Tech. L. Rev. 77 (2000) (hereafter, “Shannon (2000)”); see also Edward Sherman, *Confidentiality in ADR Proceedings: Policy Issues Arising From the Texas Experience*, 38 S. Tex. L. Rev. 541, 557-58 (1997) (warning that *Randle* approach could “considerably reduce the confidentiality protection of the Texas ADR Act if there will always be a waiver of confidentiality whenever a contract defense is asserted.”).

396. See Fla. Stat. § 44.405(4)(b) (There is no confidentiality or privilege for a mediation communication that is “[o]ffered for the limited purpose of establishing or refuting legally recognized grounds for ordering or reforming a settlement agreement reached during a mediation.”).

397. *Vitakis-Valchine v. Valchine*, 793 So.2d 1094, 1096 (Fla. Ct. App. 2001). The appellate court also held:

- (1) The record adequately supported the trial court’s finding that the opposing party was not involved in any duress or coercion. See *id.*
- (2) Remand was necessary to determine whether the mediator engaged in misconduct. See *id.* at 1100.

398. *Clark v. School Bd.*, 2010 U.S. Dist. LEXIS 120216, at *12 (M.D. Fla. 2010).

- 1 • Another unpublished federal district court decision, in which a client sought
2 to avoid a mediated settlement agreement due to alleged misconduct on the
3 part of his own attorney. The court concluded that “Plaintiff’s mere
4 dissatisfaction with the advice of her attorney cannot support a finding that
5 his agreement to settle and release his claims was not knowing or
6 voluntary.”³⁹⁹

7 **Federal Law**

8 In federal court, mediation confidentiality issues arise in a variety of settings,
9 such as:

- 10 • A case based on diversity jurisdiction, consisting solely of claims under
11 state law.⁴⁰⁰
- 12 • A case that combines federal and state claims. Mediation evidence may be
13 relevant to both types of claims,⁴⁰¹ or only to one type of claim.⁴⁰²
- 14 • A case involving a federal statute that includes a mediation confidentiality
15 provision.⁴⁰³
- 16 • A case involving a federal court rule on mediation confidentiality.⁴⁰⁴
- 17 • A case purely under federal law, but not governed by a mediation
18 confidentiality rule or statute.⁴⁰⁵

399. Shepard v. Florida Power Corp., 2010 U.S. Dist. LEXIS 58693, at *1 (M.D. Fla. 2010).

For further discussion of the law of non-UMA states, see CLRC Staff Memorandum 2014-35; First Supplement to CLRC Staff Memorandum 2014-35; CLRC Staff Memorandum 2014-43; CLRC Staff Memorandum 2014-44; CLRC Staff Memorandum 2014-59; CLRC Staff Memorandum 2015-54, pp. 5-7; CLRC Staff Memorandum 2016-30, pp. 12-15.

400. See, e.g., *Benesch*, 2009 U.S. Dist. LEXIS 117641.

401. See, e.g., *Folb v. Motion Picture Industry Pension & Health Plans*, 16 F. Supp. 2d 1164 (C.D. Cal. 1998), *aff’d without opinion*, 216 F.3d 1082 (9th Cir. 2000).

402. See, e.g., *Doe v. Archdiocese of Milwaukee*, 2014 U.S. App. LEXIS 21114, at *5-*6 (No. 13-3783, Nov. 5, 2014).

403. See, e.g., *J.D. v. Kanawha County Board of Education*, 571 F.3d 381 (4th Cir. 2009) (construing mediation confidentiality provision in Individuals with Disabilities Education Act).

The Federal Administrative Dispute Resolution Act contains a mediation confidentiality provision that mediator Ron Kelly suggested as a possible model for this study. See 5 U.S.C. § 574; Third Supplement to CLRC Staff Memorandum 2014-60, Exhibit p. 3 (comments of Ron Kelly).

404. See, e.g., *Davis v. Nat’l Council of Negro Women*, 821 F. Supp. 2d 262 (D.D.C. 2011) (construing mediation confidentiality provision in local rule).

The Alternative Dispute Resolution Act of 1998 requires each federal district court to provide civil litigants with at least one ADR process and directs each court to adopt a local rule providing for the confidentiality of its ADR process(es) and prohibiting disclosure of confidential ADR communications. See 16 U.S.C. § 652(a), (d).

In response to this requirement, the federal district courts have adopted local rules for their ADR programs, which vary in how they protect confidentiality. See, e.g., N.D. Cal. ADR Local R. 6-12; N.D.N.Y. Local R. 83.11-5(d). Federal appeals courts also have local rules regarding the confidentiality of their ADR programs, which vary as well. See, e.g., 3d Cir. Local R. 33.5(c); 11th Cir. Local R. 33-1(c)(3).

405. See, e.g., *Sheldone*, 104 F. Supp. 2d at 511.

- 1 • A case involving a contractual agreement in which the parties agreed to
2 keep mediation communications confidential.⁴⁰⁶

3 Many federal courts have expressed support for the concept of protecting
4 mediation communications.⁴⁰⁷ In some of those cases, courts have stressed the
5 importance of protecting a mediator from having to testify or produce mediation-
6 related documents.⁴⁰⁸ In a few of the cases, a federal court has gone so far as to
7 impose sanctions for violation of a mediation confidentiality requirement.⁴⁰⁹ At

406. See, e.g., *Facebook*, 640 F.3d at 1041 (confidentiality agreement precluded introduction of mediation communications); *ZVI*, 60 N.E. 3d at 377 (confidentiality requirement in mediation agreement was enforceable).

407. See, e.g., *J.D.*, 571 F.3d at 386 (mediation confidentiality requirement is “critical to ensuring that parties trust the integrity of the mediation process and remain willing to engage in it.”); *Beazer East, Inc. v. Mead Corp.*, 412 F.3d 429, 435 (3d Cir. 2005) (mediation confidentiality requirement allows attorneys to discuss matters in uninhibited manner that often leads to settlement; creating exception would make them cautious, tight-lipped, and non-committal, and would “compromise the effectiveness of the Appellate Mediation Program.”); *Fields-D’Arpino v. Restaurant Associates, Inc.*, 39 F. Supp. 2d 412, 417 (S.D.N.Y. 1999) (“Successful mediation ... depends upon the perception and existence of mutual fairness throughout the mediation process. In this regard, courts have implicitly recognized that maintaining expectations of confidentiality is critical.”); *Willis v. McGraw*, 177 F.R.D. 632, 632 (S.D. W.Va. 1998) (local rule regarding mediation confidentiality “was drafted to ensure confidentiality, to reassure the parties and counsel they would suffer no prejudice, perceived or actual, as a result of the full, frank, conciliatory, and sometimes heated, exchanges that occur inevitably during the mediation process.”); *In re Joint Eastern and Southern Districts Asbestos Litigation*, 737 F. Supp. 735, 739 (E.D.N.Y. & S.D.N.Y. 1990) (“The parties engaged in a mediated settlement process recognize that they must, if the process is to work, fully disclose to the mediator their needs and tactics — not only those that have been publicly revealed, but also their private views and internal arrangements.”); *Pipefitters Local Union No. 208 v. Mechanical Contractors Ass’n*, 507 F. Supp. 935, 935 (D. Colo. 1980) (“Effective mediation hinges upon whether labor and management negotiators feel free to advance tentative proposals and pursue possible solutions that later may prove unsatisfactory to one side or the other. Such uninhibited interaction may be impaired absent the assurance that mediation proceedings will remain confidential.”).

408. See, e.g., *Anonymous*, 283 F.3d at 639 (“[G]ranting of consent for the mediator to participate in any manner in a subsequent proceeding would encourage perceptions of bias in future mediation sessions involving comparable parties and issues ...”); *Macaluso*, 618 F.2d at 55 (explaining that if conciliators could testify about their activities or be compelled to produce notes or reports of their activities, not even strictest adherence to purely factual matters would prevent evidence from favoring or seeming to favor one side).

409. See, e.g., *Williams v. Johanns*, 529 F. Supp. 2d 22, 23 (D.D.C. 2008) (holding counsel in civil contempt for violating court’s order regarding mediation confidentiality, because it is “essential that counsel maintain the confidentiality of mediation sessions and comply with orders of the Court to ensure that such proceedings operate fairly, efficiently, and effectively.”); *Frank v. L.L. Bean, Inc.*, 377 F. Supp. 2d 229 (D. Maine 2005) (applying 5-factor test and imposing \$1,000 sanction on plaintiff for disclosing settlement offer made in mediation); *Bernard v. Randolph*, 901 F. Supp. 778 (S.D.N.Y. 1995) (imposing \$2,500 sanction on plaintiff’s lead counsel for willfully and deliberately disclosing details of mediation); but see *Anonymous*, 283 F.3d at 635-36 (applying 5-factor test and determining that sanctions for violation of local rule on mediation confidentiality were not warranted).

1 other times, a federal court has determined that a competing policy interest
2 overrides the interest in mediation confidentiality.⁴¹⁰

3 In resolving mediation confidentiality issues, a federal court must first determine
4 what law applies. The choice-of-law rules are described below.

5 ***Choice-of-Law Rules***

6 To decide whose law applies in a federal case, it is critical to identify the
7 particular issue being resolved.⁴¹¹ Here, the Commission is examining mediation
8 confidentiality issues, which fall within the same rubric as evidentiary privilege
9 issues.⁴¹²

10 The Federal Rules of Evidence do not include a set of evidentiary privileges,
11 like the attorney-client privilege and the doctor-patient privilege. Congress could
12 not agree on such rules,⁴¹³ so it enacted a single choice-of-law provision instead:
13 Federal Rule of Evidence 501.⁴¹⁴

14 Under that rule,

15 Except as otherwise required by the Constitution of the United States or
16 provided by Act of Congress or in rules prescribed by the Supreme court pursuant
17 to statutory authority, *the privilege of a witness, person, government, State, or*
18 *political subdivision thereof shall be governed by the principles of the common*
19 *law* as they may be interpreted by the courts of the United States in the light of
20 reason and experience. However, in civil actions and proceedings, with respect to
21 an element of a claim or defense *as to which State law supplies the rule of*
22 *decision*, the privilege of a witness, person, government, State, or political
23 subdivision thereof *shall be determined in accordance with State law.*⁴¹⁵

410. See, e.g., *In re Grand Jury Proceedings*, 148 F.3d 487, 492 (5th Cir. 1998) (mediation confidentiality must yield to public interest in administration of criminal justice); *In the Matter of the Fort Totten Metrorail Cases*, 960 F. Supp. 2d 2, 15-16 (D.D.C. 2013) (mediation confidentiality must yield to common law right of public access to judicial records); *In re March, 1994 — Special Grand Jury*, 897 F. Supp. 1170, 1173 (S.D. Ind. 1995) (interest in fact-finding served by grand jury subpoena outweighs interest in mediation confidentiality under circumstances of case).

411. See *Olam*, 68 F. Supp. 2d at 1119.

412. See *id.* at 1120 n.15 (differentiating between mediation confidentiality rule and evidentiary privileges in federal choice-of-law analysis would be little more than semantic sleight of hand). For analysis of the term “mediation privilege” and the consequences of classifying a provision as a “privilege,” see discussion of “Mediation Privilege” *supra*.

413. “Since it was clear that no agreement was likely to be possible as to the content of specific privilege rules, and since the inability to agree threatened to forestall or prevent passage of an entire rules package, the determination was made that the specific privilege rules proposed by the Court should be eliminated ...” Sen. Rep. No. 93-1277, 93rd Cong. 2d Sess. (Oct. 18, 1974).

414. See *id.*

415. Fed. R. Evid. 501 (emphasis added).

1 In other words, (1) federal common law applies to a privilege issue in a case that
 2 consists solely of federal claims, while (2) state law applies to a privilege issue in
 3 a diversity case that only involves questions of state law.⁴¹⁶

4 Thus, for example, federal common law governed the admissibility of mediation
 5 evidence in a federal case solely alleging violations of the federal Fair Labor
 6 Standards Act.⁴¹⁷ In contrast, state law governed the admissibility of mediation
 7 evidence in a legal malpractice case removed to federal court based on diversity of
 8 citizenship.⁴¹⁸

9 How Rule 501 applies in a case involving both federal and state law is more
 10 complex. Where the same evidence relates to both federal and state law claims,
 11 “federal privilege law governs.”⁴¹⁹ As courts have explained, this approach is
 12 warranted because applying different privilege rules to different claims in the
 13 same lawsuit could undermine federal evidentiary policies and be unworkable.⁴²⁰

14 Where, however, the evidence at issue relates only to a state law claim, and has
 15 no relevance to any federal claim, most courts have concluded that Rule 501’s
 16 proviso requires application of state privilege law.⁴²¹ As one court put it, “[w]here
 17 the application of state privilege law to evidence in support of a claim arising
 18 under state law creates no conflict, such as where the evidence sought can be

416. See, e.g., *Gilbreath v. Guadalupe Hosp. Foundation, Inc.*, 5 F.3d 785, 791 (5th Cir. 1993) (applying federal privilege law in federal question case); *International Ins. Co. v. RSR Corp.*, 426 F.3d 281, 299 n.26 (5th Cir. 2005) (applying state privilege law in diversity case); see also *In re Sealed Case*, 381 F.3d 1205, 1212 (D.C. Cir. 2004) (“It is thus clear that when a plaintiff asserts federal claims, federal privilege law governs, but when he asserts state claims, state privilege law applies.”); *Platypus Wear, Inc. v. K.D. Co., Inc.*, 905 F. Supp. 808, 811 (S.D. Cal. 1995) (“It is clear that State law governs a claim of privilege in a pure diversity case, and that in pure federal question cases the federal common law of privilege governs.”); *Guzman v. Memorial Hermann Hosp. System*, 2009 U.S. Dist. LEXIS 13336 (S.D. Texas 2009) (“It is well established that federal privilege law governs in a federal question case involving only federal law and that state privilege law applies in a diversity case involving only state law.”); but see *Babasa v. LensCrafters, Inc.*, 498 F.3d 972, 974-75 (9th Cir. 2007) (federal law, including federal privilege law, governs determination of whether case exceeds amount-in-controversy necessary for diversity action to proceed in federal court).

417. See *Sheldone*, 104 F. Supp. 2d 511.

418. See *Benesch*, 2009 U.S. Dist. LEXIS 117641; see also *Olam*, 68 F. Supp. 2d at 1124 (“[I]f the basis for subject matter jurisdiction was diversity of citizenship, F.R.E. 501 would require application of state privilege law in all phases of the proceedings in federal court ...”).

419. *Sony Computer Entertainment America, LLC v. HannStarr Display Corp.*, 835 F.3d 1155, 1158-59 (9th Cir. 2016); *Wilcox v. Arpaio*, 753 F.3d 872 (9th Cir. 2014); see also *Guzman*, 2009 U.S. Dist. LEXIS at *12 (collecting authorities establishing that “[i]n cases in which there are federal and state claims, the evidence at issue is relevant to both, and the privilege rules conflict, courts have generally applied federal privilege law ...”).

420. See, e.g., *In re Sealed Case*, 381 F.3d at 1213; *Pearson v. Miller*, 211 F.3d 57, 66 (3d Cir. 2000).

421. See, e.g., *Doe v. Archdiocese of Milwaukee*, 2014 U.S. App. LEXIS 21114 (No. 13-3783, Nov. 5, 2014); *Garza v. Scott & White Memorial Hosp.*, 234 F.R.D. 617, 624-25 (W.D. Tex. 2005); *Platypus Wear*, 905 F. Supp. at 811-12; *Guzman*, 2009 U.S. Dist. LEXIS at *17-*24 (collecting & analyzing cases).

1 relevant only to state law claims, the state law privilege should be applied
2 consistent with the express language of Rule 501.”⁴²²

3 ***Existence and Contours of a Federal Mediation Privilege or Similar Protection Under Federal***
4 ***Common Law***

5 Because federal common law sometimes applies to mediation confidentiality
6 issues that arise in federal court, a number of cases address whether federal
7 common law includes a mediation privilege. There is considerable, but far from
8 definitive, support for the existence of such a privilege.

9 In particular, several lower courts have found that a mediation privilege exists.⁴²³
10 In so doing, those courts applied a four-factor test that the United States Supreme
11 Court established in a case involving the psychotherapist-patient privilege.⁴²⁴ They
12 ultimately conclude that a privilege is necessary to encourage mediation, which is
13 a public good that transcends the general principle of using all relevant evidence to
14 determine the truth.⁴²⁵

422. *Platypus Wear*, 905 F. Supp. at 812.

423. See *Sheldone*, 104 F. Supp. 2d at 517 (“[T]he federal mediation privilege will be adopted and applied in this case”); *Folb*, 16 F. Supp. 2d at 1179-80 (“[I]t is appropriate, in light of reason and experience, to adopt a federal mediation privilege applicable to all communications made in conjunction with a formal mediation.”); *Hays v. Equitex, Inc.*, 277 B.R. 415, 430 (N.D. Ga. Bankr. 2002) (“While it is impossible to know for certain whether the existence of a mediation privilege actually encourages settlements, the Court is persuaded that it does.”); see also *Chester County Hosp. v. Independence Blue Cross*, 2003 U.S. Dist. LEXIS 25214 (E.D. Pa. 2003); *Microsoft Corp. v. Suncrest Enterprise*, 2006 U.S. Dist. LEXIS 21269 (N.D. Cal. 2006).

Some federal courts have expressed apparent support for the existence of a federal mediation privilege, without holding as much. See *Sampson v. School Dist.*, 262 F.R.D. 469, 477 n. 6 (E.D. Pa. 2008) (“We decide this case on grounds other than the federal mediation privilege. Nevertheless, we find persuasive the reasoning set forth by the court in [*Sheldone*] and by other courts that have adopted the federal mediation privilege.”); *U.S. Fidelity & Guaranty Co. v. Dick Corp.*, 215 F.R.D. 503, 506 (W.D. Pa. 2003) (“Because there are no Pennsylvania cases directly on point we look to federal case law construing the federal mediation privilege for guidance.”); see also *N.J. Dep’t of Environmental Protection v. American Thermoplastics Corp.*, 2017 U.S. Dist. LEXIS 16743, *48-*50 (asserting that “[m]any federal courts have recognized a ‘federal mediation privilege’ of some nature,” but concluding that “[t]his court need not determine the appropriateness of applying the federal privilege”); *United States v. Union Pacific Railroad Co.*, 2007 U.S. Dist. LEXIS 40178, *14-*20 (E.D. Ca. 2007) (seemingly accepting existence of federal mediation privilege but concluding that requested documents were not privileged).

424. In *Jaffee v. Redmond*, 518 U.S. 1 (1996), the United States Supreme Court directed courts to weigh the following factors in determining whether an asserted federal privilege exists:

- (1) Whether the asserted privilege is rooted in an imperative need for confidence and trust.
- (2) Whether the privilege would serve public ends.
- (3) Whether the evidentiary detriment caused by exercise of the privilege is modest.
- (4) Whether denial of the federal privilege would frustrate a parallel privilege adopted by the states.

Id. at 9-13.

425. See, e.g., *Folb*, 16 F. Supp. 2d at 1181.

1 Although these courts acknowledge the existence of a mediation privilege, they
2 do not fully flesh out its contours.⁴²⁶ None of the decisions resolve whether that
3 privilege is subject to any kind of exception relating to alleged attorney
4 misconduct (in the mediation context or otherwise).

5 A few district courts, applying the same four-factor test, have issued
6 unpublished decisions refusing to recognize a mediation privilege in the particular
7 circumstances before them.⁴²⁷ In taking that position, one court correctly pointed
8 out that “no Circuit Court has ever adopted or applied such a privilege”⁴²⁸

9 The Sixth Circuit has, however, recognized the existence of a settlement
10 privilege under federal common law — i.e., a privilege that extends to settlement
11 negotiations generally, not just to mediation communications.⁴²⁹ Two other circuits
12 have rejected that concept⁴³⁰ and two circuits have expressly left the question
13 open.⁴³¹ The Sixth Circuit does not appear to have resolved whether the settlement
14 privilege is subject to an exception for alleged attorney misconduct.

15 Regardless of whether federal common law includes a settlement privilege,
16 settlement negotiations (including mediation communications) receive some
17 protection under Federal Rule of Evidence 408.⁴³² In enacting that rule, however,

426. See, e.g., *Sheldone*, 104 F. Supp. 2d at 517-18 (declining to determine full contours of mediation privilege); *Folb*, 16 F. Supp. 2d at 1180 (same).

427. See *Willis v. Geico General Ins. Co.*, 2016 U.S. Dist. LEXIS 49038, at *25; *Munoz v. J.C. Penney Corp.*, 2009 U.S. Dist. LEXIS 36362, at *7 (C.D. Cal. 2009); *Molina v. Lexmark International, Inc.*, 2008 U.S. Dist. LEXIS 83014 (C.D. Cal. 2008); see also *In re Lake Lotawana Community Improvement Dist.*, 563 B.R. 909, 923-24 (2016).

428. *Molina*, 2008 U.S. Dist. LEXIS 83014, at *41-*44. The Fourth Circuit and the Ninth Circuit have declined to decide whether a mediation privilege exists. See *Babasa*, 498 F.3d at 975 & n. 1; *Anonymous*, 283 F.3d at 639 n. 16. Some federal district courts have done the same. See *EEOC v. Hibbing Taconite Co.*, 266 F.R.D. 260, 271-72 (D. Minn. 2009); *Smith v. Smith*, 154 F.R.D. 661, 675 (N.D. Tex. 1994).

429. *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 981 (6th Cir. 2003).

430. See *In re MSTG, Inc.*, 675 F.3d 1337 (Fed. Cir. 2012); *In re General Motors Corp. Engine Interchange Litigation*, 594 F. 2d 1106, 1124 n.20 (7th Cir. 1979).

431. See *Gov’t of Ghana v. ProEnergy Services, LLC*, 677 F.3d 340, 344 n.3 (8th Cir. 2012); *In re Subpoena Duces Tecum*, 439 F.3d 740, 754 (D.C. Cir. 2005). “District courts are divided on whether a settlement negotiation privilege exists.” *MSTG*, 675 F.3d at 1342 n.2.

432. Rule 408 provides:

(a) **Prohibited Uses.** Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

(1) furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

(b) **Exceptions.** The court may admit this evidence for another purpose, such as proving a witness’s bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

1 Congress only restricted the admissibility of settlement negotiations for certain
2 purposes, and it did not expressly provide any protection from discovery.⁴³³

3 *Using Mediation Evidence to Prove or Disprove Allegations of Attorney Misconduct*

4 Although the cases on the existence of a federal mediation privilege do not
5 address the intersection of mediation confidentiality and attorney misconduct, a
6 few other federal cases do. Some of these have already been mentioned elsewhere
7 in this report.⁴³⁴ A few other examples are described below.

8 *In the Matter of Young*.⁴³⁵ This was a disciplinary proceeding stemming from a
9 mediation conducted by a mediator in the Settlement Conference Office of the
10 Seventh Circuit. The mediator had directed appellants' lawyers to bring their
11 clients to meet with him, but the lawyers refused to do so. The underlying case
12 later settled, but the Seventh Circuit was troubled by the lawyers' conduct and
13 issued an order to show cause regarding that matter.

14 The Seventh Circuit ultimately concluded that "[t]he lawyer's refusal to produce
15 their clients in response to the mediator's order was unjustifiable and indeed
16 contumacious."⁴³⁶ In reaching that conclusion, the Seventh Circuit considered
17 mediation communications. It briefly explained that "[a]lthough settlement
18 negotiations are of course confidential for most purposes, *their contents may be*
19 *revealed insofar as necessary for the decision of an issue of alleged misconduct in*
20 *them*."⁴³⁷

21 *In re Teligent*.⁴³⁸ This Second Circuit case did not involve allegations that an
22 attorney committed misconduct during a mediation. Rather, it involved an attempt
23 by a law firm accused of legal malpractice to obtain discovery of information from

433. See, e.g., *Admissibility, Discoverability, and Confidentiality of Settlement Negotiations*, *supra* note 47 & sources cited therein.

434. See, e.g., *supra* note 282 & accompanying text (referring to *Benesch*); *supra* note 384 (discussing *Fehr*).

435. 253 F.3d 926 (7th Cir. 2001).

436. *Id.* at 928.

437. *Id.* at 927 (emphasis added). In support of this statement, the Seventh Circuit cited only a decision in which the Tenth Circuit said, without support or elaboration, that an attorney had not violated the local rule making Tenth Circuit mediations confidential when he disclosed settlement negotiations in response to an order to show cause why he should not be sanctioned. See *Pueblo of San Ildefonso v. Ridlon*, 90 F.3d 423, 424 n.1 (10th Cir. 1996). In making that statement, however, the Tenth Circuit had cautioned that it was making "no determination as to the exact scope of confidentiality nor [was it] establish[ing] a basis for counsel to disclose such matters in the future." *Id.*

For another federal case in which a court admitted mediation communications in resolving an allegation of attorney misconduct, see *FDIC*, 76 F. Supp. 2d 736. After considering the evidence, the court rejected the defendants' claim that the opposing counsel and the mediator coerced settlement by threatening criminal prosecution. See *id.* at 738.

438. 640 F.3d 53 (2d Cir. 2011).

1 a mediation it did not attend, which it claimed was critical to issues in the legal
2 malpractice case.

3 Unlike the Seventh Circuit, the Second Circuit did not simply admit the
4 proffered mediation evidence because it was being used to establish misconduct.
5 Instead, the court established the following test for disclosure of confidential
6 mediation communications:

7 A party seeking disclosure of confidential mediation communications must
8 demonstrate (1) a special need for the confidential material; (2) resulting
9 unfairness from a lack of discovery, and (3) that the need for the evidence
10 outweighs the interest in maintaining confidentiality. All three factors are
11 necessary to warrant disclosure of otherwise non-discoverable documents.⁴³⁹

12 Applying the 3-part test to the case before it, the Second Circuit found that the
13 law firm had failed to satisfy any of the three requirements. Accordingly, the law
14 firm was not entitled to disclosure of the mediation evidence it sought. The Second
15 Circuit specifically warned that “[w]ere courts to cavalierly set aside
16 confidentiality restrictions on disclosure of communications made in the context of
17 mediation, parties might be less frank and forthcoming during the mediation
18 process or might even limit their use of mediation altogether.”⁴⁴⁰

19 *Olam*.⁴⁴¹ U.S. Magistrate Judge Wayne Brazil, a national and international
20 innovator and leader in the field of alternative dispute resolution, used still another
21 approach in the *Olam* decision mentioned several times earlier in this report. In
22 *Olam*, an individual sought to avoid enforcement of a mediated settlement
23 agreement on the ground that it was obtained against her will. The parties waived
24 their right to mediation confidentiality and the key question was whether the
25 mediator could be compelled to testify about the mediation.

26 Relying on *Rinaker*,⁴⁴² a case that involved a clash between mediation
27 confidentiality and a constitutional right, Judge Brazil decided to apply a two-
28 stage balancing test. He explained the *Rinaker* procedure as follows:

29 In essence, the *Rinaker* court instructs California trial judges to conduct a two-
30 stage balancing analysis. The goal of the first stage balancing is to determine
31 whether to compel the mediator to appear at an *in camera* proceeding to
32 determine precisely what her testimony would be. In this first state, the judge

439. *Id.* at 58 (citations omitted). The court drew that standard from the Uniform Mediation Act, the Administrative Dispute Resolution Act of 1996, and the Administrative Dispute Resolution Act of 1998. According to the court, each of those sources “recognizes the importance of maintaining the confidentiality of mediation communications and provides for disclosure in only limited circumstances.” *Id.*

Notably, the 3-part *Teligent* test does not appear to be limited to evidence of attorney misconduct, evidence of professional malfeasance, or even evidence of wrongdoing. Rather, it conceivably could apply to any type of request for disclosure of mediation communications.

440. *Id.* at 59-60.

441. 68 F. Supp. 2d 1110.

442. 62 Cal. App. 4th 155.

1 considers all the circumstances and weighs all the competing rights and interests,
2 including the values that would be threatened not by public disclosure of
3 mediation communications, but by ordering the mediator to appear at an *in*
4 *camera* proceeding to disclose only to the court and counsel, out of public view,
5 what she would say the parties said during the mediation. At this juncture the goal
6 is to determine whether the harm that would be done to the values that underlie
7 the mediation privileges simply by ordering the mediator to participate in the *in*
8 *camera* proceedings can be justified — by the prospect that her testimony might
9 well make a singular and substantial contribution to protecting or advancing
10 competing interests of comparable or greater magnitude.

11 The trial judge reaches the second stage of balancing analysis only if the
12 product of the first stage is a decision to order the mediator to detail, *in camera*,
13 what her testimony would be. A court that orders the *in camera* disclosure gains
14 precise and reliable knowledge of what the mediator’s testimony would be — and
15 only with that knowledge is the court positioned to launch its second balancing
16 analysis. In this second stage the court is to weigh and comparatively assess (1)
17 the importance of the values and interests that would be harmed if the mediator
18 was compelled to testify (perhaps subject to a sealing or protective order, if
19 appropriate), (2) the magnitude of the harm that compelling the testimony would
20 cause to those values and interests, (3) the importance of the rights or interests
21 that would be jeopardized if the mediator’s testimony was not accessible in the
22 specific proceedings in question, and (4) how much the testimony would
23 contribute toward protecting those rights or advancing those interests — an
24 inquiry that includes, among other things, an assessment of whether there are
25 alternative sources of evidence of comparable probative value.⁴⁴³

26 Judge Brazil did not follow those exact same procedures in *Olam*, but instead
27 used ones that he considered similar in effect and no more harmful to the interests
28 underlying California’s mediation confidentiality statute. In particular, he “decided
29 not to hold a separate *in camera* proceeding in advance of the evidentiary hearing
30 to determine what the mediator’s testimony would be.”⁴⁴⁴ Rather, he began by
31 hearing testimony from other key witnesses, which convinced him that the
32 mediator’s testimony was necessary under the first stage of the balancing analysis.
33 He then took the mediator’s testimony in closed proceedings, under seal. Having
34 heard all the evidence, he decided to publicly disclose the mediator’s testimony,
35 because it was essential to doing justice in the case before him. He concluded that
36 there was “absolutely no basis” for finding that plaintiff’s attorney coerced her
37 assent to the mediated settlement.⁴⁴⁵

38 *In re Anonymous*.⁴⁴⁶ This Fourth Circuit case did not involve allegations of
39 attorney misconduct, but it is noteworthy because it provides another model for

443. *Olam*, 68 F. Supp. 2d at 1131-32.

444. *Id.* at 1126.

445. *Id.* at 1150. The California Supreme Court has narrowly limited the application of the approach that Judge Brazil used in *Olam*. See CLRC Staff Memorandum 2014-45, pp. 12-13 & cases cited therein.

446. 283 F.3d 627.

1 addressing the intersection between mediation confidentiality and competing
2 interests. In it, the court considered whether to grant a waiver from the
3 confidentiality requirement applicable to mediations conducted by Office of the
4 Circuit Mediator for that court.

5 With regard to mediation evidence generally, the Fourth Circuit decided that the
6 appropriate test for waiver was to disallow disclosure “unless the party seeking
7 such disclosure can demonstrate that ‘manifest injustice’ will result from non-
8 disclosure.”⁴⁴⁷ With regard to disclosures by the mediator, however, the court
9 established a more stringent test:

10 [T]he threshold for granting of consent to disclosures by the mediator is
11 substantially higher than that for disclosures by other participants. Thus, we will
12 consent for the Circuit Mediator to disclose confidential information only where
13 such disclosure *is mandated by manifest injustice, is indispensable to resolution of*
14 *an important subsequent dispute, and is not going to damage our mediation*
15 *program.*⁴⁴⁸

16 ***Implications of Federal Law on Mediation Confidentiality***

17 From the foregoing discussion, it is clear that many factors, beyond the content
18 of California law, may affect whether communications or other evidence from a
19 California mediation are admissible, subject to discovery, or can otherwise be
20 disclosed or used in the future. Among those factors are the following:

- 21 • Whether a person seeks disclosure in California or in some other state, and
22 which state’s law applies to the request, if any.
- 23 • Whether a person seeks disclosure in federal court as opposed to state court.
- 24 • If the evidence is sought in federal court, whether the evidence is sought in
25 connection with a federal claim as opposed to a state claim.
- 26 • If the evidence is sought in federal court in connection with a federal claim,
27 whether the case involves a federal statute that governs admissibility and
28 disclosure of mediation evidence.
- 29 • If the evidence is sought in federal court in connection with a state claim,
30 whether that claim is coupled with a federal claim, and, if so, whether the
31 evidence is relevant to the federal claim or only to the state claim.
- 32 • Whether the mediation was court-connected and is subject to a local rule
33 governing mediation confidentiality, and, if so, how that rule is interpreted.
- 34 • Whether the mediation participants entered into a contractual confidentiality
35 agreement and, if so, the terms of that agreement, whether the party seeking
36 disclosure is a party to that agreement, and whether the court considers the
37 agreement enforceable under the circumstances of the case.
- 38 • If the evidence is sought in federal court, which federal court is considering
39 the request. Different doctrines apply in different federal circuits (such as

447. *Id.* at 637.

448. *Id.* at 640 (emphasis added).

1 ***Impediments to Rigorous Scientific Testing***

2 In designing an experiment to compare two different mediation confidentiality
3 rules, it is crucial to recognize that it is impossible to mediate the same dispute
4 with the same participants under the same conditions twice, once using one rule
5 and once using another rule. As soon as a dispute is mediated the first time, the
6 conditions necessarily change. Even if the dispute remains unresolved, its
7 character and the relationships among the parties will have been influenced by the
8 first mediation: Positions may have hardened, animosities may have grown,
9 participants may have greater understanding of each others' positions, participants
10 may be more aware of strengths and weaknesses in their own cases, and the like.
11 The mediation could not simply be redone from scratch, even if the dispute were
12 simulated rather than real.⁴⁵³

13 Because it is impossible to redo the same mediation using a different
14 confidentiality rule, assessing the impact of differing confidentiality rules would
15 necessarily have to involve comparing the outcomes of mediations that differ not
16 only with regard to which rule is used, but also in other respects (such as the
17 personalities and experience of the participants, and the nature and intensity of the
18 dispute). That constraint would make it difficult to determine whether a difference
19 in outcome is attributable to the use of a different confidentiality rule, or to some
20 other difference between the mediations.⁴⁵⁴

21 By using a large sample of mediations that involve closely similar disputes,
22 similar types of participants, and closely similar conditions, and randomly
23 selecting which confidentiality rule to apply to each of the mediations, one could
24 minimize the problem just identified.⁴⁵⁵ It would be challenging, however, to
25 obtain such a sample.

453. If a simulated dispute were mediated a second time with the same participants, the participants would not be able to set aside what they had learned in the first mediation. In addition, the process of repeating the mediation, but providing different information regarding confidentiality, might draw the participants' attention to the level of confidentiality and the possibility that researchers are evaluating its effect. That might then influence their behavior and distort the results of the mediation.

454. For example, if the settlement rate of Florida mediations were 60% (a purely hypothetical figure) and the settlement rate of California mediations were 50% (also a purely hypothetical figure), the difference in settlement rates might be due to differing mediation confidentiality rules, or it might be due to any number of other factors: Differences in the types of disputes mediated in the two states, differences in the quality of the mediators, differences in cultural attitudes about reaching a compromise, differences in the demography of the disputants, differences in litigation costs, differences in usage of mandatory mediation, and so forth. There would be too many variables to determine which one (or more) of them accounts for the difference in results.

455. Under that approach, there would be two groups of mediations: (1) mediations conducted pursuant to Confidentiality Rule A and (2) mediations conducted pursuant to Confidentiality Rule B. Through the process of random selection, other differences between the groups would tend to cancel each other out and make it possible to determine with some degree of confidence that a difference between the results of the two groups was attributable to the use of differing confidentiality rules.

For example, if the same pool of mediators (with varying levels of experience, skill, and expertise) was used for all of the mediations, and every mediator conducted multiple mediations, one would expect that

1 The simplest way may be to have a court in a particular jurisdiction establish a
2 mandatory mediation program for a carefully defined set of cases.⁴⁵⁶ The
3 researchers would randomly assign a mediator from a court-selected mediator
4 pool, and randomly determine which of two mediation confidentiality rules to
5 apply to each case. Other mediation conditions would have to be kept as constant
6 as possible.⁴⁵⁷

7 Such an approach might be effective in determining the impact of a mediation
8 confidentiality rule, at least within a particular jurisdiction for a particular type of
9 case. The results would be a start in gathering empirical data, but they would not
10 tell anything about private mediations (pre-litigation or otherwise) or voluntary
11 court-connected mediations. Nor could the results be generalized to mandatory
12 court-connected mediations in other jurisdictions or to other types of cases without
13 replicating the experiment elsewhere and with other types of cases (preferably
14 numerous repetitions). That would, of course, be costly and extremely time-
15 consuming. Moreover, the expenditures would multiply dramatically if researchers
16 sought to compare several different confidentiality rules, not just two such rules.⁴⁵⁸

17 Perhaps most importantly, the type of experiment described above would
18 involve applying different mediation confidentiality rules to similarly-situated
19 litigants. That raises important fairness considerations and the specter of
20 potentially inconsistent results in future cases involving attempts to introduce or
21 obtain discovery of mediation evidence. Such concerns might even rise to the level
22 of a due process challenge.

23 There would also be related practical complications. Suppose the experiment
24 involved comparison of a jurisdiction's own mediation confidentiality rule with
25 another jurisdiction's mediation confidentiality rule. Regardless of how the
26 experiment turns out and whether the jurisdiction revises its approach to mediation
27 confidentiality as a result, the experiment would essentially involve making
28 promises to mediation participants about how their mediation communications
29 will be treated by courts within that jurisdiction in the future.

each mediator would mediate some disputes that would be randomly selected for the first group of mediations and a roughly equal number of disputes that would be selected for the second group, and thus the mediator's attributes (whatever they might be) would affect both groups roughly equally and thus would not account for a difference in the outcomes of the two groups.

456. For example, a court could establish a mandatory mediation program comprised of all car accident cases filed in a particular jurisdiction within a certain time frame that consist solely of property damage claims for \$10,000-\$15,000 in which both sides are represented by counsel.

457. For example, to eliminate variability due to mediation timing, the program could require that all of the mediations be conducted 90-120 days after the filing of the complaint.

458. As the Commission has seen during the course of this study, there are many different possible approaches to mediation confidentiality: jurisdictions vary in the scope and extent of protection for mediation communications, the existence and contours of exceptions to the general rules, who has authority to prevent disclosure and under what circumstances, waiver doctrines, treatment of the mediator, and various other aspects. Ideally, it would be possible to test the effects of all of the different approaches, but that would be prohibitive.

1 That is always the case with regard to a promise of confidentiality; it necessarily
2 is a promise regarding future treatment of the communications. But the scenario
3 contemplated here is a promise that future courts will, with regard to
4 communications made in at least half of the mediations involved in the
5 experiment, apply a mediation confidentiality rule *other than* the one that is
6 normally used in their jurisdiction. It may not be realistic and proper to expect that
7 this type of promise will be kept, perhaps many years later. If not, it might be
8 unfair to make the promise in the first place.

9 The types of concerns just described — concerns about fairness, inconsistent
10 results, due process, and binding future courts to use a mediation confidentiality
11 rule other than the one normally applied in their jurisdiction — would not arise if
12 the experiment involved mediations of simulated, rather than real, disputes. In that
13 case, however, a different problem could occur. While the same artificially-
14 constructed dispute could be used in all of the simulations, the mediation
15 participants may not be motivated to keep matters confidential in the same way or
16 to the same degree as with a real, naturally occurring dispute.⁴⁵⁹ That may make it
17 hard to learn anything useful about mediation confidentiality through simulations.

18 These are just some of the challenges that researchers would have to overcome
19 to obtain useful empirical data regarding the impact of differing confidentiality
20 rules on the use of mediation. It is thus not surprising that, to the best of the
21 Commission’s knowledge, no jurisdiction has tried an experiment like the one
22 described above.

23 Consequently, there is not much empirical information available and its import
24 is debatable. The work of Profs. Coben and Thompson is perhaps most significant.

25 *Coben and Thompson Studies*

26 As mediation increased in popularity, a number of scholars called for research
27 on mediation confidentiality. This included some scholars who supported the
28 concept,⁴⁶⁰ and a few self-described “heretics” who questioned the need for
29 providing special protection to mediation communications.⁴⁶¹

459. It is one thing, for example, to disclose impending financial ruin and infidelity to your spouse if the situation is hypothetical, and quite another to make such a disclosure if the situation is real. Likewise, attitudes regarding disclosure may vary depending on the nature of the matter disclosed (e.g., incest or rape, as opposed to cheating in a card game during a research study).

460. For example, Prof. Frank Sander (Harvard Law School), a leader of the ADR movement, said:

Perhaps the most sacred canon in mediation is the importance of mediation confidentiality....

There have been spirited scholarly debates about the importance *vel non* of confidentiality to the process, but little by way of basic data.

[T]his may be a question very difficult to explore.... While real-life experiments might be difficult to achieve, perhaps we could learn something from laboratory experiments.

Frank Sander, *Some Concluding Thoughts*, 17 Ohio St. J. on Disp. Resol. 705, 706 (2002); see also Phyllis Bernard, *Reply: Only Nixon Could Go To China: Third Thoughts on the Uniform Mediation Act*, 85 Marq. L. Rev. 113, 116 (2001) (scholars have not yet compiled sufficient empirical evidence from longitudinal studies to measure need for mediation confidentiality, mediation confidentiality should remain norm absent

1 In 2006, Profs. Coben and Thompson noted the lack of empirical data on
2 mediation generally, described some of the limitations in obtaining such data, and
3 pointed out that “one extremely large database” had been largely overlooked thus
4 far: “the reported decisions of state and federal judges forced to confront legal
5 disputes about mediation.”⁴⁶² They reported the results of a study in which they
6 examined that database.

7 Through Westlaw searches of all federal and state opinions issued between 1999
8 and 2003, they found 1,223 cases that implicated mediation issues.⁴⁶³ They
9 reviewed those cases and compiled various types of information about them.⁴⁶⁴

10 In undertaking that analysis, Profs. Coben and Thompson admitted that “a
11 written trial or appellate court decision is by no means a perfect window into the
12 world of mediation.”⁴⁶⁵ As they pointed out, “[o]nly the rare mediated dispute
13 shows up in a reported opinion.”⁴⁶⁶

14 Most mediated disputes result in a durable settlement, either during the
15 mediation or later in the litigation process. In a small, atypical fraction of the
16 cases, the dispute proceeds to trial, is resolved by a pretrial motion, or litigation
17 recommences when a settlement falls apart. Only a few of those cases result in a
18 written, publicly accessible opinion that is included in the Westlaw database;
19 many court decisions are not memorialized in such an opinion. The sample of
20 cases that Profs. Coben and Thompson examined was thus skewed, not necessarily
21 representative of mediated disputes generally, or even of mediation-related
22 litigation.⁴⁶⁷

solid evidence on question, and empirical data might never “truly answer this confidentiality question since the relevant factors may not be susceptible to quantification.”).

461. See, e.g., Charles Ehrhart, *Confidentiality, Privilege, and Rule 408: The Protection of Mediation Proceedings in Federal Court*, 60 La. L. Rev. 91, 126 (1999) (“Those favoring a [mediation] privilege would be well-served to develop relevant data.”); Scott Hughes, *A Closer Look – The Case for Mediation Confidentiality Has Not Been Made*, 5 Disp. Resol. Mag. 14, 16 (1998) (hereafter, “Hughes (1998)”) (no empirical data connects success of mediation to availability of mediation privilege; that privilege should not be created until such connection is made); see also Eric Green, *A Heretical View of the Mediation Privilege*, 2 Ohio St. J. on Disp. Resol. 1, 32 (1986) (no data shows confidentiality is essential to mediation process; dubious that researchers could collect such data).

462. James Coben & Peter Thompson, *Disputing Irony: A Systematic Look at Mediation About Litigation*, 11 Harv. Negotiation L. Rev. 43, 45-46 (2006) (hereafter, “Coben & Thompson (2006)”).

463. *Id.* at 49-50.

464. For example, they noted the jurisdiction in which case arose, the nature of the claims asserted, the type of issues addressed in the opinion, and the result of the case. See *id.* at 50.

465. *Id.* at 46.

466. *Id.* at 46-47.

467. As Profs. Coben and Thompson acknowledge, “most litigated issues about mediation are handled at the trial level, usually without any reported opinion.” *Id.* at 54. Most of the opinions in their database came from appellate courts (874), but they did find 350 trial court opinions, most of which (209) came from federal courts. *Id.*

1 Nonetheless, Profs. Coben and Thompson believed they could learn valuable
2 information from what they described as “failed” mediations (ones that resulted in
3 “the adversarial opinion that the ADR process was designed to avoid”).⁴⁶⁸ One
4 unexpected finding, for instance, was “the sheer volume of litigation about
5 mediation.”⁴⁶⁹

6 With regard to mediation confidentiality, Profs. Coben and Thompson
7 summarized their findings as follows:

8 The database contains 152 opinions where courts considered a mediation
9 confidentiality issue, including fifteen state supreme court decisions and eight
10 federal circuit court opinions. The number of cases raising confidentiality issues
11 more than doubled between 1999 and 2003, from seventeen to forty-three. In a
12 number of opinions, confidentiality issues were commonly interlinked with other
13 mediation dispute issues: enforcement (46); ethics/malpractice (21); sanctions
14 (21); fees (18); mediation-arbitration (9); and duty to mediate (8).

15 The majority of the confidentiality opinions (130) considered whether to permit
16 testimony or discovery from mediation participants. Courts upheld statutory or
17 rule limitations on availability of such evidence in fifty-seven opinions (44%),
18 upheld limitations in part in eight cases (6%), and declined to protect
19 confidentiality in sixty opinions (46%). In five cases (4%), the issue was left
20 undecided. The balance of the confidentiality decisions (22) address a range of
21 questions other than admissibility or discovery, most commonly judicial
22 disqualification or consequences for breach of confidentiality agreements.

23 While these confidentiality disputes certainly merit discussion, *the more*
24 *significant finding is the large volume of opinions in which courts considered*
25 *detailed evidence of what transpired in mediations without a confidentiality issue*
26 *being raised* — either by the parties, or sua sponte by the court. Indeed,
27 uncontested mediation disclosures occurred in thirty percent of all decisions in the
28 database, cutting across jurisdiction, level of court, underlying subject matter, and
29 litigated mediation issues. Included are forty-five opinions in which mediators
30 offered testimony, sixty-five opinions where others offered evidence about
31 mediator’s statements or actions, and 266 opinions where parties or lawyers
32 offered evidence of their own mediation communications and conduct — all
33 without objection or comment. *In sum, the walls of the mediation room are*
34 *remarkably transparent.*⁴⁷⁰

35 As the above quote makes clear, “a major surprise” from the study was how
36 often courts considered evidence of what transpired in a mediation, particularly
37 how often courts considered such evidence without any objection.⁴⁷¹ Both

468. *Id.* at 47.

469. *Id.*; see also *id.* at 143. In a five-year time-span when general civil caseloads were relatively steady or declining nationwide, there were over a thousand cases involving mediation issues, and mediation litigation increased 95% (from 172 decisions in 1999 to 335 in 2003). *Id.* at 47-48.

470. *Id.* at 57-59.

471. *Id.* at 48.

1 mediators and other mediation participants offered uncontested mediation
2 evidence on a wide range of topics.⁴⁷²

3 In the cases involving disputes over confidentiality, courts upheld confidentiality
4 restrictions about half of the time, and over 20% of such decisions were issued by
5 California courts.⁴⁷³ According to Profs. Coben and Thompson, the “level of
6 vigilance for maintaining the confidentiality of mediation discussions varie[d]
7 depending on the context of the litigation.”⁴⁷⁴

8 Profs. Coben and Thompson further found that when courts expressly refused to
9 protect mediation confidentiality, few of them engaged in “a reasoned weighing of
10 the pros and cons of compromising the mediation process.”⁴⁷⁵ Instead of balancing
11 the policy considerations at stake, the courts typically justified their decisions on
12 other grounds, such as waiver or the harmless error doctrine.⁴⁷⁶

13 Profs. Coben and Thompson continued their research after completing the
14 above-described article. A 2007 follow-up article reported the results of similar
15 research they conducted during 2004-2005, and more limited research they
16 conducted during 2006.⁴⁷⁷ In large part, the trends identified in their original
17 article continued during the follow-up period.⁴⁷⁸

18 *Other Studies*

19 In addition to the work of Profs. Coben and Thompson, the Commission found a
20 few other studies that provide some empirical information on mediation
21 confidentiality. These include:

- 22 • *Foster and Prentice Study.* In a study published in 2009, Prof. T. Noble
23 Foster and Selden Prentice⁴⁷⁹ systematically reviewed recently published
24 Washington cases and found only three in which a court admitted mediation
25 communications.⁴⁸⁰ The Washington researchers also surveyed 30 local
26 mediators, judges, and attorneys, who had handled a combined total of over

472. *Id.* at 59-61, 62-63.

473. *Id.* at 64.

474. *Id.* at 68.

475. *Id.* at 66.

476. *Id.* at 66-67.

477. James Coben & Peter Thompson, *Mediation Litigation Trends: 1999-2007*, 1 World Arbitration & Mediation Review 395 (2007) (hereafter, “Coben & Thompson (2007)”).

478. *Id.* at 397. For additional information collected by these professors, see James Coben & Peter Thompson, *Mediation Case Law Project 1999-2007 State Supreme Courts (Sorted by Subject Matter of Case)*, Mediation Case Law Summaries, Paper 4 (Aug. 11, 2008), available at http://digitalcommons.hamline.edu/dri_mclsummaries/4/; see also note 497 *infra* & accompanying text.

479. Both researchers were from Albers School of Business and Economics at Seattle University.

480. T. Noble Foster & Selden Prentice, *The Promise of Confidentiality in Mediation: Practitioners’ Perceptions*, 2009 J. Disp. Resol. 163, 166 (2009).

1 23,000 mediations (court-connected and otherwise).⁴⁸¹ Out of all those
 2 mediations, the survey respondents were only aware of 65 breaches of
 3 confidentiality (much less than 1%).⁴⁸² The Washington results thus differ
 4 sharply from what Profs. Coben and Thompson found in their nationwide
 5 research, which focused on mediations discussed in court decisions.⁴⁸³

- 6 • *Ohio Study*. In 2008, the Chief Judge of the U.S. District Court for the
 7 Southern District of Ohio sent a questionnaire to 290 lawyers that asked
 8 questions about their experiences with five different types of settlement
 9 procedures: (1) a settlement conference conducted by the judge or
 10 magistrate assigned to the case, (2) a settlement conference conducted by a
 11 judge or magistrate not assigned to the case, (3) a mediation conducted by a
 12 court staff mediator, (4) a court-connected mediation conducted by a
 13 volunteer mediator, and (5) a mediation conducted by a private, paid
 14 mediator.⁴⁸⁴ A total of 136 lawyers (47%) responded to the questionnaire.⁴⁸⁵

15 Among other things, the results showed that the lawyers “thought that
 16 parties could be much less candid with judges assigned to the case than with
 17 each of the other types of neutrals.”⁴⁸⁶ The lawyers also “thought that judges
 18 assigned to the case were much less ‘able to fully explore settlement without
 19 prejudice to ongoing litigation if the case is not settled’ than other types of
 20 neutrals.”⁴⁸⁷

21 The Ohio study also found that of the five procedural options, the
 22 lawyers thought parties could be most candid with private mediators. Court-
 23 connected mediators (court staff mediators and volunteer mediators for court
 24 programs) ranked higher than judges not assigned to the case.⁴⁸⁸ The results
 25 were similar with regard to the ability to explore settlement fully without
 26 prejudice.⁴⁸⁹

481. *Id.* at 169-70.

482. *Id.* at 170.

483. *Id.* at 171.

484. The results of the questionnaire were presented in an article by Roselle Wissler (a research director of a dispute resolution program at the law school of Arizona State University). Roselle Wissler, *Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences*, 26 Ohio St. J. on Disp. Resol. 271, 275-76 (2011) (hereafter, “Wissler (2011)”).

485. *Id.* at 275. Most of those lawyers had a substantial amount of legal experience. *Id.* at 275-76.

486. *Id.* at 284.

487. *Id.* at 285-86. According to the author, “[t]he main factor that appeared to affect whether *lawyers thought* they could candidly and fully discuss settlement with the neutral without negative consequences or prejudice to ongoing litigation was whether the neutral facilitating settlement discussions would make subsequent substantive decisions in the case and preside at the trial.” *Id.* at 286 (emphasis added). She pointed out that there were no “independent observations to show ... whether parties *were in fact* more candid in some models than others.” *Id.* at 283 (emphasis added). It seems likely, however, that if a lawyer thinks candor in a particular context could be unusually detrimental to a client, the lawyer will be less candid in that context than otherwise, and will instruct the client to do the same.

488. See *id.* at 285.

489. See *id.* at 286. The author offered several possible explanations for these results:

Finding that settlement conferences with judges not assigned to the case were rated lower on these two dimensions than all models of mediation suggests that a settlement facilitator with any

- 1 • *Disparity Between Volume of UMA Litigation and Volume of California*
2 *Litigation*. In 2011, JAMS published a short article regarding the tenth
3 anniversary of the UMA.⁴⁹⁰ The article reported that Prof. Nancy Rogers
4 (one of the reporters for the UMA) viewed “the limited amount of case law
5 surrounding” the UMA as a “sign that the UMA was well crafted.”⁴⁹¹ She
6 explained that “[b]y the end of 2009 there were only 30 reported cases and
7 there were very few where a court was confused about the privilege and its
8 application.”⁴⁹² She regarded it as “a good sign that the courts [were]
9 consistently getting it right.”⁴⁹³

10 The same article says that Prof. Coben “echoed her point, noting that
11 ‘in California there is a lot of litigation over the confidentiality statute.’”⁴⁹⁴
12 He contrasted that situation to the UMA, saying that “[p]eople just aren’t
13 litigating UMA issues.”⁴⁹⁵ He said that although “he was ‘not a proponent
14 of the UMA when it came out,’” the more he studied litigation, the more he
15 became “convinced that the approach the drafters took was the correct
16 one.”⁴⁹⁶ He expanded on that point in a more recent article he wrote
17 himself,⁴⁹⁷ which contrasts the amount of mediation confidentiality litigation
18 under the UMA with the amount of such litigation under California law
19 from 2013 to 2015.⁴⁹⁸

20 While the amount of mediation confidentiality litigation is clearly a factor to
21 consider in evaluating a confidentiality rule, another factor would be the extent to

potential decisionmaking role in the case raised concerns that information discussed during the settlement conference could affect subsequent rulings. Or perhaps lawyers thought that judges would be more likely than mediators to talk to the trial judge about the case, either because the judges would be more likely to communicate with the trial judge about other pretrial proceedings in the case or because the mediators had explicit confidentiality provisions and reporting limitations.

Id. (footnotes omitted).

490. See Justin Kelly, *The Uniform Mediation Act Turns 10 This Year*, JAMS Dispute Resolution Alert (Summer 2011).

491. *Id.* at 3 (quoting Prof. Rogers).

492. *Id.* (quoting Prof. Rogers).

493. *Id.* (quoting Prof. Rogers).

493. *Id.* (quoting Prof. Coben).

495. *Id.* (quoting Prof. Coben).

496. *Id.* (quoting Prof. Coben).

497. See James R. Coben, *My Change of Mind on the Uniform Mediation Act*, Dispute Resol. Mag. 6 (Winter 2017) (hereafter, “Coben (2017)”).

498. The article reports:

I analyzed federal and state mediation cases published on Westlaw and found that fewer than 50 cases decided as of 2012 discussed any aspect of the Uniform Mediation Act...

A similar pattern has emerged in the last three years, 2013 through 2015, with state or federal courts interpreting the UMA to resolve a dispute about confidentiality in mediation only 16 times nationwide (just 8% of all state and federal cases addressing mediation confidentiality disputes in that three-year period). By comparison, in that same three-year time frame, California state and federal courts issued more than four dozen mediation confidentiality opinions (25% of all state and federal cases addressing mediation confidentiality disputes in that three-year period).

See *id.* at 7.

1 which a rule does, or does not, chill candid mediation discussions that lead to
2 effective settlements. Unfortunately, that effect would be extremely difficult to
3 measure and quantify. To the best of the Commission’s knowledge, no such
4 empirical data is available.⁴⁹⁹

5 A number of people have commented, however, that there is no evidence that
6 enactment of the UMA has triggered a decline in the use or effectiveness of
7 mediation in a UMA jurisdiction.⁵⁰⁰ There does not seem to be any systematically
8 compiled contrary evidence either.

9 The lack of empirical data or anecdotal reports regarding negative effects of the
10 UMA is encouraging, though apparently none of the UMA jurisdictions had a
11 stricter mediation confidentiality rule in place prior to enacting the UMA.⁵⁰¹
12 Whether the same result would occur in a jurisdiction like California is thus
13 unclear.⁵⁰²

14 **Empirical Information on the Effects of Mediation**

15 Empirical data on the impact of differing mediation confidentiality rules is not
16 the only type of empirical data that might be useful in this study. For instance,
17 rules protecting mediation communications are grounded in part on the concept
18 that mediations (or at least some types of mediations) have positive effects, such
19 as cost savings and increased party satisfaction. Researchers have expended much
20 effort trying to determine whether such effects actually occur.

21 In this section of its report, the Commission first describes some of the
22 difficulties inherent in mediation research generally. The Commission then
23 discusses the results of empirical research on the benefits of mediation.

24 *Difficulties Inherent in Mediation Research Generally*

25 Like research on the impact of mediation confidentiality rules, other empirical
26 research on mediation issues involves significant challenges. The effectiveness of
27 mediation could be measured in a variety of different ways;⁵⁰³ there is no

499. The Ohio study perhaps comes closest to addressing this point.

500. See, e.g., Coben (2017), *supra* note 497, at 8 (“[T]o my knowledge not a single empirical study suggests that the UMA has triggered a decline in the use of mediation. If there are anecdotal reports, I have not heard them.”); see also First Supplement to CLRC Staff Memorandum 2016-36, Exhibit pp. 5-6 (comments of Jeff Kichaven).

501. See First Supplement to CLRC Staff Memorandum 2014-14 (comments of Casey Gillece on behalf of Uniform Law Commission).

502. It seems reasonable to predict that mediation would not entirely disappear upon enactment of a weaker mediation confidentiality rule in California. Whether there would be a less dramatic effect is less certain. Even a relatively small reduction in the percentage of cases settled through mediation could have a significant impact on court dockets and access to justice.

503. For instance, the effectiveness of a mediation could be measured by (1) whether it results in a settlement, (2) whether it results in an early settlement, which is likely to conserve judicial and litigant resources, (3) whether it results in a durable settlement, which will not unravel or result in further disputes,

1 standardized, broadly accepted, and readily administered measuring technique.⁵⁰⁴
 2 Collecting data on mediation programs and analyzing such data is also expensive,
 3 slow, time-consuming, and hard to finance when state budgets are tight and data
 4 collection would divert funds and resources away from direct provision of services
 5 to the public.⁵⁰⁵ In addition, “sound empirical data is necessarily hard to obtain
 6 given the confidential nature of most mediation.”⁵⁰⁶ In fact, it is even hard to learn
 7 how many mediations occur.⁵⁰⁷

(4) whether it results in a settlement that enhances party satisfaction, (5) some combination of the preceding means of measurement, or (6) some other method. For a list of possible factors to consider in determining whether court-connected mediation is “successful,” see Bobbi McAdoo & Nancy Welsh, *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 Nev. L.J. 399, 404-05 (2004). Regardless of which criterion is used, it is of no use in a vacuum; it must instead be compared to what would occur without the use of mediation.

504. See Gregory Jones, *Fighting Capitulation: A Research Agenda for the Future of Dispute Resolution*, 108 Penn. St. L. Rev. 277, 302 (2003) (“I have found little in the way of measurement of dispute resolution processes, with the notable exception of the ex post participant satisfaction surveys that have become so common.... Efforts at standardization and consistency in the collection and reporting of longitudinal data are desperately needed.”).

In 2003, an ABA task force developed a list of data fields the courts could use to determine what ADR data to capture. “The hope [was] that with more similar data collection across court systems, there [would] be more ability to discern the impact of ADR on the justice system as a whole.” Bobbi McAdoo, *All Rise, the Court is in Session: What Judges Say About Court-Connected Mediation*, 22 Ohio St. J. on Disp. Resol. 377, 428 n. 270 (2007) (hereafter, “McAdoo (2007)”); see also Donna Shestowsky, *Disputants’ Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 Ohio St. J. on Disp. Resol. 549, 592 n. 158 (2008). It is not clear to the Commission whether the ABA effort has had much impact; as best we can tell from extensive reading in the area, the measurement problem persists.

In California, the Judicial Council similarly prepared a model survey for trial courts to use in collecting ADR data. The Commission does not have information on how extensively the trial courts have used the model survey.

505. See, e.g., McAdoo (2007), *supra* note 504, at 430 (“In this era of severe budget constraint encompassing the fiscal environment in state and federal government, great creativity will be needed to generate effective systems to monitor and evaluate ADR programs.”); Ignazio Ruvolo, *Appellate Mediation — “Settling” the Last Frontier of ADR*, 41 San Diego L. Rev. 177, 188 n.23 (Feb.-March 2005) (“[S]ome programs have been required to limit the resources devoted to the collection of data, thereby making the process of drawing conclusions about the reasons for programmatic success somewhat more conjectural than might be desirable.”); see generally Peter Robinson, *An Empirical Study of Settlement Conference Nuts and Bolts: Settlement Judges Facilitating Communication, Compromise, and Fear*, 17 Harv. Negotiation L. Rev. 97, 102-03 (2012) (California judicial officers were surveyed on settlement practices in 2000-2004, but results were published in 2012).

Long-term follow-up (such as checking whether a settlement proves durable) is particularly prohibitive. See, e.g., Lynn Kerbeshian, *ADR: To Be Or ...?*, 70 N. Dak. L. Rev. 381, 400 (1994) (“long-term follow-up is nonexistent”).

506. Jeffrey Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 J. Disp. Resol. 247, 250 (2000); see also Jones, *supra* note 504, at 283 (“Given the importance of process integrity and confidentiality, how can we measure the performance of alternative dispute resolution programs, particularly those that are connected to our formal systems of justice?”).

507. Coben & Thompson (2006), *supra* note 462, at 45-46 (“Since many mediations are private matters, it is difficult to determine the number of mediations conducted in any jurisdiction.”); see also Jones, *supra*

1 Moreover, “[s]ome of the standard requirements of experimental design,
2 including random case selection, adequate model specification, and the control of
3 other non-specified variables, have offered significant challenges in the context of
4 actual (non-simulated) dispute resolution.”⁵⁰⁸ “Random assignment is the best way
5 to create groups that are reasonably equivalent on all known variables (e.g., age of
6 disputant, nature of relationship between the disputants, case type) as well as
7 unknown or unmeasured variables (e.g., psychological functioning of
8 disputants).”⁵⁰⁹ Despite its “greatness of value,” ADR research using random
9 assignment of actual cases has been rare.⁵¹⁰

10 Not only is data collection relating to mediation challenging, but also much care
11 is necessary in interpreting the data that do exist.⁵¹¹ Particularly common are
12 problems comparing results that may have been affected by multiple variables. As
13 Magistrate Judge Brazil explained:

14 Local legal cultures vary, as do docket profiles, court resources, docket
15 pressures, and the demography of the client and lawyer communities. The extent
16 of the development of the private ADR provider market can also vary
17 dramatically between jurisdictions — as can the level of experience and comfort
18 with various ADR tools in the local bar and among local repeat-player clients.⁵¹²

19 Key characteristics of court programs may also vary, such as “whether
20 participation in ADR is mandated by the court or is voluntary; whether the parties

note 504, at 302 (“We do not even have a good idea about how many mediations are conducted each year.”); Art Thompson, *The Use of Alternative Dispute Resolution in Civil Litigation in Kansas*, 12 Kan. J. L. & Pub. Policy 351, 354 (2003) (“much of the ADR that takes place is never reported”).

508. Jones, *supra* note 504, at 290 n. 61; see also Kerbeshian, *supra* note 505, at 399 (“The success of mediation is difficult to assess given the limitations in methodology and research design common in much of the published literature.”).

509. Shestowsky, *supra* note 504, at 608 (footnote omitted).

510. *Id.* at 609 (footnote omitted); see also Kerbeshian, *supra* note 505, at 399 (“Random assignment and use of matched samples is frequently impossible or not attempted.”); Wayne Brazil, *Should Court-Sponsored ADR Survive?*, 21 Ohio St. J. on Disp. Resol. 241, 250 (2006) (hereafter, “Brazil (2006)”) (pointing out that comparative analyses of control groups are “a very rare commodity in the world of judicial administration.”).

In part, the lack of such experimentation may be due to reluctance to treat an actual case in a manner that appears sub-optimal, simply for purposes of experimental research. For example, in discussing the pros and cons of random assignment to appellate mediation, Justice Ruvolo (California First District Court of Appeal) explained that “forcing the parties and counsel to spend time, and therefore money, mediating a hopeless case will undoubtedly engender resentment towards the court and its program.” Ruvolo, *supra* note 505, at 217.

511. See, e.g., Matthias Prause, *The Oxymoron of Measuring the Immeasurable: Potential and Challenges of Determining Mediation Developments in the U.S.*, 13 Harv. Negotiation L. Rev. 131, 134 (Winter 2008) (“[T]he availability of data might be as heterogeneous as the development of mediation throughout the country; information might be difficult to obtain due to decentralized organization and lack of coordination, and even if successfully obtained, there might be too many variables to accurately compare and contrast it.”).

512. Brazil (2006), *supra* note 510, at 243 n.2.

1 are permitted to select their own neutral; whether the parties are required to pay
2 for the neutral’s services and, if so, whether at market rates or at below-market
3 rates; and the kinds of cases that are served by the ADR program and the
4 circumstances of the parties.”⁵¹³ Consequently, Judge Brazil warned that it is
5 “*impossible to generalize reliably* because there is such a huge range of programs,
6 with major differences in setting, purpose, design, quality, and quality control, as
7 well as other variables.”⁵¹⁴

8 With that warning in mind, and appreciation for the difficulties in gathering
9 empirical data on the costs and benefits of mediation, the Commission turns now
10 to describing the available data.

11 *Results From Across the Country*

12 By the mid-1990’s, a majority of state courts and almost all federal district
13 courts had adopted mediation programs for large categories of civil cases.⁵¹⁵ Some
14 of these programs were “based on efficiency goals of being less costly — both to
15 the court system and to the individual parties — and a quicker way to a final
16 resolution”⁵¹⁶ Other programs focused on party satisfaction, looking to
17 mediation “as a means to enhance self-determination and mutual problem solving
18 by the parties in a dispute to a much greater degree than litigation.”⁵¹⁷ Proponents
19 also justified mediation programs on other grounds, such as the notion that a
20 mediated settlement was more likely to be durable than a settlement reached
21 through other means.⁵¹⁸

22 There are apparently “hundreds of studies” pertaining to these justifications.⁵¹⁹
23 The Commission does not have sufficient resources to review and analyze each of
24 those studies. Instead, the Commission assessed the general nature of the findings,
25 as summarized in the scholarly literature.

513. *Id.*

514. *Id.* at 249; see also Roselle Wissler, *Representation in Mediation: What We Know From Empirical Research*, 37 *Fordham Urb. L.J.* 419, 468 (2010) (“Mediation programs for different types of cases and in different jurisdictions differ in many ways, including the characteristics of the parties, the characteristics of the mediators, the model or style of mediation, whether mediation is voluntary or mandatory, the typical length and number of mediation sessions, and the legal context and local legal culture within which they operate.”) (hereafter, “Wissler (2010)”); Kerbeshian, *supra* note 505, at 400 (“results obtained in one jurisdiction may not generalize to another location or type of program”).

515. Sharon Press, *Court-Connected Mediation and Minorities: A Report Card*, 39 *Cap. U. L. Rev.* 819, 823 (2011) (footnote omitted).

516. *Id.*

517. *Id.*

518. See, e.g., James Alfini & Catherine McCabe, *Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law*, 54 *Ark. L. Rev.* 171, 195 (2001); Chris Guthrie & James Levin, *A “Party Satisfaction” Perspective on a Comprehensive Mediation Statute*, 13 *Ohio St. J. on Disp. Resol.* 885, 887 n.7 (1998); Kerbeshian, *supra* note 505, at 395.

519. Shestowsky, *supra* note 504, at 603.

1 In sum, looking at the empirical data from across the country on the costs and
2 benefits of mediation, the situation appears to be:

- 3 • It is unclear whether mediation results in significant cost savings, helps
4 reduce court dockets, or shortens case disposition times. Scholars generally
5 indicate that the data is mixed and inconclusive.⁵²⁰
- 6 • Empirical studies (mostly post-mediation surveys) fairly consistently show
7 that disputants like using the mediation process.⁵²¹ Whether mediation is *the*
8 *most effective* means, as opposed to *an effective* means, of promoting
9 disputant satisfaction is not definitively resolved, but mediation is clearly
10 very popular.⁵²²
- 11 • It is unclear whether mediation results in more durable or otherwise better
12 settlements than unassisted negotiations, or has other beneficial effects
13 besides what is noted above.⁵²³

520. For example, Prof. Deborah Hensler (Stanford Law School) said in 2003 that the available data on court mediation programs “indicates that they ... produce little in the way of time or cost savings.” Deborah Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Reshaping Our Legal System*, 108 Penn. State L. Rev. 165, 187-188 (2003) (hereafter, “Hensler (2003)”). In contrast, Magistrate Judge Brazil said a few years later that “*there is substantial evidentiary support – even if no unassailable empirical proof – for the view that strong court ADR programs can reduce cost and delay for significant percentages of litigants.*” Brazil (2006), *supra* note 510 at 249 (emphasis added; citing sources, while acknowledging that results are mixed).

For additional sources and further discussion of this point, see CLRC Staff Memorandum 2015-5, pp. 25-28 & sources cited therein.

521. See, e.g., McAdoo (2007), *supra* note 504, at 378 (referring to “a body of literature suggesting that parties are ‘satisfied’ with the mediation process.”); Art Thompson, *supra* note 507, at 355 (referring to Kansas data and “a number of national studies that show high levels of satisfaction among users of various forms [of ADR] and in particular mediation.”); Sander, *supra* note 460, at 706-07 (“[i]f there is any consistent finding in mediation research, it is that the participants like the process and tend to view it as fair, regardless of whether a settlement was reached.”); Guthrie & Levin, *supra* note 518, at 887 (“Parties consistently report high levels of satisfaction with mediation.”); see also Daniel & Lisa Klerman, *Inside the Caucus: An Empirical Analysis of Mediation from Within*, 12 J. Empirical Legal Stud. 686 (2015) (providing rare data on voluntary, private mediations; authors conclude that “the very high settlement rate [of mediator in study] and the fact that parties are willing to pay thousands of dollars to mediate suggest that mediation is helpful.”).

522. See, e.g., Brazil (2014), *supra* note 102, at 64 (describing multi-option ADR program in federal district court and reporting that parties very much prefer settlement-oriented alternatives like mediation and “the closer a particular process parallels the trial process the less attracted to it they are likely to be.”); Shestowsky, *supra* note 504, at 552 (“On balance, the initial research, conducted primarily in the 1970s, suggests that disputants favor adjudicative procedures (e.g., arbitration) to nonadjudicative procedures (e.g., mediation). The more recent literature tends to suggest the opposite.”); Deborah Hensler, *Suppose It’s Not True: Challenging Mediation Ideology*, 2002 J. Disp. Resol. 81, 83-84 (2002) (hereafter, “Hensler (2002)”) (“[K]nowing that litigants are ‘satisfied’ with mediation tells us little about preferences for mediation – litigants might be even more satisfied with a different procedure if it were offered to them.”).

523. Compare sources cited in *supra* note 518 (maintaining that mediated settlements are more durable than other settlements) with McAdoo (2007), *supra* note 504, at 382 (“although judges perceive better and more durable settlements, we know so little about settlements, with or without ADR, that the validity of this result is questionable.”); see also Kerbeshian, *supra* note 505, at 400 (“There is little data on long-term

1 Although scholars express differing views on what the existing empirical results
2 show, they do agree that more empirical research is needed.⁵²⁴

3 ***California Results***

4 Given the gaps and limitations in the nationwide data, especially the difficulties
5 inherent in comparing data from different jurisdictions, it seems appropriate to pay
6 particularly close attention to data from studies of mediations in California
7 jurisdictions. Such data may be the best indicator of whether the use of mediation
8 is having beneficial effects in the state today, and is therefore worth promoting in
9 the future.

10 In that regard, the Commission is fortunate to have access to the data from five
11 early mediation pilot programs established pursuant to a 1999 legislative
12 mandate.⁵²⁵ The Judicial Council’s study of those programs was carefully designed
13 to yield reliable empirical data. Although the precise program structure varied
14 from jurisdiction to jurisdiction, and not every feature was present in each
15 jurisdiction, the study involved the use of large samples (almost 8,000 mediations
16 altogether), random selection, control groups, and direct querying of both parties
17 and attorneys (as well as some inquiries of judges). The researchers analyzed the
18 results cautiously, using regression analyses and other techniques to control
19 variables as much as possible.⁵²⁶

20 The results showed that the early mediation pilot programs were successful
21 based on all of the criteria specified by the Legislature in the pilot program statute.
22 “These benefits included reductions in trial rates, case disposition time, and the
23 courts’ workload, increases in litigant satisfaction with the court’s services, and
24 decreases in litigant costs in cases that resolved at mediation in some or all of the
25 participating courts.”⁵²⁷

26 The results thus tend to support one of the premises underlying mediation
27 confidentiality: The notion that mediation is a beneficial process, which should be

compliance or noncompliance and the factors influencing both.”). For additional sources and further discussion of this point, see CLRC Staff Memorandum 2015-5, pp. 28-29 & sources cited therein.

524. See, e.g., Press, *supra* note 515, at 846, 850-51; Jones, *supra* note 504, at 282; see also Hensler (2003), *supra* note 520, at 183 n. 76 (“[T]here are no comprehensive statistics on cases that use alternative dispute resolution mechanisms in the private sector.”). For additional sources and further discussion of this point, see CLRC Staff Memorandum 2015-5, pp. 30-32 & sources cited therein.

525. See Judicial Council, *Evaluation of the Early Mediation Pilot Programs* (Feb. 27, 2004) (hereafter, “Judicial Council report”). The full report can be downloaded at http://www.courts.ca.gov/documents/empp_rept.pdf.

526. It is also noteworthy that the study collected data from five programs with certain required characteristics, and, with few exceptions, the results were similar for each of the five programs. The consistency of the results adds to their credibility, even though the test conditions were not identical in each jurisdiction.

527. Judicial Council Report, *supra* note 525, at xix.

1 encouraged and therefore governed by rules that promote its effectiveness.⁵²⁸
2 Importantly, however, the pilot program data pertains only to court-connected,
3 early mediations conducted within a certain time period, and is subject to other
4 caveats and limitations.⁵²⁹

5 Other California research reflects similarly positive results:

- 6 • *Earlier Judicial Council study.* In an earlier study, the Judicial Council
7 examined how ADR affected civil cases in Los Angeles, San Diego, and El
8 Dorado Superior Courts, as well as several municipal courts.⁵³⁰ The study
9 reported “a high level of satisfaction from the parties and attorneys
10 involved” and “found significant savings to the court system in reducing
11 motions, hearings, conferences, and trials.”⁵³¹ In addition, the study showed
12 that “the program was associated with a reduction in the trial judgment rate,
13 no change in median time to disposition, and possibly a reduction in
14 relitigation compared to trial judgments.”⁵³²
- 15 • *Appellate mediation program.* The results of a mediation program in
16 Division Two of the Fourth District Court of Appeal (commenced in 1991)
17 were also promising, leading to a two-year experimental mediation program
18 in the First District Court of Appeal (commencing in mid-1999).⁵³³ The
19 latter program used both random selection and criterion-based selection
20 techniques; participation was mandatory and the mediations occurred early
21 in the appellate process.⁵³⁴ For the 217 cases mediated during the pilot
22 period, the settlement rate was 43.3% and the time from notice of appeal to
23 resolution “was reduced from approximately fourteen months to about four
24 months”⁵³⁵ The experimental mediation program also “achieved
25 substantial savings for the parties as well as for the court, primarily by
26 assisting the parties to settle before briefing.”⁵³⁶ In addition, “evaluations by

528. Scholars have recognized that the Judicial Council study tends to support this premise. See, e.g., Shestowsky, *supra* note 504, at 560 n.37; McAdoo (2007), *supra* note 504, at 424 n.256.

529. See CLRC Staff Memorandum 2015-6, pp. 13-14. For further discussion of the early mediation pilot programs, see *id.* at 2-14 & Exhibit pp. 1-26.

530. See Art Thompson, *supra* note 507, at 363 (referring to data reported in Judicial Council publication entitled *Civil Action Mediation Act: Results of the Pilot Project* (Nov. 1996)).

531. *Id.*

532. *Id.* at 363-64.

533. See Ruvolo, *supra* note 505, at 180-89.

534. See *id.* at 184-87.

535. See *id.* at 191.

536. *Id.* at 192. More specifically,

In settled mediated cases, counsel estimated the cumulative savings of attorney’s fees and costs to exceed \$7.1 million. Per case savings in attorney fees averaged from \$45,367 for appellants to \$21,269 for respondents. Cost savings per case approached \$10,000. The investment made by even those cases that did not resolve appears to have been worth the expenditure. On average, attorney fees in nonsettled cases were \$2989 for appellants and \$2402 for respondents, covering the time devoted to the mediation process. Yet, even after the costs of unsuccessful mediations were offset, the estimated net savings to parties participating in the mediation program exceeded \$6.2 million.

1 participants of the mediation process, the mediators, and program
2 administration were generally quite positive.”⁵³⁷

3 Because the experimental program was a success, the program was made
4 permanent. Data from the permanent program, summarized in a 2005
5 publication by Justice Ignazio Ruvolo, are similarly favorable.⁵³⁸

- 6 • *San Mateo County program.* In San Mateo County Superior Court, virtually
7 100% of the ADR used in the court’s civil/probate/complex litigation
8 program from July 2007 to July 2008 was mediation, although the court
9 offered other options.⁵³⁹ The “overwhelming majority” of attorneys
10 surveyed said that ADR reduced court time.⁵⁴⁰ In addition, “85% of
11 respondents believed that costs were reduced as a result of ADR, whereas
12 15% thought that ADR increased costs.”⁵⁴¹ The court also found that
13 “[m]ost respondents, regardless of their role, felt very satisfied with the
14 process”⁵⁴² The positive results for the period from 2007-2008 were
15 consistent with earlier data from the same court; more recent data does not
16 appear to be available.⁵⁴³

17 From the data discussed above, it appears that court-connected mediation
18 programs of the types mentioned are having beneficial effects in the California
19 jurisdictions studied.

20 Unfortunately, the Commission is aware of only one study pertaining to private
21 mediations in California. That study yielded encouraging results, but it involved

Id. at 192-93.

537. *Id.* at 193. “The great majority of parties and counsel indicated they would use the process and the mediators again.” *Id.*

538. See *id.* at 194-201. Combined data from 1999-2003 showed a settlement rate of 55% in a total of approximately 500 mediations. *Id.* at 201. Based on evaluations completed by attorneys and parties, Justice Ruvolo estimated that “mediation program operations have saved the parties an estimated net savings of \$13,636,500.”

539. See Superior Court of California, County of San Mateo, *Multi-Option ADR Project Evaluation Report July 2007-July 2008* (hereafter, “San Mateo Multi-Option ADR Report”), p. 11. This report can be downloaded at http://sanmateocourt.org/documents/adr/2007_2008_evaluation_report.pdf.

540. *Id.* at 16.

541. *Id.* at 17.

542. *Id.* at 21. More specifically, the cumulative satisfaction rating for parties and attorneys was more than 4.0 on a scale of 1 to 5, with 5 being most satisfied and 4 being least satisfied. *Id.* “The highest overall satisfaction across roles was in response to the question about whether the neutral provided a safe and secure setting for the ADR session.” *Id.*

As in the early mediation pilot program, “attorneys expressed more satisfaction with the process overall than did their clients.” *Id.* This “could be due to the fact that attorneys may have more realistic expectations about the ADR process as well as a better sense of the ultimate value of the case.” *Id.* The same result occurred in a study of domestic relations mediation in Maine in 1996-97 and a study of general civil mediation in Ohio in 1998-2000. See Wissler (2010), *supra* note 484, at 437 (“parties rated the mediation process as less fair than their lawyers did ...”).

543. See San Mateo Multi-Option ADR Report, *supra* note 539, at 16; see also Shestowsky, *supra* note 504, at 565-66.

1 only one particular mediator.⁵⁴⁴ Additional information on private mediations may
2 not exist due to privacy concerns and cost constraints.

3 Given that information gap and the need for caution in generalizing from the
4 results of studies conducted under specific circumstances, it would be overly
5 strong to say there is empirical proof that mediation of all types has beneficial
6 effects in all California jurisdictions. Such strong proof rarely exists for policy
7 decisions that the Legislature must make.

8 What can perhaps be said is that the results of studies conducted in various
9 California jurisdictions at various times tend to support, rather than refute, the
10 general notion that mediation has significant positive effects. That in turn suggests
11 that the rules governing mediation, including any confidentiality requirements,
12 should be crafted to promote its effectiveness, absent other overriding policy
13 considerations.

14 **Empirical Information on Mediation Misconduct**

15 As directed by the Legislature, the Commission’s current study is focusing on
16 the relationship between mediation confidentiality and attorney malpractice and
17 other misconduct.⁵⁴⁵ Consequently, any empirical data regarding alleged
18 misconduct occurring in mediations, particularly professional misconduct, would
19 be of interest. It would also be useful to have empirical data regarding instances in
20 which evidence of professional misconduct in another setting allegedly surfaced in
21 a mediation.⁵⁴⁶

22 **Results From Across the Country**

23 From the nationwide case law discussed earlier in this report, it is clear that
24 there are occasional allegations of attorney misconduct in a mediation context.⁵⁴⁷ It
25 is less clear how often those allegations are true; the written decisions do not
26 usually reveal as much.

27 A few sources shed further light on attorney misconduct in a mediation context:

- 28 (1) A survey of Minnesota judges.
- 29 (2) The previously-mentioned studies conducted by Profs. Coben and
30 Thompson.
- 31 (3) Research on a multi-option ADR program in the federal district court for the
32 Northern District of California.

544. See *Klerman, supra* note 521.

545. 2012 Cal. Stat. res. ch. 108; see discussion of “Scope of Study” *supra*.

546. For example, a mediation communication revealing that an attorney gave erroneous advice at an earlier stage of the case.

547. See discussions of “Implementation of the UMA,” “Case Law” (under “Other States”), and “Using Mediation Evidence to Prove or Disprove Allegations of Attorney Misconduct” (under “Federal Law”) *supra*.

1 Each source is discussed in order below.

2 *Survey of Minnesota Judges.* In 2003, a survey was administered to all 287 state
3 district court judges in Minnesota.⁵⁴⁸ Of those judges, 203 responded (71%), of
4 which 172 (60%) regularly handled the types of Minnesota cases subject to ADR
5 processes.⁵⁴⁹

6 Among other things, the survey asked whether the judges had heard complaints
7 about the use of ADR under the applicable Minnesota rule. In response, 55 judges
8 said “yes,” and 48 of those judges gave qualitative comments.⁵⁵⁰

9 Of the 14 “representative complaints” that Prof. Bobbi McAdoo quoted in her
10 article reporting the survey results, only three could conceivably have involved
11 mediation misconduct.⁵⁵¹ While those results do not provide a firm sense of the
12 volume of mediation misconduct, the small number of judges who reported having
13 heard complaints that *might* have involved such misconduct at least suggests that
14 mediation misconduct is not a major problem in court-connected mediations in
15 Minnesota.

16 *Coben and Thompson Studies.* In their first study, which involved a database of
17 1,223 federal and state Westlaw opinions issued between 1999 and 2003, Profs.
18 Coben and Thompson found:

- 19 • The most frequently litigated mediation issue was an attempt to enforce a
20 mediated agreement. Enforcement issues were raised in 568 cases (46% of
21 the opinions in the 5-year database).⁵⁵²

548. McAdoo (2007), *supra* note 504, at 386.

549. *Id.*

550. *Id.* “[I]ssues of costs and time, together and separately, were noted by forty-six judges; six judges referred to problems with arbitration; and nineteen judges raised an issue that arguably could be considered a justice concern ...” *Id.*

551. Those complaints were:

- “Mediated agreement doesn’t provide sense of fair process or fair result — but rather, just a cheaper result they will live with.”
- “Mediator’s notes or others’ writings don’t accurately reflect agreement, unequal bargaining positions resulting in unfair agreements, bias of mediator.”
- “Raises cost of process — insurance industry fails to negotiate in good faith.”

Id. at 418-19.

552. Coben & Thompson (2006), *supra* note 462, at 73. Of the enforcement cases, 55 involved claims that a mediated agreement was obtained by fraud or misrepresentation. “The fraud or misrepresentation defense was successful in whole or in part in only nine cases.” *Id.* at 80.

Duress was raised as an enforcement defense in 36 opinions in the 5-year database. *Id.* at 81-82. “A mediation party was successful in claiming duress in only one of the thirty-six opinions.” *Id.* at 82.

Thirteen of the opinions in the 5-year database involved a defense of undue influence. None of those defenses was successful. *Id.* at 83-84.

There were 34 opinions that appeared to involve a claim of mutual mistake. In four of those, the court refused to enforce the mediated agreement; in two of them the case was remanded. *Id.* at 85. There were also 19 claims of unilateral mistake, none of which was successful. *Id.*

- 1 • A total of 99 opinions in the 5-year database involved issues relating to
2 ethics or malpractice in mediation. Those opinions fell into five categories:
3 (1) 34 opinions on mediator misconduct,⁵⁵³ (2) 30 opinions on lawyer
4 malpractice, (3) 19 opinions on lawyer discipline, (4) five opinions on
5 lawyer conflict of interest, and (5) 11 opinions on judicial ethics.⁵⁵⁴
- 6 • In 21 of the enforcement cases, a party argued that counsel had acted
7 without authority in agreeing to the mediated settlement.⁵⁵⁵ “This defense
8 was rarely successful.”⁵⁵⁶
- 9 • In addition to claims of lack of authority, specific acts of misconduct were
10 raised as a defense in 20 of the cases involving an attempt to enforce a
11 mediated agreement.⁵⁵⁷ Those claims “involved some variation on an
12 argument that counsel placed undue pressure on their clients to settle.”⁵⁵⁸
13 Profs. Coben and Thompson did not specify how often those claims
14 succeeded.
- 15 • Similarly, Profs. Coben and Thompson did not specify how many of the 30
16 cases involving legal malpractice claims were successful. They did give
17 details regarding several of those cases, including three in which the
18 malpractice plaintiff succeeded to some extent with regard to the issues at
19 stake in the opinion.⁵⁵⁹ Such results were apparently the exception rather
20 than the rule, because Profs. Coben and Thompson noted that claims for
21 erroneous legal advice in mediation “usually fail for inability to establish
22 causation and damages.”⁵⁶⁰
- 23 • The disciplinary proceedings against lawyers involved “a wide range of
24 alleged improper conduct.”⁵⁶¹ Profs. Coben and Thompson provided
25 examples of the alleged improper conduct, but did not specify how often the
26 allegations succeeded.⁵⁶²

553. The database contained four opinions naming mediators as defendants, none of which was successful. *Id.* at 98. Similarly, mediator misconduct was asserted as an enforcement defense “only seventeen times in five years.” *Id.* at 48. That statistic led Profs. Coben and Thompson to conclude that “[e]ither the concern about coercive mediators is unwarranted or the litigation process does not provide an appropriate forum to address this issue.” *Id.*

For further information on mediator misconduct, see CLRC Staff Memorandum 2015-5, pp. 41-45 & sources cited therein.

554. *Id.* at 89-90.

555. *Id.* at 90.

556. *Id.*

557. *Id.* at 91.

558. *Id.*

559. See *id.* at 92-93.

560. *Id.* at 93.

561. *Id.*

562. See *id.*

1 With regard to mediation misconduct, the results of the second study that Profs.
2 Coben and Thompson conducted were similar to the results of the first study.⁵⁶³ In
3 particular, they concluded that the later data was consistent with their previous
4 findings that “if there is widespread overreaching and unfairness in the thousands
5 of mediations throughout the country, *it is not showing up in great numbers in the*
6 *reported cases.*”⁵⁶⁴ The two studies also show, however, that allegations of
7 mediation misconduct occasionally occur and a few of them succeed.

8 *Northern District of California Research.* The federal district court for the
9 Northern District of California has offered a multi-option ADR program for many
10 years.⁵⁶⁵ In theory, “when litigants choose either mediation or settlement
11 conferences over ENE or arbitration they are choosing the processes whose form
12 and substance are least regulated by Court rule and in which, as a matter of formal,
13 rule-based constraints, the parties could be most exposed to ‘abuse’ by the neutral
14 or by other parties.”⁵⁶⁶ Nonetheless, “for years parties consistently have been
15 choosing the least structured and the least rule-controlled of the Court’s ADR
16 process options.”⁵⁶⁷

17 As Magistrate Judge Brazil puts it:

18 There simply is no evidence that the substantially lower level of regulation-
19 based control of mediation and judicially hosted settlement conferences engenders
20 greater fear that parties will try to take advantage, for improper purposes, of the
21 freedom and flexibility that these procedures entail. Nor is there evidence that, in
22 fact, there is a higher incidence of misbehavior by participants or neutrals in these
23 more fluid processes. The incidence of complaints about abuse of any of the
24 Court’s ADR processes is extremely small – and the complaints that do surface
25 most often are based on alleged post-process breaches (by parties, not neutrals) of
26 confidentiality rules, not on misbehavior during the events.⁵⁶⁸

27 Judge Brazil notes, however, that this result might not occur in every ADR
28 program; it could stem from special factors applicable to the program in the
29 Northern District of California.⁵⁶⁹

563. See Coben & Thompson (2007), *supra* note 477, at 404-06, 413; see also CLRC Staff Memorandum 2015-5, p. 41. In at least some jurisdictions, a confidentiality restriction or mediator immunity provision might have impeded or deterred one or more parties in pursuing a mediation misconduct claim.

564. *Id.* at 405 (emphasis added). The studies by Profs. Coben And Thompson involved a skewed sample of mediations: Ones that resulted in opinions in the Westlaw database. See discussion of “Coben and Thompson Studies” under “Empirical Information on Mediation Confidentiality” *supra*.

565. See Brazil (2014), *supra* note 102.

566. *Id.* at 53.

567. *Id.*

568. *Id.*

569. See *id.* at 54.

1 **California Results**

2 In an effort to learn more about the magnitude and nature of mediation
3 misconduct in California (particularly attorney malpractice and other attorney
4 misconduct), the Commission sought information from the State Bar.
5 Unfortunately, it appears that the State Bar has not collected any data on the
6 point.⁵⁷⁰

7 The Commission also sought such data from the Judicial Council. Although the
8 Judicial Council could not provide any data on *attorney* misconduct in the
9 mediation context, it did provide some information suggesting that *mediator*
10 misconduct in California’s court-connected mediation programs is infrequent.⁵⁷¹

11 As previously discussed, California’s court-connected mediation programs are
12 quite popular and studies consistently show high levels of satisfaction with those
13 programs.⁵⁷² From those facts, it seems reasonable to infer that there is not much
14 misconduct during such mediations, whether by attorneys, mediators, or anyone
15 else.⁵⁷³

16 Some anecdotal information tends to reinforce the conclusion that mediation
17 misconduct is relatively uncommon. The Commission has received many
18 comments to that effect,⁵⁷⁴ several of which include numerical references.⁵⁷⁵

570. See CLRC Staff Memorandum 2015-5, P. 37 & Exhibit p. 1 (comments of Saul Bercovitch on behalf of State Bar of California); see also CLRC Staff Memorandum 2016-37; CLRC Staff Memorandum 2016-30, pp. 10-11 & Exhibit pp. 22-23; CLRC Minutes (July 2016), p. 4.

571. See Cal. R. Ct. 3.865 Comment (“Complaints about mediators are relatively rare.”); Memorandum from Civil & Small Claims Advisory Committee to Members of the Judicial Council re *Alternative Dispute Resolution: Procedures for Addressing Complaints About Mediators in Court-Connected Mediation Programs for Civil Cases* (Oct. 6, 2008), at 15 (“complaints about mediators are rare and are almost always informally resolved”), 18 (“Complaints about mediators are relatively rare.”); Memorandum from Civil & Small Claims Advisory Committee to Members of the Judicial Council (Sept. 27, 2005) re *Alternative Dispute Resolution: Preserving Mediation Confidentiality in Rule 1622 Proceedings*, at 13 (volume of complaints against mediators is “perhaps 50 per year statewide” out of more than 30,000 court-program mediations per year statewide), 16 n.20 (“overall number of complaints against mediators historically received by the courts is small”). The Commission does not have access to the data supporting these statements.

572. See discussion of “California Results” under “Empirical Information on the Effects of Mediation” *supra*.

573. See generally Brazil (2014), *supra* note 102, at 53-54 (inferring low incidence of misconduct from popularity of federal district court’s mediation program and lack of complaints about it).

574. See, e.g., CLRC Staff Memorandum 2015-54, Exhibit pp. 2 (comments of Donald Proby & Coreal Riday-White on behalf of Ass’n for Dispute Resolution of Northern California), 25 (comments of Deborah Ewing), 39 (comments of Lynnette Berg Robe); First Supplement to CLRC Staff Memorandum 2015-46, Exhibit p. 15 (comments of Win Heiskala); Third Supplement to CLRC Staff Memorandum 2015-46, Exhibit p. 8 (comments of Loretta Van Der Pol & J. Felix De La Torre on behalf of Public Employment Relations Board); CLRC Staff Memorandum 2015-45, Exhibit p. 29 (comments of Jill Switzer).

575. See, e.g., First Supplement to Memorandum 2015-46, Exhibit pp. 37 (In my family law mediations, “I have witnessed very rare instances of what might be deemed malpractice. Maybe once or twice in the past six years a lawyer has espoused a position not supported by law.”) (comments of Hon. Gretchen Taylor (ret.)); CLRC Staff Memorandum 2015-45, Exhibit p. 20 (Revising mediation confidentiality

1 It would be improper to infer, however, that misconduct is nonexistent in court-
2 connected mediation programs, much less in California mediations generally.
3 There are certainly some allegations of misconduct, as reflected in the case law
4 and comments previously discussed.⁵⁷⁶ At least a few of those allegations appear
5 to have merit,⁵⁷⁷ while the validity of many allegations will never be clear.⁵⁷⁸

6 **Empirical Information on Mediation Usage**

7 At times during this study, Commissioners or others have asked how the volume
8 of mediations in California compares to the volume in other states, or other
9 questions about how California’s mediation culture differs from that in other
10 states. To some extent, such information might be helpful in attempting to assess
11 the likely impact of adopting a mediation confidentiality approach used in another
12 jurisdiction. As previously discussed, however, such data is hard to obtain.⁵⁷⁹

“should require solid evidence establishing a need Personally, I’ve never seen such a need in the 900+ mediations I have conducted in 11 years of mediation practice.”) (comments of David Karp); CLRC Staff Memorandum 2013-39, Exhibit pp. 22-23 (“I have specialized in handling professional liability cases throughout my 27-year career as a trial attorney, including hundreds of legal malpractice cases. I have acted as mediator in over 400 disputes In all the legal malpractice cases I have handled in the last 27 years, either for a party or as a mediator, I can think of only two situations where mediation confidentiality might have impaired a party’s ability to prosecute or defend a potential legal malpractice claim. Ironically, the only situation I have ever encountered where the situation was serious was a case where *the attorney* might have been precluded from defending himself against a bogus legal malpractice claim — not the other way around”) (comments of John S. Blackman) (emphasis in original), 27 (“[S]ome 90% of my mediations produce settlements. Other than the few publicized situations in the court cases, I have never encountered conduct that might lead to a malpractice case.”) (comments of Richard J. Collier).

See also CLRC Staff Memorandum 2015-46, Exhibit pp. 88 (comments of Daniel Kelly), 176 (comments of mediator Stephen Sulmeyer); First Supplement to Memorandum 2015-46, Exhibit p. 7 (comments of Hon. Susan Finlay (ret.)); Second Supplement to CLRC Staff Memorandum 2015-46, Exhibit p. 9 (comments of Robert J. Macfarlane).

576. See discussions of “*Cassel*” and “Other Decisions on the Intersection of Mediation Confidentiality and Alleged Attorney Misconduct Under California Law” *supra* & sources cited therein.

577. See, e.g., *In re Bolanos*, Case No. 12-O-12167 (Review Dep’t of State Bar Ct., filed May 18, 2015), pp. 4-8 (available at <http://www.statebarcourt.ca.gov/Portals/2/documents/opinions/Bolanos.pdf>); *In re Bolanos*, Case No. 12-O-12167-PEM (Hearing Dep’t of State Bar Ct. filed Sept. 16, 2013), n.7. See also CLRC Staff Memorandum 2016-59, Exhibit p. 52 (“I spoke recently with Mr. Cassel’s attorney, Mr. Makarem.... He pointed out that even in Mr. Cassel’s case, and even without the ability to introduce mediation communications following that Supreme Court decision, when his case went to trial the jury nevertheless returned a verdict in Mr. Cassel’s favor with regard to liability which included all issues related to mediation.”) (comments of Ron Kelly).

578. See discussion of “Other Decisions on the Intersection of Mediation Confidentiality and Alleged Attorney Misconduct Under California Law” *supra* & sources cited therein.

579. See discussion of “Difficulties Inherent in Mediation Research Generally” *supra*.

1 It is clear that mediation is well-established in California. There are many
2 mediators, lots of mediation programs, and numerous mediations.⁵⁸⁰ Nonetheless,
3 precise statistical information appears to be scarce.

580. See, e.g., <http://apps2.alameda.courts.ca.gov/adr/Default.aspx> (ADR options in Alameda County Superior Court include court mediation and private mediation; court’s ADR information packet includes contact information for three low-cost mediation services in Alameda County); <http://www.amadorcourt.org/gi-adr.aspx> (Amador County Superior Court encourages ADR in civil cases and offers court mediation as ADR option); <http://www.cc-courts.org/civil/alternative-dispute-resolution.aspx> (Amador County Superior Court says mediation is “the leading” alternative to trial); http://www.fresno.courts.ca.gov/alternative_dispute_resolution (Fresno County Superior Court implemented Case Management Conference order in 2006 that requires parties in general civil cases to participate in ADR prior to trial; court says “mediation process is commonly used for most civil case types and can provide the greatest level of flexibility for parties.”); <http://www.humboldt.courts.ca.gov/gi/adr.htm> (Humboldt County Superior Court offers Voluntary Civil Mediation Program and “[m]ost civil lawsuits are resolved without a trial.”); https://www.kern.courts.ca.gov/divisions/civil/alternative_dispute_resolution (Through Dispute Resolution Programs Act, Kern County Superior Court provides mediation services in certain cases); <http://www.mariposacourt.org/mediationpolicy.htm> (Mariposa County Superior Court has policy “to provide no-cost mediation services to litigants or potential litigants in areas of small claims, unlawful detainer, and civil harassment); http://www.mercedcourt.org/alternative_dispute_resolution.shtml (Merced County Superior Court says most civil cases are resolved without a trial; it offers Early Mediation Program for unlimited civil cases); Sheila Fell, *Spotlight on ADR – Part 1: Options With Merit*, 51 Orange County Lawyer 10 (Dec. 2009) (Orange County Superior Court mediation program “has had enormous popularity” and “success rate has been highly rewarding to the litigants, the attorneys, and the mediators”); http://www.riverside.courts.ca.gov/adr/civmed_partiescounsel.shtml (“Riverside County Superior Court offers mediation services to help parties resolve their general disputes as early in the process as appropriate.”); <https://www.saccourt.ca.gov/civil/alternative-dispute-resolution.aspx> (Sacramento County Superior Court “strongly encourages” parties in civil cases to pursue ADR; it offers mediation as one of two ADR options); <http://www.sb-court.org/Portals/0/Documents/PDF/Misc/AlternativeDisputeResolution.pdf> (In San Bernardino Superior Court, ADR “provides an opportunity for parties to receive assistance reaching a resolution in their small claims, landlord tenant, civil family law, probate case with a trained mediator” from Inland Fair Housing and Mediation Board); http://www.sdcourt.ca.gov/portal/page?_pageid=55,1555034&_dad=portal&_schema=PORTAL (San Diego County Superior Court offers mediation as ADR option; court also points out that “[p]arties may voluntarily stipulate to private mediation” and parties may “utilize mediation services offered by programs that are partially funded by the county’s Dispute Resolution Programs Act.”); <http://sfsuperiorcourt.org/divisions/civil/dispute-resolution> (San Francisco County Superior Court has policy that every noncriminal, nonjuvenile case participate in ADR; court offers variety of ADR options, including judicial mediation and Bar Association of San Francisco mediation program, which has success rate of 64% and satisfaction rate of 99%); <https://www.sjcourts.org/self-help/alternative-dispute-resolution/> (San Joaquin County Superior Court says “most civil lawsuits are resolved without a trial;” it offers mediation as one of two ADR options); <http://slocourts.net/civil/adr> (San Luis Obispo County Superior Court offers mediation as one of two ADR options); San Mateo County Superior Court, *Multi-Option ADR Project Evaluation Report: July 2007-July 2008*, pp. 7 (Of cases referred to ADR in 2007-2008, 73% participated in ADR, 10 (71 % of cases settled in ADR and another 3% partially settled), 11 (about 100% court’s ADR users chose mediation), 21 (most participants were very satisfied with court’s ADR program); Sheila Purcell, *Growing Mediation in Our Courts: Why and How One Court Made the Journey*, Cal. Cts. Review 13 (Spring 2007) (“Through its mediation programs, our court, like many others across California and throughout the country, has been able to better serve litigants by meeting their need for a different dispute resolution option.”); <http://www.scscourt.org/documents/mediation.pdf> (Santa Clara County Superior Court online slideshow says “95% of cases settle before trial,” “mediation promotes *quicker, cost-effective* settlements,” and California courts “are successfully using Mediation”);

1 It may be worth noting, however, that a decade ago Prof. Frank Sander⁵⁸¹ and
2 Matthias Prause⁵⁸² proposed the concept of a “Mediation Receptivity Index”
3 (“MRI”), a “metric to measure the extent of mediation development” in a
4 jurisdiction.⁵⁸³ They hoped that this concept would help “determine the strengths
5 and weaknesses of the various mediation communities,” so as to “improve the
6 understanding of mediation” and “be a powerful tool for its practical promotion
7 and advocacy.”⁵⁸⁴

8 Prof. Sander and Mr. Prause suggested a list of factors to use in calculating a
9 jurisdiction’s MRI, which Mr. Prause refined in a later article.⁵⁸⁵ Using his refined
10 list, Mr. Prause attempted a “first rough cut” at determining the MRI for each state
11 and the District of Columbia.⁵⁸⁶ He then put the jurisdictions into five groups
12 based on their MRI scores.⁵⁸⁷ California was in the top group, indicating that (1) it

<http://www.solano.courts.ca.gov/AlternativeDisputeResolutionADR.html> (Solano County Superior Court encourages parties to use ADR and offers mediation as ADR option); <http://sonoma.courts.ca.gov/self-help/adr> (Sonoma County Superior Court says mediation “is one of the most frequently used methods of ADR because it is informal, quick, convenient and confidential”); <https://www.stanct.org/voluntary-mediation> (Stanislaus County Superior Court says “[m]any courts successfully use mediation as a form of alternative dispute resolution;” it offers “ground-breaking” voluntary mediation program); <http://www.trinity.courts.ca.gov/civil> (Trinity County Superior Court website includes link to video inviting litigants to “please consider mediation instead of going to court” and describing advantages of mediation); See also Fam. Code § 3170 (“If it appears on the face of a petition, application, or other pleading to obtain or modify a temporary or permanent custody or visitation order that custody, visitation, or both are contested, the court shall set the contested issues for mediation.”); Cal. R. Ct. 3.221(c) (In every general civil case, plaintiff must serve copy of ADR information package on each defendant).

581. Prof. Sander (Harvard Law School emeritus) was a well-respected leader of the ADR movement.

582. Matthias Prause is a legal scholar who was mentored by Prof. Sander.

583. See Frank Sander & Matthias Prause, *Developing the MRI (Mediation Receptivity Index)*, 22 Ohio St. J. on Disp. Resol. 599 (2007).

584. *Id.* at 600-01.

585. As refined, Mr. Prause’s list included:

I. Objective MRI

A. Quantitative indicators

1. Number of community mediation centers
2. Number of companies offering mediation services
3. Number of members of ADR organizations
4. Academic Citation index

B. Infrastructure indicators

1. UMA implemented
2. State ADR Office

II. Subjective MRI

1. Survey of ADR experts

Prause, *supra* note 511, at 141-42.

586. *Id.* at 134. For each jurisdiction, Mr. Prause calculated not only an “absolute MRI” (the absolute level of mediation activity in the jurisdiction), but also a “relative MRI” (the relative level of mediation activity in relation to the population). *Id.* at 145-47, 149-50, 162.

587. See *id.* at 150-56.

1 is one of the most active states in terms of the absolute level of mediation, and (2)
2 the level of mediation is high even relative to the state’s large population.⁵⁸⁸

3 As best the Commission can tell, there has not been any follow-up work on the
4 MRI concept. It is unclear how much weight to ascribe to Mr. Prause’s “first
5 rough cut.”

6 **Conclusions Regarding Empirical Information**

7 According to the Judicial Council, California’s court system is the largest in the
8 world, with approximately 2,000 judicial officers, 19,000 court employees, and 6.8
9 million cases processed in fiscal year 2014-2015.⁵⁸⁹ Ideally, any policy choice
10 about mediation “should be informed by empirical data bearing on procedural
11 justice and other aspects of civil case dispute resolution,” and “the central
12 comparison [should] be between unaided bilateral settlement in the context of
13 litigation and such negotiation assisted by mediation.”⁵⁹⁰ It would also be valuable
14 to have data that was replicated in a number of different studies “from both the
15 laboratory and field paradigms,” so as to “obtain more clarity on the reliability and
16 generalizability of findings.”⁵⁹¹

17 Unfortunately, empirical data on mediation is difficult and costly to gather, and
18 there is much danger of comparing apples and oranges. One cannot just examine
19 what one jurisdiction is doing and assume that the same approach will have the
20 precisely same effect in another jurisdiction with a different mediation structure.⁵⁹²

21 In the Commission’s view, the empirical data discussed in this memorandum,
22 while imperfect, tends to suggest:

- 23 (1) Mediation, or at least court-connected mediation similar to the types used in
24 the California programs previously described, serves valuable purposes in
25 California.
- 26 (2) Mediation misconduct is relatively infrequent, but allegations of such
27 misconduct do occur occasionally and at least a few of those allegations
28 appear to have some merit.

29 As for the impact of differing confidentiality rules (i.e., whether one such rule is
30 better than another in promoting frank discussion and effective mediation), there

588. *Id.* at 150.

589. *2016 Court Statistics Report*, *supra* note 1, at Preface & xvii.

590. Craig McEwen & Roselle Wissler, *Finding Out If It Is True: Comparing Mediation and Negotiation Through Research*, 2002 J. Disp. Resol 131, 131 (2002).

591. Shestowsky, *supra* note 504, at 624.

592. This does not mean it is pointless to look at what is happening in other jurisdictions. From looking at Florida’s mediation practice, for instance, it is probably safe to conclude that creating a malpractice exception to California’s mediation confidentiality statute would not eliminate mediation in California. But it would be risky to assume that the effect of such an exception would be the exactly same here as in Florida (even if we knew what effect the exception had in Florida). There is no way to predict precisely what would happen to California’s mediation culture and its court system.

1 do not seem to have been any rigorously controlled experiments in this area. The
2 Commission is dubious about the feasibility of such experimentation.⁵⁹³

3 Consequently, assessing the potential impact of a particular mediation
4 confidentiality rule appears to be a decision that that the Legislature and the
5 Governor have to make without the benefit of solid empirical evidence. Many
6 other policy decisions fall into the same category.⁵⁹⁴

7 In such a situation, it seems reasonable to rely on the *commonsense* notions that
8 people will speak more freely if they are confident their words will not be used to
9 their detriment, and negotiations are more likely to succeed if the participants are
10 able to speak freely.⁵⁹⁵ Courts and legislatures across the country have made such
11 commonsense, experience-based assumptions for years in establishing provisions
12 that protect mediation confidentiality.⁵⁹⁶

13 Although commonsense suggests that policymakers should recognize the
14 *existence* of an interest in protecting mediation communications, that does not end
15 the analysis. Policymakers must further decide how much weight to place on that
16 interest and how to balance it against competing interests.

17 Given the limited availability of reliable empirical data, those determinations
18 properly depend largely on the personal values of each policymaker. The

593. See discussion of “Impediments to Rigorous Scientific Testing” *supra*.

Prof. Coben and Thompson have shown the existence of a significant number of written opinions in which mediation participants disclosed mediation communications without objection. See notes 470-78 *supra* & accompanying text. It might be a mistake, however, to put much weight on that statistic in assessing the importance of mediation confidentiality to the many thousands of mediation participants in the universe of mediations conducted in this country. Presumably, if confidentiality were important to one or more participants in a mediation, those participants would be reluctant to let the dispute become the subject of an opinion in the Westlaw database that Profs. Coben and Thompson searched. In such circumstances, it seems likely that they would try hard to settle the dispute without reaching that point.

594. For instance, it cannot be empirically proven that freedom of speech promotes sounder governmental decisions or is the best test of truth, but our federal and state constitutions nonetheless firmly protect the right to speak freely.

595. Minnesota bar groups advocated this type of approach in commenting on a draft of the UMA:

While we appreciate that there is no research demonstrating that participants in mediation would be less forthright or would refuse to participate without the assurance of confidentiality, *common sense and experience with settlement negotiations* dictates that participants in mediation feel free to be forthright, to “try on” ideas that they may later reject and to share information they might not otherwise share *without risk that their communications could be used against them*.

Letter from Jennelle Soderquist (Chair, Conflict Management & Dispute Resolution Section of Minnesota State Bar Ass’n) & Rebecca Picard (Chair, Ethics Committee of Conflict Management & Dispute Resolution Section of Minnesota State Bar Ass’n) to NCCUSL & ABA Drafting Committees on Uniform Mediation Act (Oct. 7, 1999) (emphasis added), *available from* Minnesota State Bar Ass’n.

596. See discussion of “Law of Other Jurisdictions” *supra*; see also CLRC Staff Memorandum 2015-5, p. 3 (Mediation confidentiality “is the main thrust of the Uniform Mediation Act (‘UMA’); it is established by court rule or statute in virtually every state; it is a mandatory element of the local rules governing court-connected mediations in the federal arena; it has broad (but not unanimous) support in the academic community; and it is considered essential for effective mediation by numerous mediators, attorneys, and judges throughout the country.”) (footnotes omitted).

1 Commission’s tentative recommendation, presented in Parts II and III of this
2 report, reflects the collective assessment of its members regarding the best means
3 of balancing the competing interests at stake in this study.⁵⁹⁷

4 Scholarly Views

5 In this study, the Legislature specifically directed the Commission to consider
6 “scholarly commentary.”⁵⁹⁸ Consistent with that directive, numerous references to
7 scholarly commentary appear throughout this tentative report. This section of the
8 report focuses specifically on scholarly commentary.

9 The volume of scholarly commentary potentially relevant to this study is vast. It
10 would be prohibitively time-consuming to review and summarize all of it. The
11 discussion below briefly describes the material that seems most likely to be of
12 interest.⁵⁹⁹ It is organized as follows:

- 13 (1) Scholarly views on protection of mediation communications in general.
- 14 (2) Scholarly views on use of mediation communications to prove or disprove a
15 misconduct claim.
- 16 (3) Scholarly views on use of mediation communications to challenge a
17 mediated settlement agreement.
- 18 (4) Scholarly views on *in camera* proceedings relating to mediation evidence.
- 19 (5) Scholarly views on informing mediation participants about the extent of
20 protection for mediation communications
- 21 (6) Scholarly views on other means of addressing mediation misconduct.

22 **Scholarly Views on Protection of Mediation Communications in General**

23 The prevailing scholarly view is that mediation communications need special
24 protection to some degree.⁶⁰⁰ A few scholars disagree.⁶⁰¹ There is much
25 commentary on this subject and it does not seem necessary to repeat it here.⁶⁰²

597. For further discussion of empirical information relevant to this study, see CLRC Staff Memoranda 2015-5 and 2015-6.

The Commission considered the possibilities of (1) conducting some empirical research before commencing this study (or enlisting a knowledgeable person to do so) and/or (2) calling for some empirical research in its proposed legislation. The Commission decided not to pursue either of those options; it was not convinced that such efforts would be advisable given the costs and difficulties of designing and conducting a good empirical study. See CLRC Minutes (Aug. 2013), p. 3; CLRC Minutes (July 2016), p. 4; CLRC Minutes (Dec. 2016), p. 7. The Commission remains open to suggestions regarding empirical work.

598. 2012 Cal. Stat. res. ch. 108.

599. For further information on scholarly commentary relevant to this study, see CLRC Staff Memoranda 2015-23 and 2015-35.

600. See, e.g., Cole, *supra* note 5, at 426-28; Bernard, *supra* note 460, at 118-19; Deason (2001, re quest for uniformity), *supra* note 70, at 80-84; Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 B.Y.U. L. Rev. 715, 722-23 (1997); Kirtley, *The Mediation Privilege’s Transition from Theory to Implementation: Designing a Mediation Privilege Standard to*

1 Some scholars stress the importance of providing *predictable* protection for
 2 mediation communications.⁶⁰³ They emphasize that before a mediation participant
 3 discloses sensitive information, the participant should be able to reliably determine
 4 whether the information could later be used against the participant.⁶⁰⁴

5 Most scholars believe, however, that the protection for mediation
 6 communications should not be absolute.⁶⁰⁵ They generally agree that the protection
 7 should be more nuanced; it should be subject to some limitations.⁶⁰⁶ For example,
 8 a frequently-cited article says:

Protect Mediation Participants, the Process and the Public Interest, J. Disp. Resol. 1, 8-10 (1995); see also Harvard Note, *supra* note 49, at 444-46.

601. See, e.g., J. Brad Reich, *Call for Intellectual Honesty: A Response to the Uniform Mediation Act's Privilege Against Disclosure*, 2001 J. Disp. Resol. 1 (2001); Hughes (1998), *supra* note 461; Kevin Gibson, *Confidentiality in Mediation: A Moral Reassessment*, 1 J. Disp. Resol. 25 (1992); Green, *supra* note 461.

602. For discussion of arguments on both sides, see CLRC Staff Memorandum 2015-23 & sources cited therein. See also discussion of “Key Policy Underlying Mediation Confidentiality” *supra*.

603. See, e.g., Charles Ehrhardt, *Confidentiality, Privilege and Rule 408: The Protection of Mediation Proceedings in Federal Court*, 60 La. L. Rev. 91, 121-22 (1999) ([m]aking confidentiality contingent upon a judge’s subsequent evaluation of the relative importance of the competing interests’ would eviscerate the effectiveness of the privilege”); Kirtley, *supra* note 600, at 52 (“[c]ertainty of application is a critically important characteristic for mediation privilege provisions.”).

604. See, e.g., Deason (2001, re request for uniformity), *supra* note 70, at 84-85 (“In mediation, as in other settings in which privileges encourage communications, protection for those communications must be predictable if confidentiality is to have its intended effect. To optimize communication among mediation participants and provide a foundation for their perception of the mediator’s ... neutrality, the benefits of confidentiality must be effective *ex ante*, during the mediation process, and prior to any dispute over the scope of confidentiality.”) (footnotes omitted); see also Ehrhardt, *supra* note 461, at 121-22.

605. See, e.g., Reuben, *supra* note 292, at 114 (“the simple ‘mediation is confidential’ statutes found in some state statutes and court rules ... are seductive in their simplicity, [but] they are deceptive in that they raise more questions than they answer, promise much more than they deliver, and in the end contribute little to the reliability of mediation confidentiality.”); Ehrhardt, *supra* note 461, at 124 (“Just as exceptions are recognized in limited situations to the attorney-client and psychotherapist-patient privileges, exceptions should be recognized to a mediation privilege when social policy outweighs the need for the privilege.”); Gibson, *supra* note 601, at 2 (“[F]or mediation to be effective some degree of confidentiality may be required, but it is wrong to assume that mediation needs *absolute* confidentiality.”) (emphasis in original); Green, *supra* note 461, at 11 (an absolute privilege would result in “tremendous harm” due to “the public perception that a mediation that takes place behind a curtain of confidentiality may produce unfair results.”); see also Harvard Note, *supra* note 49, at 452 (“Recent legislative enactments in several states have provided near-absolute protection for communications made in mediation, whether among the parties or with the mediator. Though this approach creates a straightforward rule suitable to an informal process, it is an overreaction to the shortcomings of evidentiary rules and contractual arrangements.”) (footnotes omitted).

606. See, e.g., Cole, *supra* note 5, at 1423, 1432, 1446-47, 1448-49, 1454 (emphasizing need for clearly drafted exceptions to mediation confidentiality statute, instead of providing absolute protection); Michael Perino, *Drafting Mediation Privileges: Lessons from the Civil Justice Reform Act*, 26 Seton Hall L. Rev. 1, 15 (1995) (Alternatives to an absolute privilege are (1) “a flexible privilege that gives courts wide discretion to qualify the privilege on a case-by-case basis,” and (2) “a broad confidentiality rule with specific exceptions,” but “[t]he better solution is to combine these two approaches.”); but see Green, *supra*

1 A confidentiality provision can be crafted with appropriate exceptions and
2 flexibility to mitigate the disutilities of a blanket privilege. Professor Green,
3 among others, says it is difficult to draft a statute. We agree. However, this
4 difficulty does not override the need for a privilege where mediation is so vital to
5 the effective functioning of our dispute settlement system and confidentiality is so
6 important to mediation.⁶⁰⁷

7 The concept of a nuanced privilege is to some extent inconsistent with the
8 concept of a predictable privilege. Prof. Ellen Deason⁶⁰⁸ acknowledged this
9 tension, explaining that an “adequate level of predictability requires, at a
10 minimum, knowledge of *the boundaries at which uncertainty begins* for
11 confidentiality.”⁶⁰⁹

12 **Scholarly Views on Use of Mediation Communications to Prove or Disprove a Misconduct** 13 **Claim**

14 Because this study is directed to “the relationship under current law between
15 mediation confidentiality and attorney malpractice and other misconduct,”⁶¹⁰ it is
16 important to consider what scholars have said about using mediation
17 communications to prove or disprove alleged misconduct. The Commission first
18 describes scholarly views on this matter generally, focusing primarily on
19 professional misconduct. Next, the Commission specifically examines scholarly
20 views on the UMA and California approaches to this matter.

21 **General View**

22 As Prof. Alan Kirtley put it, “[t]he mediation privilege should not provide a safe
23 haven for participant wrongdoing or injustice.”⁶¹¹ Consistent with that sentiment,
24 the academic community seems to generally agree that a mediation privilege or
25 other provision protecting mediation communications should be subject to one or
26 more exceptions or limitations to facilitate resolution of misconduct claims.⁶¹²

note 461, at 30 (mediation privilege should not be absolute but it would be prohibitively difficult and dangerous to draft less-than-absolute privilege, so there should not be any mediation privilege).

607. Lawrence Freedman & Michael Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 J. Disp. Resol. 37, 43 (1986).

608. Prof. Deason is currently on the faculty at Ohio State University Moritz College of Law. When she wrote the quoted article, she was a professor at the University of Illinois College of Law.

609. Deason (2001, re quest for uniformity), *supra* note 70, at 85 (emphasis added).

610. 2012 Cal. Stat. res. ch. 108.

611. Kirtley, *supra* note 600, at 49.

612. See, e.g., Kirtley, *supra* note 600, at 49 (“a clear-cut exception to the privilege for mediator malpractice is appropriate.”); Freedman & Prigoff, *supra* note 607, at 43 (“[e]xceptions mandating use of confidential information in actions against the mediator would assure redress against abuses of the process.”); see also Harvard Note, *supra* note 49, at 452 (there should be exception “guard[ing] against abuse of the mediation process,” which “allows confidentiality to be pierced when a party brings suit alleging the breach of a duty owed by another party or the mediator in the course of mediation.”).

1 Scholarly commentary taking a contrary viewpoint (arguing against the need for
2 such constraints on mediation confidentiality) appears to be scarce.⁶¹³

3 In expressing these views, commentators sometimes speak of several different
4 types of misconduct collectively, rather than differentiating between attorney
5 misconduct, mediator misconduct, other types of professional misconduct, and
6 misconduct by parties or other laypersons. In addition, it is not always clear
7 whether the comments pertain only to misconduct during mediation, or are also
8 meant to encompass the use of mediation communications to prove or disprove
9 other misconduct.

10 There are, however, a number of sources that focus specifically on attorney
11 misconduct. For example, Prof. Deason wrote:

12 [D]espite th[e] evidence that confidentiality in mediation is accepted wisdom,
13 confidentiality is, and should be, controversial. It can hinder accurate decision
14 making by excluding salient information. It can run counter to democratic
15 principles of transparency and participation in public processes. In the context of
16 mediation, confidentiality may conflict with other important values that are served
17 by reporting certain mediation conduct or statements. [For example], *disclosures*
18 *may be important in preventing or punishing ... attorney misconduct* These
19 competing values mean that the appropriate scope of confidentiality is not a
20 matter of absolute protection or absolute disclosure. It is instead *a matter of*
21 *balance between protection and disclosure that requires difficult policy*
22 *choices.*⁶¹⁴

23 Along similar lines, Prof. Charles Ehrhardt⁶¹⁵ noted that if a mediator observes
24 attorney misconduct, “a strong argument exists that the privilege should not extend
25 to prohibit testimony concerning [the] misconduct.”⁶¹⁶ In the same vein, Prof.
26 Pamela Kentra⁶¹⁷ argued that mediation confidentiality should at times yield to
27 facilitate proof of attorney misconduct.⁶¹⁸

613. However, most scholars advise against creating a mediation confidentiality exception for evidence that a person failed to participate in a court-ordered mediation in “good-faith.” See CLRC Staff Memorandum 2015-35, pp. 26-28 & sources cited therein; see also *supra* note 22.

614. Ellen Deason, *Secrecy and Transparency in Dispute Resolution: The Need for Trust as a Justification for Confidentiality in Mediation: A Cross-Disciplinary Approach*, 54 Kan. L. Rev. 1387, 1388 (2006) (hereafter, “Deason (2006)”) (emphasis added, footnotes omitted).

615. When he wrote the quoted article, Prof. Ehrhardt was on the faculty of Florida State University School of Law. He is now a professor emeritus there.

616. Ehrhardt, *supra* note 461, at 123 n.145. Prof. Ehrhardt also advocated creation of a mediation confidentiality exception covering mediator misconduct. See *id.* at 123 & n.145.

617. Prof. Kentra is on the faculty of Chicago-Kent College of Law.

618. See Kentra, *supra* note 600, at 717-18, 753-54. Prof. Kentra focused on how to handle a clash between (1) a mediation confidentiality requirement and (2) a professional responsibility rule that requires an attorney to report a fellow attorney’s misconduct. She concluded that “mediation confidentiality statutes, local rules, and mediation program rules should contain an exception for reporting attorney misconduct.” *Id.* at 754.

1 Aside from Prof. Deason’s quote, the commentary discussed in this section all
2 predates the approval of the UMA in 2001. Later commentary is similar in tenor,
3 but tends to focus on the UMA provisions, California’s approach, or the laws of
4 other jurisdictions.

5 ***Views on the UMA Approach to Allegations of Professional Misconduct***

6 The academic community was extensively involved in drafting the UMA.⁶¹⁹ As
7 one might expect, the academic community did not, and does not, speak with one
8 voice regarding it.⁶²⁰ For the most part, however, academic debate has
9 concentrated on details of the UMA, and there appears to be fairly widespread, if a
10 bit grudging, support of the general concept.⁶²¹

11 As previously discussed, the UMA privilege is subject to an exception for
12 evidence bearing on professional misconduct (including attorney misconduct).⁶²²
13 That provision precludes a court from compelling a mediator to testify in
14 connection with a professional misconduct claim (other than a claim against the
15 mediator).⁶²³ Some scholars have questioned whether it is appropriate to provide

For a student publication arguing that the need for mediation confidentiality outweighs the policy interest in attorney accountability in resolving a clash between a mediation confidentiality rule and a professional responsibility rule requiring an attorney to report a fellow attorney’s misconduct, see Cletus Hess, Comment, *To Disclose or Not to Disclose: The Relationship Between Confidentiality in Mediation and the Model Rules of Professional Conduct*, 95 Dick. L. Rev. 601, 623-24 (1991).

Such a situation should not arise in California, because California has a self-reporting system for its attorneys, not a rule that requires an attorney to report a fellow attorney’s misconduct. See Bus. & Prof. Code § 6068(o).

619. The reporters for the UMA were Prof. Nancy Rogers (Ohio State University, Michael E. Moritz College of Law) and Prof. Richard Reuben (University of Missouri — Columbia School of Law), and the drafting committee included several other law professors, perhaps most notably Prof. Sander.

620. For sharp criticism of the UMA, see Scott Hughes, *The Uniform Mediation Act: To the Spoiled Go the Privileges*, 85 Marq. L. Rev. 9, 77 (2001) (hereafter, “Hughes (2001)”) (UMA “demonstrate[s] favoritism for mediators and may result in damage to the integrity of the process.”); Shannon (2000), *supra* note 395, at 109 (Texas ADR Act “is vastly superior to the pending draft of the UMA.”).

621. See, e.g., Coben (2017), *supra* note 497, at 6 (“[T]he Uniform Mediation Act was — and is — a great idea.”); Maureen Laflin, *The Mediator as Fugu Chef: Preserving Protections Without Poisoning the Process*, 49 S. Tex. L. Rev. 943, 983 (2008) (“The UMA, the product of five years of research and debate, is a major step forward for the mediation community.”); Eric van Ginkel, *Another Look at Mediation Confidentiality: Does It Serve Its Intended Purpose*, 32 Alternatives to the High Cost of Litig. 119, 121 (2014) (hereafter, “van Ginkel (2014)”) (“The UMA Is Very Good, But Not Perfect”); Bernard, *supra* note 460, at 145 (“Despite long-standing apprehensions, this author was able to lend tentative support to the UMA, a sign of hope for the future.”); see also Reuben, *supra* note 292, at 100 (UMA has support of “many if not most leading dispute scholars”).

622. See UMA § 6(a)(6). The UMA includes a separate exception addressing allegations of mediator misconduct. For discussion of these exceptions, see discussion of “UMA Exceptions for Professional Misconduct and Mediator Misconduct” *supra*.

623. See UMA § 6(a)(6) & (c) & Comment.

1 special treatment to mediator testimony, as opposed to compelling the mediator to
2 testify just like any other witness.⁶²⁴

3 There was also debate during the UMA drafting process about whether the
4 professional misconduct provision should be subject to the “gateway test” used for
5 some of the other UMA exceptions.⁶²⁵ In the end, the UMA drafters determined
6 that such a “gateway test” was not necessary for professional misconduct, because
7 “in these narrow circumstances, society’s interest in the information clearly
8 outweighs its interest in barring the admissibility of mediation communications
9 evidence, and if applicable, should not require an additional judicial determination
10 before the mediation communication may be received into evidence.”⁶²⁶

11 Although legal scholars have expressed differences of opinion on details such as
12 the ones described above, they seem to widely agree with the UMA’s inclusion of
13 an exception for professional misconduct.⁶²⁷ Two years after the UMA was
14 approved, for example, one of the UMA reporters wrote that “the list of UMA
15 privilege exceptions have been substantially uncontroversial.”⁶²⁸

624. Compare Rebecca Hiers, *Navigating Mediation’s Uncharted Waters*, 57 Rutgers L. Rev. 531 (2005) (noting that UMA includes exception allowing person to report attorney misconduct, but its language “is, unfortunately, somewhat convoluted”; it “apparently would allow parties, attorneys and non-party participants both to report and to testify regarding professional misconduct, but would exempt mediators from being compelled to testify in such a case.”) with van Ginkel (2014), *supra* note 621, at 122 (“I am in favor of retaining the exclusion of mediator testimony in cases alleging malpractice ...”).

625. The “gateway test” (used in UMA § 6(b)) permits a court to use mediation evidence only if the court first conducts an *in camera* hearing and then finds that “the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in a specified type of proceeding.

626. Reuben, *supra* note 292, at 122; see also *id.* at 121 (UMA exceptions not subject to gateway test represent “situations in which the justice system’s need for the evidence may be said to categorically outweigh its interest in the confidentiality of mediation communications such that it would be either unnecessary or impractical for the parties, and administratively inefficient for the court system to hold a full evidentiary hearing on the applicability of the exception.”).

627. See, e.g., van Ginkel (2014), *supra* note 621, at 122 (approvingly noting that UMA drafters “realized that the need for confidentiality does not apply to situations where either an attorney or the mediator himself is accused of malpractice ...”); Cole, *supra* note 5, at 1448-49 (urging jurisdictions to “draft a clear statute that provides exceptions to mediation confidentiality for important public policy reasons,” and referring to UMA as good example because its exceptions “are particularly helpful to courts charged with disciplining attorneys and parties who misuse mediation communications.”); Hiers, *supra* note 624, at 578 (encouraging lawmakers to address misconduct more directly: “Proactive jurisdictions may choose to address specific types of issues, such as ... explicitly permitting disclosure of professional misconduct.”); John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 U.C.L.A. L. Rev. 69, 139 (2002) (observing that UMA exception for professional misconduct serves as “[a]nother protection against misrepresentations” in mediation).

628. Reuben, *supra* note 292, at 121.

1 **Views on California’s Approach to Allegations of Professional Misconduct**

2 As previously discussed, California’s main statute on mediation confidentiality
3 (Evidence Code Sections 1115-1128) does not have an exception for attorney
4 misconduct, mediator misconduct, or professional misconduct generally.⁶²⁹ The
5 statute is, however, subject to another limitation: Its protection against
6 admissibility or disclosure of a mediation communication applies only in an
7 “arbitration, administrative adjudication, civil action, or other *noncriminal*
8 proceeding.”⁶³⁰ The statute does not provide any protection if mediation evidence
9 is sought in a criminal case;⁶³¹ it differs from the UMA in this respect.⁶³² The idea
10 is to draw a bright-line, relatively predictable distinction between misconduct
11 warranting criminal prosecution and other allegations of misconduct.

12 Consistent with their generally favorable view of the UMA’s approach to
13 professional misconduct, scholars have been critical of California’s very different
14 approach.⁶³³ For example, Prof. Nancy Welsh⁶³⁴ voiced concern about the
15 “extreme position” California has taken with regard to mediation confidentiality,
16 under which “mediation is sometimes being used inappropriately; to shield
17 lawyers from potential claims of malpractice”⁶³⁵

18 **Scholarly Views on Use of Mediation Communications to Challenge a Mediated Settlement**
19 **Agreement**

20 The issue of whether to create a mediation confidentiality exception to facilitate
21 resolution of a misconduct claim (for example, a legal malpractice claim or a State

629. See discussion of “California Law on Mediation Confidentiality” *supra*.

630. Evid. Code § 1119(a)-(b) (emphasis added).

631. In *Cassel*, for example, the Court said:

[B]y their plain terms, section 1119, subdivisions (a) and (b), protect mediation-related communications from disclosure and admissibility only in “arbitration[s], administrative adjudication[s], civil action[s] [and] other *noncriminal* proceeding[s]” Thus, we note, these statutes would afford no protection to an attorney who is *criminally prosecuted* for fraud on the basis of mediation-related oral communications.

51 Cal. 4th at 135 n.11, *quoting* Evid. Code § 1119 (emphasis in *Cassel*).

632. The UMA protects mediation evidence in some criminal cases under specified circumstances See UMA §§ 4, 6(b)(1) & Comments. For discussion of scholarly views on the intersection of mediation confidentiality and criminal conduct, see CLRC Staff Memorandum 2015-35, pp. 32-34.

633. See, e.g., van Ginkel (2014), *supra* note 621, at 121 (people “can criticize the drafters of the UMA for not going far enough with the exceptions it provides, but compared to the California statute we are approaching Nirvana); Cole, *supra* note 5, at 1456 (“California decisions demonstrate the problem of going too far with a prohibition on use of mediation communications.”); see also Brand, *supra* note 102, at 403 (“California should adopt ... exception and permit the admission of mediation-related evidence.... The admission of such evidence will allow victims of mediation-related legal malpractice to finally have recourse against attorneys who engage in such malpractice.”).

634. Prof. Welsh is on the faculty at Penn State University, Dickinson School of Law.

635. Nancy Welsh, *Musings on Mediation, Kleenex, and (Smudged) White Hats*, 33 U. La Verne L. Rev. 5, 17, 18 (2011) (hereafter, “Welsh (2011)”).

1 Bar disciplinary proceeding) is distinct from, but closely related to, the issue of
2 whether to create a mediation confidentiality exception when a party seeks
3 rescission or reformation of, or asserts a traditional contract defense such as fraud
4 or duress to, a mediated settlement agreement. The first type of exception
5 (discussed in the preceding section of this report) would allow a person to seek
6 redress for misconduct, without undoing any settlement that participants may have
7 reached in mediation. The second type of exception would allow an attack on a
8 mediated settlement agreement; it might disrupt the finality of the mediation
9 result.

10 There is considerable scholarly support for creating the second type of
11 exception,⁶³⁶ but it is “more controversial” than the first type.⁶³⁷ California does
12 not have such an exception⁶³⁸ and some scholars have criticized its approach to
13 this matter.⁶³⁹

14 **Scholarly Views on *In Camera* Proceedings Relating to Mediation Evidence**

15 An *in camera* proceeding is one that the court conducts in private, either by (1)
16 holding it in the judge’s chambers or other private location or (2) excluding all
17 spectators from the courtroom.⁶⁴⁰ If confidential information is disclosed in such a
18 proceeding, the degree of intrusion on the interest in confidentiality is less than if
19 the proceeding were held in public, because the information is shared with fewer
20 people.⁶⁴¹ Courts have also made clear that disclosing evidence at an *in camera*

636. See, e.g., Ellen Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides With Confidentiality*, 35 U.C. Davis L. Rev. 33, 89-91, 102 (2001) (hereafter, “Deason (2001, re contract law)”); Hughes (2001), *supra* note 620, at 38-63, 66, 77; Kirtley, *supra* note 600, at 51-52; see also Harvard Note, *supra* note 49, at 452-53.

637. Hughes (2001), *supra* note 620, at 38-39; see also Reuben, *supra* note 292, at 121-22.

638. See discussion of “California Law on Mediation Confidentiality” *supra*.

639. See, e.g., van Ginkel (2014), *supra* note 621, at 122; Eric van Ginkel, *Mediation Under National Law: United States of America*, IBA Legal Prac. Div. Mediation Comm. Newsletter 43, 51 (Aug. 2005); Peter Robinson, *Centuries of Contract Common Law Can’t Be All Wrong: Why the UMA’s Exception to Mediation Confidentiality in Enforcement Proceedings Should be Embraced and Broadened*, 2003 J. Disp. Resol. 135, 137-68 (2003).

For further discussion of scholarly views on this type of exception, see CLRC Staff Memorandum 2015-35, pp. 19-26. See also discussions of (1) “UMA Exception Relating to the Validity and Enforceability of a Mediated Settlement Agreement” *supra*, (2) “Case Law” under “Other States” *supra* (particularly the part on “[c]ases that seek to undo mediated settlement agreements”), and (3) “No Undoing Settlements” *infra*.

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

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

1 proceeding is not a forfeiture of secrecy, a breach of a promise of confidentiality,
2 or a waiver of any applicable privilege.⁶⁴²

3 *In camera* proceedings can take many different forms, involving a variety of
4 different procedural techniques. The concept allows for considerable flexibility.⁶⁴³

5 A number of rules, statutes, and judicial doctrines require a court to conduct an
6 *in camera* hearing when a party seeks to use mediation evidence.⁶⁴⁴ For instance,
7 Magistrate Judge Brazil followed such an approach in *Olam*,⁶⁴⁵ and the UMA calls
8 for an *in camera* hearing when a party seeks or proffers mediation evidence in
9 connection with a challenge to the enforcement of a mediated settlement
10 agreement.⁶⁴⁶

11 There is considerable scholarly support for the concept of conducting an *in*
12 *camera* hearing to assess the admissibility and discoverability of mediation
13 evidence, at least in certain contexts.⁶⁴⁷ As Prof. Deason noted, “in camera
14 methods ... can protect confidentiality while a court evaluates the need for
15 mediation confidentiality”⁶⁴⁸ Importantly, however, not all commentators view
16 this type of approach favorably.⁶⁴⁹

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

643. See Amelia Green, *Mediation Confidentiality and Attorney Malpractice: The Potential for the Use of In Camera Proceedings to Balance Confidentiality with Accountability* (Feb. 2, 2015), p. 9 (reproduced in CLRC Staff Memorandum 2015-13, Exhibit p. 9); see also CLRC Staff Memorandum 2015-55, pp. 5-6 & sources cited therein.

644. See CLRC Staff Memorandum 2016-28 & sources cited therein.

645. See 68 F. Supp. 2d at 1126-27, 1131-32. *Olam* is discussed in “Using Mediation Evidence to Prove or Disprove Allegations of Attorney Misconduct” under “Federal Law” *supra*.

646. See UMA § 6(b)(2) & Comment. The UMA also calls for an *in camera* hearing when a party seeks or proffers mediation evidence in a felony case (or, in some jurisdictions, a misdemeanor case). See UMA § 6(b)(1) & Comment.

647. Several scholars have voiced support for having a court conduct an *in camera* hearing when a party seeks or proffers mediation evidence in connection with a challenge to the enforcement of a mediated settlement agreement. See Hiers, *supra* note 624, at 578; Deason (2001, re contract law), *supra* note 636, at 102; Hughes (2001), *supra* note 620, at 77; Kirtley, *supra* note 600, at 51-52; see also Brand, *supra* note 102, at 396.

Other scholars have proposed an *in camera* approach in crafting a mediation confidentiality exception that addresses an alleged failure to mediate in good faith. See, Weston, *supra* note 311, at 78; see also Samara Zimmerman, Note, *Judges Gone Wild: Why Breaking the Mediation Confidentiality Privilege for Acting in “Bad Faith” Should be Reevaluated in Court-Ordered Mandatory Mediation*, 11 *Cardozo J. Conflict Resol.* 353, 382 (2009).

Some scholars have suggested conducting *in camera* hearings in connection with other mediation confidentiality issues. See, e.g., Cole, *supra* note 5, at 1456.

648. Deason (2001, re contract law), *supra* note 636, at 102.

649. *Id.* at 101 & sources cited therein.

1 **Scholarly Views on Informing Mediation Participants About the Extent of Protection for**
2 **Mediation Communications**

3 In addition to expressing views on the extent to which mediation
4 communications should be kept confidential or otherwise protected, scholars have
5 commented on a related matter: What a mediator or attorney should tell
6 prospective mediation parties about how much protection their mediation
7 communications will receive.

8 On this topic, the scholarly commentary appears to be unanimous. The articles
9 that touch on it all emphasize the importance of being up-front and honest with
10 prospective mediation parties by accurately informing them, before a mediation
11 begins, about the extent of protection that their mediation communications will
12 receive.⁶⁵⁰

13 For the most part, the literature stresses that mediators and attorneys should
14 forthrightly acknowledge the existence of *weaknesses* in the protection of
15 mediation communications.⁶⁵¹ For instance, Prof. Maureen Laflin⁶⁵² expressly
16 noted that such disclosures might inhibit candor, but she nonetheless urged
17 mediators to make them.⁶⁵³

18 The academic literature does not seem to say much about disclosures alerting
19 prospective mediation participants to the *strength* of the protection for mediation
20 communications, particularly the possibility that mediation communications might

650. See, e.g., Laflin, *supra* note 621, at 944 (“Participants need to know that there are limits on confidentiality and that everything said in mediation is not necessarily privileged.”); Stephen Bullock & Linda Gallagher, *Surveying the State of the Mediative Art: A Guide to Institutionalizing Mediation in Louisiana*, 57 La. L. Rev. 885, 964 (1997) (Instead of advising participants that confidentiality is only guaranteed “to the greatest extent permitted by law,” a mediator should make “a full and more precise disclosure.”).

A 1991 Comment published in the *Journal of Dispute Resolution* put it this way:

Mediation is communication. It often requires disclosure of embarrassing and potentially damaging information. Such self-disclosure is a very threatening process for most people. It requires a willingness to assume the risk of rejection and abuse, but it is absolutely necessary to the proper functioning of the mediation process. Mediation is built on trust. Without trust participants will not disclose their true needs. But before participants can trust each other they must trust the mediator. If mediators are to be trusted they must be truthful. *Frankly informing parties to a mediation of the limitations to confidentiality may in the short run discourage some disclosures and hence reduce effectiveness. In the long run, however, it is the only viable solution.*

Kent Brown, *Comment, Confidentiality in Mediation: Status and Implications*, 1991 J. Disp. Resol. 307, 334 (1999) (emphasis added, footnotes omitted).

651. See, e.g., Weston, *supra* note 311, at 37 (arguing that constitutional limitations on mediation confidentiality should be made explicit); Harvard Note, *supra* note 49, at 441 n.4 (Lawrence Freedman of the ABA Standing Committee on Dispute Resolution “has said that ‘it wouldn’t really be honest to say [that mediation is confidential] to people who are considering participating.’”).

652. Prof. Laflin is on the faculty at University of Idaho College of Law.

653. Laflin, *supra* note 621, at 982 (“[W]arning participants of the limits of confidentiality could inhibit full disclosure. Even with the potential adverse consequences, mediators must stop making broad and misleading assertions concerning confidentiality.”).

1 be unavailable to show mediation misconduct. But the logic and principle of being
2 honest with mediation participants also seems to apply to that type of disclosure.

3 It thus appears unlikely that the academic community would draw a distinction
4 between the two situations. In fact, one recent article says:

5 Explaining confidentiality to parties in mediation is analogous to the
6 requirement that law enforcement officers inform suspects of their Miranda rights.
7 A primary aspect of the orientation for mediation is informing parties about *what*
8 *is and is not confidential*.⁶⁵⁴

9 **Scholarly Views on Other Means of Addressing Mediation Misconduct**

10 Allegations of coercion during the mediation process — by the mediator, an
11 attorney, or an opponent — are central to many of the mediation confidentiality
12 cases that the Commission reviewed.⁶⁵⁵ There is sentiment that “policy-makers
13 should invent safeguards to insure that the confidentiality guaranteed to parties in
14 mediation is not used to veil coercive tactics” This report has already described
15 scholarly suggestions about the proper degree of confidentiality and the
16 importance of accurately disclosing the extent of protection.

17 In addition, some commentators have proposed other means to reduce the
18 danger of coercion during mediation, ones that would not alter mediation
19 confidentiality requirements. Two such suggestions are discussed below:

- 20 (1) Explicitly establishing that a party is entitled to bring a support person along
21 to a mediation, and
- 22 (2) Creating a mandatory “cooling-off” period before a mediated settlement
23 agreement becomes binding and enforceable.

654. Susan Oberman, *Confidentiality in Mediation: An Application of the Right to Privacy*, 27 Ohio St. J. on Disp. Resol. 539, 618-19 (2012) (emphasis added, footnotes omitted); see also Laflin, *supra* note 621, at 981 (“In order to make free and informed choices, participants need to know the parameters of confidentiality before they enter into the mediation process.”).

655. See, e.g., *Cassel*, 51 Cal. 4th at 118 (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.”); *Porter*, 107 Cal. Rptr. 3d at 656 n.5 (superseded opinion) (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.”); *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*, 201 Cal. App. 4th at 1302 (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*, 188 Cal. App. 4th at 1164 (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”).

1 ***Explicit Right to Bring Along a Support Person***

2 Under UMA Section 10, a party is expressly entitled to bring an attorney or
3 other individual along to a mediation:

4 **SECTION 10. PARTICIPATION IN MEDIATION.** An attorney or other
5 individual designated by a party may accompany the party to and participate in a
6 mediation. A waiver of participation given before the mediation may be
7 rescinded.

8 The accompanying Comment explains that the provision was designed to help
9 remedy imbalances of power and ensure that any settlement reached in the
10 mediation is truly voluntary.⁶⁵⁶

11 To some, Section 10 may “seem a small and almost non-noteworthy addition to
12 the UMA.”⁶⁵⁷ In contrast, Prof. Phyllis Bernard⁶⁵⁸ considers it “a critical
13 mechanism for re-balancing power in mediations and thereby addressing one of
14 the chief areas of criticism.”⁶⁵⁹

15 Prof. Bernard believes that “allowing individuals to bring someone with them
16 will guard against coercion and power politics in the course of the mediation.”⁶⁶⁰
17 She anticipates that “if coercive mediations are eliminated through the use of
18 section [10] of the UMA, ... then *there will be less need to pierce mediation*
19 *confidentiality* in order to reassess the fairness of agreements.”⁶⁶¹

20 California does not have a statutory provision like UMA Section 10. It appears
21 to be widely assumed, however, that a party may bring an attorney and others to a
22 California mediation if the party so desires. The Commission is not aware of any
23 attempts to codify that rule.

656. The Comment says that the provision “is consistent with good practices that permit the *pro se* party to bring someone for support who is not a lawyer if the party cannot afford a lawyer.” The Comment further explains:

The fairness of mediation is premised upon the informed consent of the parties to any agreement reached. Some statutes permit the mediator to exclude lawyers from mediation, resting fairness guarantees on the lawyer's later review of the draft settlement agreement....

Some parties may prefer not to bring counsel. However, *because of the capacity of attorneys to help mitigate power imbalances, and in the absence of other procedural protections for less powerful parties, the Drafting Committees elected to let the parties, not the mediator, decide.*

UMA § 10 Comment (emphasis added).

657. Bernard, *supra* note 460, at 140.

658. Prof. Bernard is on the faculty at Oklahoma City University School of Law.

659. Bernard, *supra* note 460, at 140.

660. Andrea Schneider, *Which Means to an End Under the Uniform Mediation Act?*, 85 Marq. L. Rev. 1, 6 (2001) (summarizing Prof. Bernard's article).

661. *Id.* (emphasis added); See Bernard, *supra* note 460, at 119 (contrasting her views with those of Prof. Hughes, who “seeks to assure party self-determination by allowing mediators and parties to testify about mediation communications”).

1 **Cooling-Off Period**

2 In a 2001 article in *Harvard Negotiation Law Review*, Prof. Welsh expressed
3 concern about coercive mediation tactics that could defeat the goal of party self-
4 determination.⁶⁶² She suggested a number of possible means to protect parties’
5 self-determination in mediation, most particularly “the adoption of a three-day,
6 non-waivable cooling-off period before mediated settlement agreements may
7 become enforceable.”⁶⁶³

8 In proposing that approach, she noted that various jurisdictions use cooling-off
9 periods in other contexts, especially situations involving high pressure sales
10 tactics.⁶⁶⁴ She further noted that cooling-off periods “have even been applied to
11 particular types of mediation.”⁶⁶⁵

12 Several other scholars have also indicated that a cooling-off period may serve as
13 a tool to protect vulnerable participants from coercion or misrepresentations
14 during the mediation process.⁶⁶⁶ The Commission has not found much information
15 on how well mediation cooling-off periods have functioned in the jurisdictions
16 that have tried them.⁶⁶⁷

17 **Possible Approaches**

18 As may already be clear from the discussions of scholarly views and the law of
19 other jurisdictions, California’s existing approach is but one of many possible
20 ways to address the intersection of mediation confidentiality and attorney
21 misconduct. The Commission has received numerous suggestions in the course of
22 this study, while other ideas have surfaced through its research and analysis. There
23 are too many potential variations to list.

24 One possibility, of course, would be to leave existing law intact. Most of the
25 reform ideas can be grouped into the following categories:

662. Nancy Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 Harv. Negotiation L. Rev. 1, 5 (2001) (hereafter, “Welsh (2001)”).

663. *Id.* at 6-7; see also Welsh (2011), *supra* note 635, at 23-24 (“We could require, or at least urge, the inclusion of a cooling off period in the settlement agreements that emerge from our mediations.”).

664. Welsh (2001), *supra* note 635, at 87-89.

665. See *id.* at 89 (referring to Cal. Ins. Code § 10089.82(c) (earthquake insurance dispute), former Fla. Family Law R. Proc. 12.740(f)(1) (family mediation), and Minn. Stat. § 572.35 (debtor-creditor dispute)).

666. See, e.g., Stephan Landsman, *Nothing for Something? Denying Legal Assistance to Those Compelled to Participate in ADR Proceedings*, 37 Fordham Urb. L.J. 273, 292 (2010); Hiers, *supra* note 624, at 577-78; Peter Thompson, *Enforcing Rights Generated in Court-Connected Mediation – Tension Between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice*, 19 Ohio St. J. on Disp. Resol. 509, 539 (2004); Lande, *supra* note 627, at 137.

667. The Florida provision cited by Prof. Welsh has since been revised to eliminate the cooling-off period. See Fla. Fam. Law R. Proc. 12.740(f)(1).

- 1 • Create some type of mediation confidentiality exception addressing attorney
2 malpractice and other misconduct.
- 3 • Revise the law on waiving mediation confidentiality or modifying it by
4 agreement.
- 5 • Add safeguards against attorney misconduct in the mediation process.
- 6 • Establish disclosure requirements.

7 Each category of possible reforms is discussed briefly below. These discussions
8 introduce the ideas, rather than fully critiquing each concept.

9 **Create Some Type of Mediation Confidentiality Exception Addressing Attorney**
10 **Malpractice and Other Misconduct**

11 Many sources have suggested creating some type of exception to the mediation
12 confidentiality statutes to address attorney malpractice and other misconduct, or
13 aspects thereof. There are numerous variables to consider in drafting this type of
14 exception, which could be combined in different ways.

15 For example, an exception could be based or modeled on Evidence Code
16 Section 958. Alternatively, an exception could require some type of *in camera*
17 screening or preliminary filtering. The Commission describes these possibilities
18 first, then mentions other ways of drafting an attorney misconduct exception.

19 ***Exception Based on or Modeled on Evidence Code Section 958***

20 The legislative resolution relating to this study directs the Commission to
21 consider Evidence Code Section 958 and its predecessors.⁶⁶⁸ Section 958 is an
22 exception to the lawyer-client privilege.⁶⁶⁹ It says that there is no privilege “as to a
23 communication relevant to an issue of breach, by the lawyer or by the client, of a
24 duty arising out of the lawyer-client relationship.”⁶⁷⁰ In other words, “[i]n a

668. 2012 Cal. Stat. res. ch. 108.

669. 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).

670. 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

1 lawsuit between an attorney and a client based on an alleged breach of a duty
2 arising from the attorney-client relationship, attorney-client communications
3 relevant to the breach are not protected by the attorney-client privilege.”⁶⁷¹

4 In a simple bilateral lawyer-client relationship, the application of Section 958 is
5 relatively straightforward. Complications can arise, however, when there is more
6 than one client or the lawyer-client relationship is otherwise complex.⁶⁷² In a few
7 instances, a court even dismissed a legal malpractice suit because the lawyer-client
8 privilege precluded the defendant from effectively presenting a defense and the
9 plaintiff could not provide the necessary privilege waiver.⁶⁷³

10 One possibility in this study would be to let the policy of Section 958
11 completely override the mediation confidentiality statutes. In other words,
12 California could revise those statutes such that a mediation communication would
13 be admissible and discoverable in a subsequent dispute between a lawyer and a
14 client whenever the communication is “relevant to an issue of breach, by the
15 lawyer or by the client, of a duty arising out of the lawyer-client relationship.”

16 This type of approach would help to ensure attorney accountability, while
17 decreasing the level of protection for mediation confidentiality and the interests
18 underlying it. The approach could result not only in disclosure of mediation
19 communications between the lawyer and client in question, but also in disclosure
20 of mediation communications including other mediation participants.⁶⁷⁴

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 client’s property, or the client’s duty to pay for the lawyer’s services.

(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).

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. See Evid. Code §§ 953, 954,

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

A few California cases have examined the intersection of Section 958 and the mediation confidentiality statutes. See discussions of “*Cassel*” and “*Porter*” *supra*.

672. See CLRC Staff Memorandum 2015-22, pp. 4-8 & cases cited therein. The mediation context is more complicated than the multi-player situations encountered in applying Section 958, 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.

673. See, *e.g.*, *Solin v. O’Melveny & Myers*, 89 Cal. App. 4th 451, 107 Cal. Rptr. 456 (2001); *McDermott, Will & Emery v. Superior Court*, 83 Cal. App. 4th 378, 99 Cal. Rptr. 2d 622 (2000).

674. For further discussion of this type of approach, see CLRC Staff Memorandum 2015-22, pp. 13-14 (Approach #1).

1 Another possibility would be to make the mediation confidentiality statutes
2 inapplicable to a private lawyer-client communication. Under this approach, if
3 Section 958 applied to a private lawyer-client communication, the communication
4 would be admissible and subject to disclosure, even if the communication was
5 made “for the purpose of, in the course of, or pursuant to, a mediation”⁶⁷⁵
6 Mediation communications that include other mediation participants would remain
7 protected. That limitation would help protect the confidentiality expectations of
8 mediation participants, but could pose complications similar to the ones that
9 sometimes arise in complex situations under Section 958.⁶⁷⁶

10 ***Exception With Mandatory In Camera Screening or Preliminary Filtering***

11 A different type of approach would be to create a mediation confidentiality
12 exception that focuses on attorney misconduct and mandates the use of *in camera*
13 screening in assessing the admissibility and discoverability of mediation evidence.
14 “Courts have commonly used *in camera* proceedings as a procedural technique to

675. Evid. Code § 1119. Many variations on this approach are possible, such as:

- (1) Only admit or disclose a private, mediation-related lawyer-client communication if Section 958 applies *and* the communication “contain[s] no information of anything said or done or any admission by a party made in the course of mediation.” *Cassel v. Superior Court*, 101 Cal. Rptr. 3d 501, 509 (2009) (superseded opinion); see also CLRC Staff Memorandum 2016-59, pp. 31-32 & Exhibit pp. 51-53 (Ron Kelly’s “Alternative Compromise Package”); CLRC Staff Memorandum 2015-33, Attachment p. T5 (Option A-4-a).
- (2) Admit or disclose private, mediation-related lawyer-client communications “irrespective of whether such communications took place in the presence of the mediator or not.” *Porter*, 107 Cal. Rptr. 3d at 662 (superseded opinion); see also CLRC Staff Memorandum 2015-33, Attachment p. T5 (Option A-4-b).
- (3) 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. See CLRC Staff Memorandum 2015-33, pp. 15-16 (Approach #3).
- (4) The approach used in the bill that led to this study. See discussion of “Assembly Bill 2025 and the Inception of the Commission’s Study” *supra*.

676. See generally *Kurwa v. Cheng*, 2009 Cal. App. Unpub. LEXIS 2899, *20-*21 (Cheng needs to use evidence of mediation proceedings to defend against Kurwa’s action to rescind mediated settlement agreement, but “statutory confidentiality rules remain fully in [f]orce, effectively foreclosing Cheng’s ability to defend herself. As in *McDermott, Will & Emery*, such action may not proceed.”); *Wolf v. Loring Ward Internat’l Ltd.* (No. BC445310 in L.A. Sup. Ct.), order entered April 6, 2016, p. 11 (“Defendants would be unable to defend themselves in this action pursuant to the mediation privilege. As such, the action may properly be dismissed.”); see also *Benesch*, 2009 U.S. Dist. LEXIS 117641, at *23-*24.

For further discussion of this type of approach, see CLRC Staff Memorandum 2015-22, pp. 14-15 (Approach #2); see also *Alfieri v. Solomon*, 358 Or. 383, 365 P.3d 99 (2015); CLRC Staff Memorandum 2015-33, Attachment pp. T5 to T6 (General Approach A-4); CLRC Staff Memorandum 2014-43, pp. 12-13 (describing article by Abraham Gafni).

1 balance a need for disclosure of relevant information in a court proceeding against
2 a need to limit access to that information.”⁶⁷⁷

3 There is considerable scholarly support for this concept, as previously
4 described.⁶⁷⁸ Indeed, some jurisdictions are already using *in camera* proceedings
5 for mediation evidence;⁶⁷⁹ notable examples already discussed include UMA
6 Section 6(b)⁶⁸⁰ and the Texas doctrine applied in *Avary* and *Alford*.⁶⁸¹

7 The details of an *in camera* approach could vary widely.⁶⁸² Importantly,
8 however, any *in camera* approach must comply with federal⁶⁸³ and state⁶⁸⁴

677. Green, *supra* note 461, at 9 (CLRC Staff Memorandum 2015-13, Exhibit p. 9); see, e.g., Kerr v. United States District Court, 426 U.S. 394, 405-06 (1976) (“[A]n *in camera* review of the documents is a relatively costless and eminently worthwhile method to insure that the balance between [prison officials’] claims of irrelevance and privilege and [prisoners’] asserted need for the documents is correctly struck. Indeed, this Court has long held the view that *in camera* review is a highly appropriate and useful means of dealing with claims of governmental privilege.”); Ponte v. Real, 471 U.S. 491, 514-15 (1985) (Marshall, J., dissenting) (“The *in camera* solution has been widely recognized as the appropriate response to a variety of analogous disclosure clashes involving individual rights and government secrecy needs.”); Foltz v. State Farm Mutual Auto Ins. Co., 331 F.3d 1122, 1136 n.6 (9th Cir. 2003) (“[I]n *camera* inspection is a commonly used procedural method for determining whether information should be protected or revealed to other parties.”).

678. See discussion of “Scholarly Views on *In Camera* Proceedings Relating to Mediation Evidence” *supra*.

679. See CLRC Staff Memorandum 2016-28 & sources cited therein; see also CLRC Staff Memorandum 2015-33, Attachment pp. T13 to T17 & sources cited therein (General Approach A-9).

680. See discussion of “UMA Exception Relating to the Validity and Enforceability of a Mediated Settlement Agreement” *supra*.

681. See description of *Alford* in discussion of “Case Law” under “Other States” *supra*. Another important example is the *in camera* approach used in *Rinaker* and *Olam*. See description of *Olam* under “Using Mediation Evidence to Prove or Disprove Allegations of Attorney Misconduct” under “Federal Law” *supra*.

682. See *supra* note 643 & sources cited therein. It may be appropriate to combine an *in camera* approach with one or more other judicial techniques for protecting sensitive information, such as:

- Sealing a transcript or other court document.
- Issuance of a protective order restricting the dissemination of information.
- Strict control over copies.
- Redaction of information from a document and allocation of the costs of redaction as appears appropriate in the circumstances at hand.

For examples of cases using such techniques, see CLRC Staff Memorandum 2015-55, p. 7 nn.35-39. For further discussion of *in camera* approaches, see *id.* at pp. 3-42.

683. U.S. Const. amend. I, XIV. For a description of these constitutional constraints, see CLRC Staff Memorandum 2016-18, pp. 7-31.

684. Cal. Const. art. I, §§ 2(a), 3(b). For a description of these constitutional constraints, see CLRC Staff Memorandum 2016-18, pp. 31-32.

1 constitutional provisions entitling citizens to observe their courts in action (also
2 known as “constitutional rights of access”).⁶⁸⁵

3 That set of legal constraints may preclude the use of an *in camera* approach in
4 certain circumstances, or restrict the use of such an approach to some extent.
5 Compliance with these constitutional provisions might also entail significant
6 procedural burdens when a court uses an *in camera* approach.⁶⁸⁶

7 In light of those considerations, the Commission specifically investigated
8 whether there was any constitutionally permissible method of *in camera* screening
9 or quasi-screening that a judicial officer could use as a filter at the inception of a
10 legal malpractice case based on mediation misconduct (an early way to eliminate
11 claims that have no basis and should not result in public disclosure of mediation
12 communications).⁶⁸⁷ There are many possible methods for such preliminary
13 filtering, or other special treatment at the inception of a case alleging mediation
14 misconduct, such as:

- 15 • Minnesota’s approach, under which a party may satisfy the statute of
16 limitations by serving a complaint, without filing the complaint in court.⁶⁸⁸
- 17 • A pre-filing meet and confer requirement.⁶⁸⁹
- 18 • An Early Neutral Evaluation Conference (“ENEC”) or similar procedure.⁶⁹⁰
- 19 • An early case management conference, conducted *in camera*.⁶⁹¹
- 20 • A summary jury trial, conducted *in camera* at an early stage of the case.⁶⁹²
- 21 • An approach modeled on Civil Code Section 1714.10 (alleged conspiracy
22 between attorney and client), but conducted in a manner that would protect
23 mediation communications from public disclosure.⁶⁹³
- 24 • A specialist certification requirement.⁶⁹⁴
- 25 • A self-certification requirement.⁶⁹⁵

685. There are also rights of access that are not constitutionally-based. These include Code of Civil Procedure Section 124, California Rules of Court 8.45 to 8.47, 2.550, and 2.552, and federal and state common law doctrines. For descriptions of these rights, see CLRC Staff Memorandum 2016-18, pp. 32-38.

686. See CLRC Staff Memorandum 2016-18, pp. 80-82; see also CLRC Staff Memorandum 2016-29; CLRC Staff Memorandum 2016-18, pp. 38-80.

687. CLRC Minutes (April 2016), p. 5.

688. See CLRC Staff Memorandum 2016-27, pp. 2-4.

689. See CLRC Staff Memorandum 2016-27, pp. 4-5.

690. See CLRC Staff Memorandum 2016-38, pp. 2-34; CLRC Staff Memorandum 2016-27, pp. 5-7.

691. See CLRC Staff Memorandum 2016-27, pp. 8-9.

692. See CLRC Staff Memorandum 2016-27, pp. 9-12.

693. See CLRC Staff Memorandum 2016-38, pp. 34-46.

694. See First Supplement to CLRC Staff Memorandum 2016-38, pp. 1-6; CLRC Staff Memorandum 2016-49; First Supplement to CLRC Staff Memorandum 2016-49.

695. See First Supplement to CLRC Staff Memorandum 2016-38, pp. 6-7.

1 The Commission took a hard look at such ideas, but decided not to incorporate any
2 of them into this tentative recommendation.⁶⁹⁶

3 ***Other Ways to Draft an Exception Addressing Attorney Misconduct***

4 There are many other ways to draft a mediation confidentiality exception
5 relating to allegations of attorney misconduct. The Commission considered a
6 broad variety of approaches,⁶⁹⁷ such as UMA Section 6(a)(6)⁶⁹⁸ and some
7 provisions used in non-UMA states.⁶⁹⁹ The approach proposed in Parts II and III of
8 this tentative report draws on numerous sources in one respect or another.

9 **Revise the Law on Waiving Mediation Confidentiality or Modifying It By Agreement**

10 In requesting this study, the Legislature directed the Commission to consider the
11 “availability and propriety of contractual waivers.”⁷⁰⁰ The Commission therefore
12 looked into that topic and some other suggestions relating to waiver of California’s
13 mediation confidentiality protections.

14 This part of its tentative report briefly discusses the waiver concepts. The report
15 then describes a few related suggestions, which concern modification of mediation
16 confidentiality by agreement of all of the mediation participants.

17 ***Suggestions to Change the Waiver Rules***

18 Under existing law, a waiver of mediation confidentiality generally requires the
19 express agreement of “[a]ll persons who conduct[ed] or otherwise participate[d] in
20 the mediation”⁷⁰¹ The Commission’s 1996 report on *Mediation Confidentiality*
21 explains that “[a]ll persons attending a mediation, parties as well as nonparties,
22 should be able to speak frankly, without fear of having their words turned against
23 them.”⁷⁰²

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

697. See, e.g., CLRC Staff Memorandum 2015-33, Attachment pp. T1 to T4, T11 to T12, T17 to T19 & sources cited therein (General Approaches A-1, A-2, A-3, A-8, A-10, A-11 to A-15). Among other ideas, the Commission considered the possibility of including some type of corroboration requirement. See Jordan Rice, *Balancing Mediation Confidentiality with the Need to Admit Evidence of Attorney Malpractice: Evidentiary Corroboration Requirements as a Potential Solution* (March 10, 2015) (reproduced in CLRC Staff Memorandum 2015-13, Exhibit pp. 21-44).

698. See discussion of “UMA Exceptions for Professional Misconduct and Mediator Misconduct” under “Uniform Mediation Act” *supra*.

699. See discussions of “Statutes and Rules” and “Extent of Variation in Expressly Addressing Attorney Misconduct and Other Professional Misconduct” under “Other States” *supra*.

700. 2012 Cal. Stat. res. ch. 108.

701. Evid. Code § 1122(a)(1) (emphasis added).

702. CLRC Mediation Recommendation #2, *supra* note 136, at 425. This report was presented to the Legislature in connection with the bill that became the current mediation confidentiality statute (Evid. Code §§ 1115-1128). It is properly regarded as legislative history. See *2014-2015 Annual Report*, 44 Cal. L.

1 In his *Cassel* concurrence, Justice Chin suggested that the Legislature consider
2 the possibility of allowing disclosure of mediation communications when all
3 mediation participants waive confidentiality *except* an attorney accused of
4 malpractice or other misconduct. In other words, the mediation confidentiality
5 statute would not apply “if every participant in the mediation *except the attorney*
6 waives confidentiality.”⁷⁰³

7 Variants on the above approach would be to:

- 8 • Allow mediation *parties* to contractually agree to a *prospective* waiver at the
9 inception of a mediation, which their attorneys could not block.⁷⁰⁴ This
10 waiver would provide that “in the event one party determines, during or
11 after a mediation, that their attorney, or another attorney/representative
12 nonparty participant at the mediation, engaged in actions that compromised
13 their rights or the rights of another party in the mediation and settlement
14 process, the parties will cooperate in any action, which can range from
15 complaints to the State Bar to potential legal action by a party to redress
16 grievances for any such claims, in order to assist the party in redressing their
17 claims.”⁷⁰⁵
- 18 • *Require* an attorney representing a client in a mediation to “agree that
19 mediation communications directly between the client and his or her
20 attorney may be disclosed in any action for legal malpractice or in a State
21 Bar disciplinary action, where professional negligence or misconduct forms
22 the basis of the client’s allegations against the attorney.”⁷⁰⁶

23 Like Justice Chin’s suggestion, these proposals might improve accountability for
24 mediation-related attorney misconduct. All three approaches also appear to have
25 some potential downsides.⁷⁰⁷

26 *Modifying Mediation Confidentiality by Agreement of All Mediation Participants*

27 Instead of proposing to change the waiver rules, some suggestions concern the
28 extent to which mediation confidentiality can be adjusted by agreement of *all* of

Revision Comm’n Reports 1, 16-22 (2014); Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc., 133 Cal. App. 4th 26, 34 Cal. Rptr. 3d 520 (2005).

703. *Cassel*, 51 Cal. 4th at 139 (Chin, J., concurring) (emphasis added).

704. See First Supplement to CLRC Staff Memorandum 2015-36, Exhibit pp. 24-25 (comments of Deborah Blair Porter).

705. *Id.* at Exhibit p. 24.

706. Memorandum 2014-6, Exhibit p. 2 (comments of Ron Kelly, which do not state his personal view).

707. For further discussion of these ideas, see CLRC Staff Memorandum 2016-59, pp. 18-21; First Supplement to CLRC Staff Memorandum 2015-36, Exhibit pp. 12-26 (comments of Deborah Blair Porter); CLRC Staff Memorandum 15-33, Attachment pp. T20 (General Approach B-1); CLRC Staff Memorandum 2015-22, pp. 18-25; see also First Supplement to CLRC Staff Memorandum 2015-36, Exhibit pp. 1-2, 3-12, 26-38 (comments of Deborah Blair Porter).

1 the mediation participants. For example, a few comments suggest making
2 mediation confidentiality optional.⁷⁰⁸

3 Other commenters note that mediation participants can already modify the
4 extent of confidentiality by an express written agreement,⁷⁰⁹ but suggest taking
5 steps to increase awareness of that option. For example, mediator Gary Weiner
6 “hold[s] the view that the parties have always been free to adopt whatever rules
7 regarding confidentiality they choose.”⁷¹⁰ He suggests adding a provision to the
8 Evidence Code to make that point explicit:

9 1129. Notwithstanding any other section in this Chapter, nothing prohibits all
10 the participants including the mediator from entering into an express written
11 agreement, signed by all of them, in which they all agree to a different set of
12 provisions regarding the confidentiality of mediation communications in a given
13 mediation.⁷¹¹

14 In contemplating such an approach, it may be important to differentiate between
15 increasing and decreasing the level of mediation confidentiality. Although
16 mediation participants can expressly agree in writing to *decrease* the level of
17 mediation confidentiality, existing California law may not always permit them to
18 *increase* the level of mediation confidentiality.⁷¹² For example, existing law
19 probably would not permit mediation participants to contractually prevent use of
20 their mediation communications in a criminal case; that seems contrary to the
21 policy balance reflected in the mediation confidentiality statutes.⁷¹³

22 **Add Safeguards Against Attorney Misconduct in the Mediation Process**

23 A number of suggested approaches focus on *decreasing the risk* of coercion,
24 fraud, duress, malpractice, or other attorney misconduct in the mediation process.
25 These suggestions would create various types of safeguards against such
26 misconduct.

27 The safeguard suggestions can be grouped into the following categories:

708. See Second Supplement to CLRC Staff Memorandum 2016-50, Exhibit p. 8 (comments of Herring Law Group, on behalf of client) (Parties should be presented with an express option to waive confidentiality.) (boldface deleted); Second Supplement to CLRC Staff Memorandum 2013-39, Exhibit p. 2 (comments of Kazuko Artus) (“[M]ediation confidentiality can be made an option for the participants rather than being imposed on them.”).

709. See Evid. Code § 1122(a). Such a modification can also be made by an express oral agreement that is memorialized in a specified manner. See *id.*; Evid. Code § 1118.

710. First Supplement to CLRC Staff Memorandum 2013-47, Exhibit p. 28.

711. *Id.* at 29. For a similar suggestion, see CLRC Staff Memorandum 2015-46, Exhibit p. 24 (comments of Hank Burgoyne) (“Currently, parties can opt out of mediation confidentiality. If you want to take steps to remind parties of that option and the risks of not doing so, feel free.”).

712. See Evid. Code § 1122(a). Whether mediation participants can make the terms of a settlement agreement confidential is a separate issue, not addressed here. See *supra* note 175 and accompanying text.

713. See Evid. Code § 1119; *Cassel*, 51 Cal. 4th at 135 n.11.

- 1 • **Suggestions to provide time for reflection before committing to a deal.**
2 A repeatedly mentioned possibility (already discussed to some extent)
3 would be to establish a mandatory cooling-off period after a mediation,
4 during which the parties to a mediated settlement agreement could think
5 over the terms, or get more information, and then rescind the agreement if
6 they change their minds about it.⁷¹⁴ Another possibility would be to place a
7 time limit on each day’s mediation session (such as no more than 8 hours of
8 mediation per day).⁷¹⁵
- 9 • **Suggestions to ensure that mediation participants receive appropriate
10 assistance.** These suggestions focus on ensuring that disputants (particularly
11 self-represented litigants) have people available to help them in the
12 mediation process. One such idea would be to enact a provision similar to
13 UMA Section 10, as Prof. Bernard recommends.⁷¹⁶ A different approach
14 would be to require each mediation party to consult with independent
15 counsel before signing a mediated settlement agreement.⁷¹⁷
- 16 • **Suggestion to ensure that disputants act knowingly and voluntarily in
17 entering into a settlement.** Another type of safeguard would be to require a
18 mediator to orally ask each party a series of questions before signing a
19 mediated settlement agreement (like “Have you read the proposed
20 settlement agreement?” and “Did anyone force, threaten, or pressure you
21 into signing this agreement?”). The questions would seek to confirm that the
22 party is exercising free will and making an informed and deliberate
23 decision.⁷¹⁸ Alternatively, a mediator or attorney could present such
24 questions in written form.⁷¹⁹
- 25 • **Suggestions to ensure that key representations are memorialized in an
26 admissible manner.** Several suggestions focus specifically on ensuring that
27 key representations — ones that are critical in convincing a disputant to
28 settle — are memorialized in an admissible manner. For example, there
29 could be a statutory requirement that mediation participants complete and

714. See discussion of “Cooling-Off Period” under “Scholarly Views on Other Means of Addressing Mediation Misconduct” *supra*; see also CLRC Staff Memorandum 2016-59, pp. 23-26; CLRC Staff Memorandum 2015-35, pp. 41-44; CLRC Staff Memorandum 2015-33, Attachment p. T32 (General Approach D-5).

715. See CLRC Staff Memorandum 2016-59, p. 23; CLRC Staff Memorandum 2015-33, Attachment p. T31 (General Approach D-2); see also CLRC Staff Memorandum 2015-13, p. 6 & Exhibit p. 3 (comments of Eric van Ginkel on overly long mediation sessions).

716. See discussion of “Explicit Right to Bring Along a Support Person” under “Scholarly Views on Other Means of Addressing Mediation Misconduct” *supra*; see also CLRC Staff Memorandum 2016-59, pp. 26-27; CLRC Staff Memorandum 2015-35, pp. 40-41; CLRC Staff Memorandum 2015-33, Attachment p. T31 (General Approach D-4).

717. See CLRC Staff Memorandum 2015-45, Exhibit p. 27 (comments of Shawn Skillin); see also CLRC Staff Memorandum 2016-59, pp. 26-27.

718. See <http://www.pgpmmediation.com/informed-consent> (blogpost by Phyllis Pollack); see also CLRC Staff Memorandum 2016-59, pp. 27-28; CLRC Staff Memorandum 2016-30, pp. 15-16.

719. See CLRC Staff Memorandum 2016-59, p. 28. Under either alternative, it would be important to (1) make it possible to establish in court whether the mediator or attorney asked the questions as required and (2) specify the consequences of failing to ask the required questions.

1 sign a form in connection with any mediated settlement agreement, which
2 says something like:

- 3 (1) In entering into the mediated settlement agreement, Party A
4 is relying on the following representations made by Party B
5 during this mediation: [insert list].
- 6 (2) In entering into the mediated settlement agreement, Party B
7 is relying on the following representations made by Party A
8 during this mediation: [insert list].
- 9 (3) Notwithstanding Evidence Code Sections 1115-1128, Parties
10 A and B and all other participants in this mediation agree that
11 this form is admissible and subject to disclosure.

12 The goal is to protect a disputant from being unable to prove a key
13 representation, and thus being unable to recover for breach of that
14 representation, due to mediation confidentiality.⁷²⁰

15 In general, these safeguard suggestions are preventive in nature; they are meant to
16 stop a dispute like *Cassel* from arising, or at least from maturing into a result like
17 the one in *Cassel*, which may leave the merits of a mediation-related misconduct
18 claim unclear.

19 **Establish Disclosure Requirements**

20 Lastly, many sources have raised the possibility of statutorily requiring that
21 certain information be provided to a party before the party decides whether to
22 mediate.⁷²¹ Those sources have referred to the concept in different ways, such as

720. See CLRC Staff Memorandum 2016-59, pp. 28-29; see also CLRC Staff Memorandum 2015-33, Attachment p. T28 (General Approach C-6).

A similar suggestion would focus more specifically on representations relating to attorney's fees. It would have two components (a disclosure requirement and a safeguard suggestion), as follows:

- (1) Require the mediator and/or counsel to inform all mediation participants at the start of each mediation that any adjustment of an attorney-client fee agreement during a mediation must be properly memorialized in a writing, or in an oral recording meeting specified requirements, if it is to be effective; and
- (2) Require completion of a form at the end of each mediation, which would (a) ask each participant to indicate whether there has been any adjustment of an attorney-client fee agreement during the mediation, and (b) remind the participants of the need to properly memorialize any such adjustment.

See CLRC Staff Memorandum 2016-59, p. 29; CLRC Staff Memorandum 2015-45, p. 24 (Option B); CLRC Staff Memorandum 2015-33, Attachment p. T31 (General Approach C-12); CLRC Staff Memorandum 2016-30, Exhibit p. 17 (Lynnette Berg Robe's suggestion that "[i]f, during the mediation, as an inducement to settlement, the attorney agrees to accept a lower fee, or, if there is an agreement to enhance the attorney's fee, any modification of the fee agreement must be set forth in a writing signed by the party and his/her attorney before any overall settlement agreement is executed by the various parties and approved by the various attorneys.").

721. See, e.g., First Supplement to CLRC Staff Memorandum 2016-50, Exhibit pp. 14-37 (comments of Robert Flack); Exhibit p. 49 (article by Robert Flack); Second Supplement to CLRC Staff Memorandum 2016-50, Exhibit p. 8 (comments of Herring Law Group, on behalf of client); CLRC Staff Memorandum 2016-30, p. 30 (discussing blog post by Phyllis Pollack) & Exhibit p. 17 (comments of Lynnette Berg

1 “written notifications,”⁷²² “informed consent,”⁷²³ “safe harbor mediation
2 agreements,”⁷²⁴ “a standard list of admonitions,”⁷²⁵ and a “warning to the
3 parties.”⁷²⁶

4 The suggestions also differ in content, with many variations.⁷²⁷ To provide a
5 flavor of them, here are just a few examples:

- 6 • Disclose that California’s mediation confidentiality statute could prevent
7 introduction of evidence that an attorney engaged in misconduct in a
8 mediation,⁷²⁸ including evidence of private discussions between an attorney
9 and a client relating to a mediation.⁷²⁹

Robe); First Supplement to CLRC Staff Memorandum 2015-54, Exhibit pp. 39 (comments of Lynnette Berg Robe), 14-15 (comments of Hon. Keith Clemens, ret.); CLRC Staff Memorandum 2015-46, Exhibit p. 126 (comments of Scott O’Brien); First Supplement to CLRC Staff Memorandum 2015-46, Exhibit p. 57 (comments of Nancy Yeend); CLRC Staff Memorandum 2015-45, Exhibit pp. 11 (comments of Paul Dubow), 27 (comments of Shawn Skillin); First Supplement to CLRC Staff Memorandum 2015-36, Exhibit pp. 23-24, 26 (comments of Deborah Blair Porter); CLRC Staff Memorandum 2015-24, pp. 3-4 & Exhibit p. 3 (comments of Nancy Yeend); First Supplement to CLRC Staff Memorandum 2014-60, Exhibit p. 1 (comments of Edward Mason); CLRC Staff Memorandum 2014-43, pp. 13-14 (discussing comments of Abraham Gafni); CLRC Staff Memorandum 2014-6, Exhibit pp. 1-2 (comments of Ron Kelly), 15 (comments of Nancy Yeend); CLRC Staff Memorandum 2013-47, Exhibit pp. 28-29 (comments of Gary Weiner); First Supplement to CLRC Staff Memorandum 2013-47, Exhibit pp. 2-3 (comments of Ass’n for Dispute Resolution of Northern California), 4 (comments of Sidney Tinberg); Second Supplement to CLRC Staff Memorandum 2013-47, Exhibit p. 9 (comments of Jerome Sapiro, Jr.); Third Supplement to CLRC Staff Memorandum 2013-47, Exhibit pp. 3-4 (article by Nancy Yeend & Stephen Gizzi); Memorandum 2014-60, Exhibit p. 1 (comments of Nancy Yeend); First Supplement to CLRC Staff Memorandum 2013-39, Exhibit p. 2 (comments of Nancy Yeend).

See also discussion of “Scholarly Views on Informing Mediation Participants About the Extent of Protection for Mediation Communications” *supra*.

722. Second Supplement to CLRC Staff Memorandum 2016-50, Exhibit p. 8 (comments of Herring Law Group, on behalf of client).

723. First Supplement to CLRC Staff Memorandum 2015-46, Exhibit p. 57 (comments of Nancy Yeend).

724. CLRC Staff Memorandum 2016-59, Exhibit p. 49 (article by Robert Flack).

725. CLRC Staff Memorandum 2016-30, Exhibit p. 17 (comments of Lynnette Berg Robe).

726. CLRC Staff Memorandum 2015-45, Exhibit p. 11 (comments of Paul Dubow).

727. See CLRC Staff Memorandum 2016-59, pp. 6-18.

728. See Nancy Yeend & Stephen Gizzi, *Mediation Confidentiality: A Malpractice Exception or Not?*, Plaintiff 1, 2 (Oct. 2013) (The “state law sheltering evidence of attorney malpractice must be disclosed to clients . . . , in order to enable clients to provide valid ‘informed consent’ to the process.”).

729. See CLRC Staff Memorandum 2015-45, Exhibit p. 11 (Paul Dubow’s suggestion that attorneys should “be required to advise clients in writing when recommending mediation that conversations between them made during the course of the mediation will not be admissible should the client sue the attorney for malpractice committed during the mediation.”); First Supplement to CLRC Staff Memorandum 2015-46, Exhibit p. 53 (Robert Sall’s suggestion to disclose that “if you are invited to attend a mediation, and you agree to do so, you should understand that you will not be able to use any evidence related to that mediation in the event that you later decide to pursue a claim against Attorneys relating to the events or communications that took place regarding that mediation.”). See also A. Marco Turk, *Relax, It was Part of Mediation*, S.F. Daily Journal (Aug. 17, 2015).

- 1 • Disclose that any modification of an attorney-client fee agreement during a
2 mediation must be put in a signed writing or otherwise properly
3 memorialized to be enforceable.⁷³⁰
- 4 • Disclose that (1) any resolution of the dispute in mediation requires a
5 *voluntary* agreement of the parties⁷³¹ and (2) any party may withdraw from
6 the mediation process at any time for any reason.⁷³²

7 For the most part, the disclosure suggestions assume that California’s mediation
8 confidentiality rules will remain as is. It would also be possible, however to
9 statutorily require an attorney or mediator to inform mediation participants about
10 the existence of any attorney misconduct exception that is created.⁷³³

11 Any disclosure requirement should address the following matters:

- 12 • What must be disclosed?
- 13 • Who must make the disclosure to whom?
- 14 • When must the disclosure be made?
- 15 • In what manner must the disclosure be made?
- 16 • What are the consequences of making the disclosure? What are the
17 consequences of failing to make the disclosure?
- 18 • Given existing mediation confidentiality protections, how will a mediation
19 participant be able to establish whether the disclosure was made?⁷³⁴

20 Careful drafting would be critical.

21 Unlike creation of a new exception, a disclosure requirement would not reduce
22 the current protection for mediation communications. That would serve the policy
23 interests underlying the mediation confidentiality statutes, but it is debatable

730. See CLRC Staff Memorandum 2015-45, p. 25 (“Require the mediator and/or counsel to inform all mediation participants at the start of each mediation that any adjustment of an attorney-client fee agreement during a mediation must be properly memorialized in a writing, or in an oral recording meeting specified requirements, if it is to be effective.”); CLRC Staff Memorandum 2016-30, Exhibit p. 17 (Lynette Berg Robe’s suggestion that clients considering mediation should be informed that “[i]f, during the mediation, as an inducement to settlement, the attorney agrees to accept a lower fee, or, if there is an agreement to enhance the attorney’s fee, any modification of the fee agreement must be set forth in a writing signed by the party and his/her attorney before any overall settlement agreement is executed by the various parties and approved by the various attorneys.”).

731. See CLRC Staff Memorandum 2015-33, Attachment p. T26 (bulletpoint #4 in General Approach C-4). See also First Supplement to CLRC Staff Memorandum 2016-50, Exhibit pp. 17-37 (collection of mediation agreements from Robert Flack, which address range of topics, including rule that mediation agreement must be voluntary).

732. See First Supplement to CLRC Staff Memorandum 2016-50, Exhibit pp. 17, 31, 33, 37 (mediation agreements from Robert Flack, which include information on right to withdraw from mediation).

733. See CLRC Staff Memorandum 2015-59, pp. 11-12.

734. See *id.* at 7-17.

1 whether a disclosure requirement would sufficiently address the concerns that
2 prompted this study.⁷³⁵

3 The Commission chose a different approach for purposes of this tentative
4 recommendation. In Parts II and III of this tentative report, the Commission
5 explains its preliminary conclusions and presents its proposed legislation.⁷³⁶

735. For further discussion of possible disclosure requirements, see CLRC Staff Memorandum 2016-59, pp. 6-18; CLRC Staff Memorandum 2015-33, Attachment pp. T25-T30 (Category C).

736. For further discussion of possible approaches, see CLRC Staff Memorandum 2016-59; CLRC Staff Memorandum 2015-33; see also First Supplement to Memorandum 2016-60, pp. 7-10.

PART II. PRELIMINARY CONCLUSIONS

1 Since the Commission commenced this study in mid-2013, it has held twenty-
2 two public meetings, heard testimony from more than seventy people (many of
3 them repeatedly), received written comments from hundreds of individuals and
4 more than thirty organizations, and considered over ninety staff memoranda on the
5 subject (totaling thousands of pages). Based on the information received thus far
6 and the matters discussed in Part I of this report, the Commission has tentatively
7 concluded that existing California law does not place enough weight on the
8 interest in holding an attorney accountable for malpractice or other professional
9 misconduct in a mediation context.

10 By precluding the use of mediation communications in a subsequent
11 noncriminal proceeding, such as a legal malpractice case based on how an attorney
12 handled a mediation, the mediation confidentiality provisions (particularly
13 Evidence Code Section 1119) make it difficult and sometimes impossible for a
14 client to provide any evidence in support of allegations of attorney misconduct
15 during a mediation. Existing law may also prevent an attorney from proffering
16 mediation communications to disprove such allegations.

17 The Commission believes that courts need to be able to effectively evaluate
18 allegations that an attorney engaged in misconduct in the mediation process. In its
19 view, public confidence in the administration of justice depends on providing such
20 an opportunity to the citizens of this state.

21 Proposed New Exception to Mediation Confidentiality

22 To address this situation, the Commission tentatively recommends creating a
23 new exception to Section 1119, which would focus on holding attorneys
24 accountable for mediation misconduct, while also allowing attorneys to effectively
25 rebut meritless misconduct claims.⁷³⁷ The Commission considers this important not
26 only for purposes of achieving justice, but also to ensure the appearance of justice.

27 In proposing this approach, the Commission recognizes that the policy interests
28 underlying the mediation confidentiality statutes are significant and warrant
29 protection. A careful balancing of the competing interests is necessary.

30 The proposed new exception would therefore be narrow, so as to help protect the
31 confidentiality expectations of mediation participants. In particular, the proposed
32 new exception would be subject to a number of important limitations, as explained
33 below.

34 **Limitations to Protect the Policies Underlying Mediation Confidentiality**

35 Over a period of more than a year, the Commission considered the best means to
36 draft a new exception to the mediation confidentiality statutes. The Commission

737. See proposed Evid. Code § 1120.5 & Comment *infra*.

1 tentatively recommends that the exception incorporate the following features to
2 minimize harm to the policy interests served by those statutes.

3 ***No Undoing Settlements***

4 The proposed new exception would not apply in resolving a claim relating to the
5 enforcement of a mediated settlement agreement, such as a claim for rescission of
6 such an agreement or a suit for specific performance.⁷³⁸ This limitation is designed
7 to preserve the finality of a mediated settlement agreement⁷³⁹ and protect against
8 claims based on buyer’s remorse.⁷⁴⁰ Once parties resolve a dispute through
9 mediation and properly memorialize their agreement, they should be able to rely
10 on that agreement and put the dispute behind them.⁷⁴¹

11 ***The Exception Would Apply Only in a State Bar Disciplinary Proceeding, a Claim for***
12 ***Damages Due to Legal Malpractice, or an Attorney-Client Fee Dispute***

13 The proposed new exception would only apply in the following types of claims:

- 14 (1) A disciplinary proceeding under the State Bar Act⁷⁴² or a rule or regulation
15 promulgated pursuant to that Act.⁷⁴³ Such a proceeding serves the critical
16 function of protecting the public from attorney malfeasance.
- 17 (2) A cause of action seeking damages from a lawyer based on alleged
18 malpractice.⁷⁴⁴ This type of claim further promotes attorney accountability,
19 while also providing a means of compensating a client for breach of an
20 attorney’s professional duties.

738. See proposed Evid. Code § 1120.5 Comment *infra*.

739. See *id.*; see also CLRC Staff Memorandum 2015-46, Exhibit p. 218 (Guy Kornblum’s comment that “There has to be closure.”); CLRC Staff Memorandum 2015-45, Exhibit p. 12 (Paul Dubow’s comment that “One of the major attractions to mediation is that a successful outcome will buy peace, i.e., the matter is ended permanently and the parties can go on with their lives.”).

740. See proposed Evid. Code § 1120.5 Comment *infra*; see also CLRC Staff Memorandum 2015-46, Exhibit p. 107 (Timothy D. Martin’s comment that “Settlor’s (Buyer’s) remorse is a common reaction to settling a case.”); CLRC Staff Memorandum 2015-54, Exhibit p. 35 (Jessica Lee-Messer’s comment to same effect).

741. Mediation participants can to some extent protect themselves against fraud by ensuring that a mediated settlement agreement incorporates any representations they are relying upon in agreeing to its terms (e.g., an opponent’s assertion that he is bankrupt). Mediation participants also have some protection against coercion, because they are entitled to leave a mediation without settling. If a mediation participant is victimized by attorney misconduct despite these means of protection, the Commission’s proposed new exception could help the participant obtain relief through a disciplinary proceeding, malpractice claim, or fee dispute against the errant attorney, rather than an attack on a mediated settlement agreement.

742. Bus. & Prof. Code §§ 6000 *et seq.* For a brief description of the process used in a State Bar disciplinary proceeding, see CLRC Staff Memorandum 2015-22, pp. 42-48.

743. See proposed Evid. Code § 1120.5(a)(2)(A) & Comment *infra*.

744. See proposed Evid. Code § 1120.5(a)(2)(B) & Comment *infra*.

1 (3) An attorney-client fee dispute.⁷⁴⁵ This would encompass a mandatory fee
2 arbitration under the State Bar Act,⁷⁴⁶ which is an effective, low-cost means
3 to resolve fee issues in a confidential setting.

4 The proposed new exception would not apply in any other type of claim, because
5 that does not appear necessary to accomplish the Commission’s objectives.⁷⁴⁷

6 ***The Exception Would Apply Only to Attorney Misconduct in a Professional Capacity***

7 The proposed new exception would only apply to a mediation communication
8 bearing on an allegation that an attorney breached a *professional requirement*.⁷⁴⁸
9 The exception is thus limited to an attorney’s conduct in a professional capacity.
10 More precisely, the exception would apply “when the merits of the claim will
11 necessarily depend on proof that an attorney violated a professional obligation —
12 that is, an obligation the attorney has *by virtue of* being an attorney — in the
13 course of providing professional services.”⁷⁴⁹ Misconduct does not arise in the
14 course of providing professional services merely because it occurs during a period
15 of legal representation or because providing such representation brought an
16 attorney and client together and thus gave the attorney an opportunity to engage in
17 the misconduct.⁷⁵⁰

18 ***The Exception Would Only Apply to Alleged Misconduct in Representing a Client, Not in***
19 ***Serving as a Mediator***

20 The proposed new exception would only apply to allegations that an attorney
21 committed misconduct in *representing a client*, not in serving as a mediator.⁷⁵¹
22 The exception is thus focused specifically on the concern raised in the cases that
23 were the impetus for this study.⁷⁵² Expanding the exception further would pose
24 many questions and complications, which could hinder or delay achievement of
25 the Commission’s objectives.⁷⁵³

745. See proposed Evid. Code § 1120.5(a)(2)(C) & Comment *infra*.

746. See *id.*

747. For further discussion of this point, see CLRC Staff Memorandum 2016-58, pp. 19-24.

748. See proposed Evid. Code § 1120.5(a)(1) & Comment *infra*.

749. *Lee v. Hanley*, 61 Cal. 4th 1225, 1229, 34 P.3d 334, 191 Cal. Rptr. 3d 536 (2015).

750. *Id.* at 1239. For further discussion of this point, see CLRC Staff Memorandum 2016-58, pp. 17-25; see also First Supplement to CLRC Staff Memorandum 2015-45, Exhibit pp. 2-3 (comments of Rachel Ehrlich).

751. See proposed Evid. Code § 1120.5(a)(1) & Comment *infra*.

752. See *supra* note 26 & accompanying text.

753. See CLRC Staff Memorandum 2015-45, pp. 9-17.

1 ***The Exception Would Apply Only to Alleged Misconduct That Occurs in a Mediation Context***

2 The proposed new exception would only apply to misconduct that allegedly
3 occurred *in the context of* a mediation or a mediation consultation.⁷⁵⁴ This situation
4 is most problematic under existing law, because much, if not all, of the relevant
5 evidence for both sides might fall within the scope of Section 1119 and thus be
6 unavailable in resolving whether misconduct actually occurred.⁷⁵⁵

7 Importantly, however, the exception would extend to alleged misconduct at *any*
8 stage of the mediation process: during a mediation consultation, a face-to-face
9 mediation session with the mediator and all parties present, a private caucus with
10 or without the mediator, a mediation brief, a mediation-related phone call, or any
11 other mediation-related activity.⁷⁵⁶ The determinative factor is whether the
12 misconduct allegedly occurred in a mediation context, not the time and date of the
13 alleged misconduct.⁷⁵⁷

14 ***A Mediator Generally Could Not Testify or Provide Documentary Evidence Pursuant to the***
15 ***Exception***

16 Subject to some exceptions and limitations, Evidence Code Section 703.5 makes
17 a mediator incompetent to testify about a mediation in a subsequent civil
18 proceeding:

19 703.5. No person presiding at any judicial or quasi-judicial proceeding, and no
20 arbitrator or mediator, shall be competent to testify, in any subsequent civil
21 proceeding, as to any statement, conduct, decision, or ruling, occurring at or in
22 conjunction with the prior proceeding, except as to a statement or conduct that
23 could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the
24 subject of investigation by the State Bar or Commission on Judicial Performance,
25 or (d) give rise to disqualification proceedings under paragraph (1) or (6) of
26 subdivision (a) of Section 170.1 of the Code of Civil Procedure. However, this
27 section does not apply to a mediator with regard to any mediation under Chapter
28 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

29 Whether this restriction applies to a request for documentary evidence is not
30 expressly stated. There does not appear to be any case law squarely resolving that
31 point.

754. See proposed Evid. Code § 1120.5(a)(1) & Comment *infra*.

A similar limitation applies under the UMA's exception for professional misconduct, as well as in Florida, Maine, New Mexico, Texas, and Virginia. See UMA § 6(a)(6); Fla. Stat. § 44.405(4)(a)(4) & (6); Maine R. Evid. 514(c)(5); N.M. Stat. Ann. § 44-7B-5(a)(8); Va. Code Ann. §§ 8.01-576.10(vii), 8.01-581.22(vii); see also *Alford*, 137 S.W. 3d at 922; *Avary*, 72 S.W. 3d at 802-03.

755. See discussion of "Loss of Evidence May Mean Culpable Conduct Goes Unpunished or Another Inequitable Result Occurs" *supra*.

756. See proposed Evid. Code § 1120.5 Comment *infra*.

757. See *id.* For further discussion of the requirement that the alleged misconduct be in a mediation context, see CLRC Staff Memorandum 2015-45, pp. 17-21.

1 Section 703.5 serves to safeguard perceptions of mediator impartiality and
2 protects a mediator from burdensome requests for testimony.⁷⁵⁸ Rather than simply
3 relying on Section 703.5 to provide those important benefits in the context of its
4 proposed new exception, the Commission proposes to include some language
5 protecting a mediator in the exception itself.⁷⁵⁹ The proposed language on this
6 point is similar to Section 703.5,⁷⁶⁰ but it makes explicit that a mediator is
7 precluded from providing documentary evidence pursuant to the exception, not
8 just oral testimony.⁷⁶¹

9 In proposing this approach, the Commission takes no position on whether
10 Section 703.5 also precludes a mediator from providing documentary evidence
11 about a mediation. The proposed legislation is not intended to have any impact on
12 that or any other aspect of Section 703.5. The new provision would expressly state
13 as much.⁷⁶²

14 ***A Litigant Could Not Go to Another Source to Obtain or Learn the Content of a Mediator’s***
15 ***Writing***

16 To bolster the above-described restrictions on obtaining evidence from a
17 mediator, the proposed new exception would be subject to another important
18 limitation: It would not extend to any evidence that constitutes or discloses a
19 writing⁷⁶³ of the mediator relating to a mediation conducted by the mediator.⁷⁶⁴

758. See discussion of “Special Considerations Relating to Mediator Testimony” *supra*.

759. For further discussion of this point, see Memorandum 2017-19, pp. 8-10; First Supplement to Memorandum 2017-9, pp. 3-8; CLRC Staff Memorandum 2017-8, pp. 5-8; see also CLRC Staff Memorandum 2015-45, pp. 41-43.

760. Like Section 703.5, the proposed new provision would generally preclude a mediator from providing evidence, whether voluntarily or under compulsion of process, regarding a mediation that the mediator conducted. That general rule would be subject to the same exceptions stated in the first sentence of Section 703.5. See proposed Evid. Code § 1120.5(e) *infra*. There would not be any language comparable to the second sentence of Section 703.5, because the entire chapter on mediation confidentiality is inapplicable to a mediation under Chapter 11 of Part 2 of Division 8 of the Family Code. See Evid. Code § 1117(b)(1).

761. See proposed Evid. Code § 1120.5(e) *infra*. For a court decision recognizing the need for both types of protection, see *Macaluso*, 618 F.2d at 55 (explaining that if conciliators could testify about their activities, or be compelled to produce notes or reports of their activities, not even strictest adherence to purely factual matters would prevent evidence from favoring or seeming to favor one side).

The Commission considered but rejected the possibility of revising Section 703.5 to expressly address documentary evidence. That section pertains not only to a mediator, but also to an arbitrator and a person who presides at a judicial or quasi-judicial proceeding. The section thus reaches beyond the scope of this study. To avoid possible unintended effects, the Commission decided to leave Section 703.5 alone.

762. See proposed Evid. Code § 1120.5(f) *infra*.

763. “Writing” is defined in Evidence Code Section 250 to include:

handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.

1 Thus, a litigant generally⁷⁶⁵ could neither obtain such a writing directly from a
2 mediator,⁷⁶⁶ nor circumvent that restriction by obtaining such a writing from
3 another source.⁷⁶⁷

4 Further, a litigant could not learn the content of such a writing through other
5 materials in the custody of another source. For instance, if the *response* to a
6 mediator’s email message reflects the content of that message, the response would
7 not be discoverable under the proposed new exception unless the portion of it
8 reflecting the content of the mediator’s message could be effectively redacted.⁷⁶⁸
9 Otherwise, the response would impermissibly “disclose a writing of the mediator
10 relating to a mediation conducted by the mediator.”⁷⁶⁹

11 **The Commission seeks comment on any aspect of its tentative**
12 **recommendation, but it would especially appreciate input on its proposed**
13 **treatment of this point.**⁷⁷⁰

14 *The Same Standard Would Govern Admissibility and Disclosure Under the Exception*

15 The proposed new exception would use the same standard for both admissibility
16 and disclosure of mediation evidence: To be admissible or subject to disclosure,
17 mediation evidence must be *relevant* and must satisfy the other requirements

Courts have interpreted the term broadly. See, e.g., *People v. Goldsmith*, 59 Cal. 4th 258, 266, 326 P.3d 239, 172 Cal. Rptr. 3d 637 (2014) (“Photographs and video recordings with imprinted data are writings as defined by the Evidence Code.”).

764. See proposed Evid. Code § 1120.5(a)(3) *infra*.

765. Proposed Section 1120.5(e) is subject to the same exceptions stated in the first sentence of Section 703.5. Compare proposed Evid. Code § 1120.5(e) *infra* with Evid. Code § 703.5; see also note 760 *supra*.

766. See discussion of “A Mediator Generally Could Not Testify or Provide Documentary Evidence Pursuant to the Exception” *supra*.

767. With respect to electronic communications and records, federal legislation known as the Stored Communications Act (“SCA”), 18 U.S.C. §§ 2701-2712, provides additional protection. Under the SCA, a provider of an electronic communication service (like email) “shall not knowingly divulge to any person or entity the contents of a communication” 18 U.S.C. § 2702(a)(1). A similar rule applies to a remote computing service (like iCloud). See 18 U.S.C. § 2702(a)(2).

Those rules are subject to some exceptions and limitations, but there is no express exception for civil discovery, such as a subpoena seeking a mediator’s electronic communications for purposes of a legal malpractice case. See 18 U.S.C. § 2702(b). Nor have courts been willing to imply such an exception. See, e.g., *In re Subpoena Duces Tecum to AOL, LLC*, 550 F. Supp. 2d 606, 609-12; *O’Grady v. Superior Court*, 139 Cal. App. 4th 1442-47, 44 Cal. Rptr. 3d 72 (2006).

For further discussion of this point, see CLRC Staff Memorandum 2017-30, pp. 6-9.

768. To be discoverable under the proposed new exception, the response would also have to satisfy the other requirements enumerated in the exception.

769. Proposed Evid. Code § 1120.5(a)(3) *infra*.

770. For background on this point, see First Supplement to CLRC Staff Memorandum 2017-30, pp. 3-12.

1 stated in the exception.⁷⁷¹ To help safeguard the interests underlying mediation
2 confidentiality, that is a stricter standard for disclosure than the one governing a
3 routine discovery request.⁷⁷²

4 ***The Exception Would Limit the Extent of Disclosure***

5 If a mediation communication satisfies the requirements of the proposed new
6 exception (e.g., it is proffered in the correct type of case and it is relevant to an
7 allegation that an attorney “breached a professional requirement in the context of a
8 mediation or a mediation consultation”), then *only the portion of the*
9 *communication necessary for application of the exception* could be admitted or
10 disclosed.⁷⁷³ Further, admission or disclosure of a mediation communication
11 pursuant to the exception would not render that evidence (or any other mediation
12 communication) admissible or discoverable for any other purpose.⁷⁷⁴

13 This restriction is modeled on a provision in the UMA.⁷⁷⁵ It would serve to
14 minimize the extent of disclosure of mediation communications and thus help to
15 preserve the confidentiality expectations of mediation participants,⁷⁷⁶ particularly
16 persons who have no part in the attorney-client dispute triggering use of the
17 Commission’s proposed new exception.⁷⁷⁷

18 ***A Court Could Use Judicial Tools to Limit Public Exposure of Mediation Communications***

19 The proposed new exception would expressly permit a court to “use a sealing
20 order, a protective order, a redaction requirement, an in camera hearing, or a

771. See proposed Evid. Code § 1125(a)(1) *infra*. For further discussion of this point, see CLRC Staff Memorandum 2016-58, pp. 10-17; see also CLRC Staff Memorandum 2015-55, pp. 18 (Texas approach), 27-28 (*Olam* approach).

772. *Cf.* Code Civ. Proc. § 2017.010 (“Unless otherwise limited by order of the court in accordance with this title, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or *appears reasonably calculated to lead to the discovery of admissible evidence.*” (emphasis added).)

773. See proposed Evid. Code § 1120.5(b) *infra*.

774. See *id.* For example, if a court admitted a mediation communication in a legal malpractice case stemming from a mediation, that evidence would not be admissible under the proposed new exception in the mediated dispute. Further, only the portion of the mediation communication that is relevant to the legal malpractice case could be admitted for purposes of that case, not any other portion.

775. See UMA § 6(d).

776. Consistent and careful compliance with this restriction would be key, because predictability of an evidentiary protection for sensitive communications may be necessary to accomplish its objectives. See, e.g., *Jaffee*, 518 U.S. at 18. Application of California’s mediation confidentiality protections is already unpredictable to some extent. See discussion of “Federal Law” *supra*.

777. For sources discussing the importance of protecting the confidentiality expectations of mediation participants who have no part in a post-mediation dispute, see, e.g., *Cassel*, 51 Cal. 4th at 136; *id.* at 139 (Chin, J., concurring); *Grubaugh*, 238 Ariz. at 268-69; Brand, *supra* note 102, at 395, 401 & n.233; Gafni, *supra* note 392, at 1.

1 similar judicial technique to prevent public disclosure of mediation evidence,
2 consistent with the requirements of the First Amendment to the United States
3 Constitution, Sections 2 and 3 of Article I of the California Constitution, Section
4 124 of the Code of Civil Procedure, and other provisions of law.”⁷⁷⁸ A court would
5 thus have discretion to use existing procedural mechanisms to prevent widespread
6 dissemination of mediation evidence admitted or disclosed pursuant to the new
7 provision, so long as the court complies with the First Amendment right of access
8 and other laws that promote government transparency.⁷⁷⁹ Like the UMA-based
9 restriction discussed above, the use of such procedural mechanisms would help to
10 preserve the confidentiality expectations of mediation participants.

11 ***Mediation Participants Would Receive Notice and Could Thus Take Steps to Prevent Improper***
12 ***Disclosure of Mediation Communications***

13 Under the proposed new exception, if a plaintiff files a complaint that includes a
14 cause of action for damages against an attorney based on alleged malpractice in
15 the context of a mediation or a mediation consultation, the plaintiff must serve the
16 complaint on all of the mediation participants whose identities and addresses are
17 reasonably ascertainable.⁷⁸⁰ This notice requirement would alert mediation
18 participants who would not otherwise be involved in the malpractice case to the
19 possibility of disclosure of mediation communications in connection with that
20 case. Such participants would thus have an opportunity to speak up and guard
21 against any improper disclosure.⁷⁸¹

22 **Other Features of the Proposed New Exception**

23 In addition to the above-described features, which would help minimize harm to
24 the policy interests underlying the mediation confidentiality statutes, the proposed
25 new exception would have a number of other noteworthy features. These include:

- 26 • The exception would apply evenhandedly. It would permit use of mediation
27 communications in specified circumstances to prove *or* disprove allegations
28 against an attorney.⁷⁸²
- 29 • The exception would apply to all types of mediation communications and
30 writings, not just to a particular category (such as communications made in a
31 private caucus between an attorney and a client).⁷⁸³

778. See proposed Evid. Code § 1120.5(c) *infra*.

779. For further discussion of this point, see CLRC Staff Memorandum 2016-18; CLRC Staff Memorandum 2015-55; CLRC Staff Memorandum 2015-45, pp. 27-30, 33-41.

780. See proposed Evid. Code § 1120.5(d) & Comment *infra*.

781. See proposed Evid. Code § 1120.5 Comment *infra*. For further discussion of this point, see CLRC Staff Memorandum 2016-58, p. 36.

782. See proposed Evid. Code § 1120.5(a)(1) & Comment *infra*. For further discussion of this point, see CLRC Staff Memorandum 2015-45, pp. 25-27; CLRC Staff Memorandum 2014-43, p. 13; CLRC Staff Memorandum 2014-6, p. 16; see also Brand, *supra* note 102, at 397.

- 1 • The exception would apply across-the-board; there would not be any
2 carveouts for particular types of cases.⁷⁸⁴
- 3 • The exception would expressly state that “[n]othing in this section is
4 intended to affect the extent to which a mediator is, or is not, immune from
5 liability under existing law.”⁷⁸⁵ It would thus be clear that existing law
6 governing mediator immunity would remain unchanged.⁷⁸⁶
- 7 • The exception would not include any sanctions provision. The Commission
8 believes that existing law governing the availability of sanctions will be
9 sufficient to address any potential abuse of the new exception.⁷⁸⁷
- 10 • The exception would only apply to evidence relating to a mediation or
11 mediation consultation that commences on or after the exception becomes
12 operative. To avoid disrupting confidentiality expectations of mediation
13 participants, the new exception would not apply retroactively.⁷⁸⁸

14 Request For Comments

15 In this study, the Commission is using its traditional study process, which is
16 careful, deliberative, and transparent.⁷⁸⁹ All of its meetings are open to the public,
17 interested persons are encouraged to participate in the discussions, written
18 comments are welcome at any time, and the Commission’s written materials are
19 freely available on its website.⁷⁹⁰

20 In the resolution requesting this study, the Legislature asked the Commission to
21 seek input from a broad range of sources, “including, but not limited to,
22 representatives from the California Supreme Court, the State Bar of California,
23 legal malpractice defense counsel, other attorney groups and individuals,

783. See proposed Evid. Code § 1120.5 *infra*. For further discussion of this point, see CLRC Staff Memorandum 2015-45, pp. 31-33.

784. See proposed Evid. Code § 1120.5 *infra*. For further discussion of this point, see CLRC Staff Memorandum 2016-58, pp. 25-33 (discussing exemption requests for (1) family law mediations and (2) community-based mediation programs funded under Dispute Resolution Programs Act); see also CLRC Staff Memorandum 2017-8, pp. 5-7 (discussing PERB request for exemption).

785. See proposed Evid. Code § 1120.5(g) *infra*.

786. For further discussion of this point, see CLRC Staff Memorandum 2015-45, pp. 15-17; CLRC Staff Memorandum 2015-22, pp. 34-42.

787. See proposed Evid. Code § 1120.5 & Comment *infra*. For further discussion of this point, see CLRC Staff Memorandum 2015-45, pp. 43-44.

788. See proposed uncodified provision & Comment *infra*. For further discussion of this point, see CLRC Staff Memorandum 2015-45, p. 44.

789. Information on the Commission’s study process is available on the Commission’s website at http://www.clrc.ca.gov/Menu5_about/process.html. See also CLRC Staff Memorandum 2012-1; B. Gaal, *Evidence Legislation in California*, 36 Southwestern Univ. L. Rev. 561 (2008). For a detailed discussion about the use of Commission materials to determine legislative intent, see *2013-2014 Annual Report*, 43 Cal. L. Revision Comm’n Reports 253, 266-73 (2013) & sources cited therein.

790. See <http://www.clrc.ca.gov/K402.html>. At the bottom of that webpage, interested persons can electronically subscribe to receive new materials relating to this study as they are generated.

1 mediators, and mediation trade associations.”⁷⁹¹ That is consistent with how the
2 Commission normally conducts its studies; input from a wide spectrum of
3 knowledgeable sources is invaluable in the Commission’s study process.

4 The Commission is fortunate to have already received considerable input in this
5 study, from persons with a wide variety of views.⁷⁹² The Commission much
6 appreciates that input and is eager to hear further comments.

7 Written comments can be in any format⁷⁹³ and can be submitted by email⁷⁹⁴ or
8 by a traditional mail or delivery service.⁷⁹⁵ It is just as important to express support
9 for aspects of the tentative recommendation as it is to express opposition or
10 concern.

11 It is not necessary or desirable to give a detailed description of actual mediation
12 events. Such a description might affect pending litigation or be deemed a violation
13 of existing rules governing mediation confidentiality. For the Commission’s
14 purposes, describing a mediation situation in hypothetical terms is preferable.

15 **To receive maximum consideration, comments should be submitted by**
16 **September 1, 2017.** Comments are still welcome later, but they may not be
17 analyzed and considered as carefully as ones that arrive within the specified
18 comment period.

791. 2012 Cal. Stat. res. ch. 108.

792. The Commission has received numerous comments from professionals with relevant expertise, including mediators, attorneys, judges, and legal scholars. Mediation parties typically lack expertise in the field, but they also have an important perspective to offer. Among other things, they are less likely to be self-interested in this area than mediation professionals.

The Commission has made special efforts to obtain input from mediation parties, because they are not organized in cohesive, well-established stakeholder groups like mediation professionals. See CLRC Minutes (Sept. 2014), p. 4; CLRC Staff Memorandum 2014-60, pp. 2-4. Many mediation parties have already provided comments. See, e.g., CLRC Staff Memorandum 2017-9, Exhibit pp. 27-28 (comments of Angela Spanos); CLRC Staff Memorandum 2016-50, Exhibit pp. 1-2 (comments of Eddie Bernacchi, et al., on behalf of Air Conditioning Sheet Metal Ass’n, California Chapters of the National Electrical Contractors Ass’n, California Legislative Conference of the Plumbing, Heating & Piping Industry, Northern California Allied Trades, Wall & Ceiling Alliance, Associated General Contractors, California Building Industry Ass’n, Construction Employers Ass’n, Southern California Contractors Ass’n, United Contractors & Western Line Constructors); CLRC Staff Memorandum 2015-46, Exhibit pp. 234-35 (comments of Bonnie P. Harris); First Supplement to CLRC Staff Memorandum 2013-47, Exhibit pp. 5 (comments of Bill Chan), 17-23 (comments of Deborah Blair Porter); Second Supplement to CLRC Staff Memorandum 2013-39, Exhibit pp. 1-2 (comments of Kazuko Artus); CLRC Staff Memorandum 2014-36, Exhibit pp. 3-4 (comments of Jullie Doyle), 5-8 (comments of Karen Mak).

793. It is not necessary to submit multiple copies. One copy directed to the staff is sufficient.

794. Comments can be emailed to bgaal@clrc.ca.gov.

795. Comments can be mailed to:

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

1 After the comment period on the tentative recommendation ends, the
2 Commission will consider the written input received and any additional comments
3 made in oral testimony at public meetings. The Commission might substantially
4 revise the tentative report and/or tentative recommendation in response to that
5 input, or it might even change its approach and issue a new tentative
6 recommendation. Thus, this tentative recommendation is not necessarily the
7 recommendation the Commission will submit to the Legislature.

PART III. PROPOSED LEGISLATION

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

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

4 1120.5. (a) A communication or a writing that is made or prepared for the
5 purpose of, or in the course of, or pursuant to, a mediation or a mediation
6 consultation, is not made inadmissible, or protected from disclosure, by provisions
7 of this chapter if all of the following requirements are satisfied:

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

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

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

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

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

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

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

28 (c) In applying this section, a court may, but is not required to, use a sealing
29 order, a protective order, a redaction requirement, an in camera hearing, or a
30 similar judicial technique to prevent public disclosure of mediation evidence,
31 consistent with the requirements of the First Amendment to the United States
32 Constitution, Sections 2 and 3 of Article I of the California Constitution, Section
33 124 of the Code of Civil Procedure, and other provisions of law.

34 (d) Upon filing a complaint or a cross-complaint that includes a cause of action
35 for damages against a lawyer based on alleged malpractice in the context of a
36 mediation or a mediation consultation, the plaintiff or cross-complainant shall
37 serve the complaint or cross-complaint by mail, in compliance with Sections 1013
38 and 1013a of the Code of Civil Procedure, on all of the mediation participants
39 whose identities and addresses are reasonably ascertainable. This requirement is in

1 addition to, not in lieu of, other requirements relating to service of the complaint
2 or cross-complaint.

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

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

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

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

20 Under paragraph (1) of subdivision (a), this exception pertains to an attorney’s conduct in a
21 professional capacity. More precisely, the exception applies “when the merits of the claim will
22 necessarily depend on proof that an attorney violated a professional obligation — that is, an
23 obligation the attorney has *by virtue of* being an attorney — in the course of providing
24 professional services.” *Lee v. Hanley*, 61 Cal. 4th 1225, 1229, 34 P.3d 334, 191 Cal. Rptr. 3d 536
25 (2015) (emphasis in original); see also *id.* at 1239. “Misconduct does not ‘aris[e] in’ the
26 performance of professional services ... merely because it occurs during the period of legal
27 representation or because the representation brought the parties together and thus provided the
28 attorney the opportunity to engage in the misconduct.” *Id.* at 1238. The exception applies only
29 with respect to alleged misconduct of an attorney acting as an advocate, not with respect to
30 alleged misconduct of an attorney-mediator.

31 Paragraph (1) also makes clear that the alleged misconduct must occur in the context of a
32 mediation or a mediation consultation. This would include misconduct that allegedly occurred at
33 *any* stage of the mediation process (encompassing the full span of mediation activities, such as a
34 mediation consultation, a face-to-face mediation session with the mediator and all parties present,
35 a private caucus with or without the mediator, a mediation brief, a mediation-related phone call,
36 or other mediation-related activity). The determinative factor is whether the misconduct allegedly
37 occurred in a mediation context, not the time and date of the alleged misconduct.

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

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

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

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

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

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

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

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

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

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

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

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

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

45 **Note.** The Commission seeks comment on any aspect of the proposed Evidence Code Section
46 1120.5, but would especially appreciate input on the content and wording of paragraph (a)(3) (the
47 requirement that the proffered evidence “does not constitute a writing of the mediator relating to a
48 mediation conducted by the mediator”). For background on this point, see First Supplement to
49 CLRC Staff Memorandum 2017-30, pp. 3-12.

1 **Uncodified (added). Operative date**

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

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

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

APPENDIX: EVIDENCE CODE SECTIONS 703.5 AND 1115-1128
AND CORRESPONDING COMMENTS

Evid. Code § 703.5. Testimony by judge, arbitrator, or mediator

703.5. No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure. However, this section does not apply to a mediator with regard to any mediation under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

Comment. Section 703.5 is amended to correct the cross-reference to former Family Code Section 3155 to reflect the reorganization of those sections in 1993 Cal. Stat. ch. 219. This is a technical, nonsubstantive change. [24 Cal. L. Revision Comm'n Reports 621 (1994).]

Evid. Code § 1115. Definitions

1115. For purposes of this chapter:

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

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

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

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

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

A “mediator” may be an individual, group of individuals, or entity. See Section 175 (“person” defined). See also Section 10 (singular includes the plural). This definition of mediator encompasses not only the neutral person who takes the lead in conducting a mediation, but also any neutral who assists in the mediation, such as a case-developer, interpreter, or secretary. The definition focuses on a person’s role, not the person’s title. A person may be a “mediator” under this chapter even though the person has a different title, such as “ombudsperson.” Any person who meets the definition of “mediator” must comply with Section 1121 (mediator reports and

communications), which generally prohibits a mediator from reporting to a court or other tribunal concerning the mediated dispute.

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

For the scope of this chapter, see Section 1117.

[1997-1998 *Annual Report*, 27 Cal. L. Revision Comm'n Reports 531, 595-621 (Appendix 5) (1997).]

Evid. Code § 1116. Effect of chapter

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

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

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

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

[1997-1998 *Annual Report*, 27 Cal. L. Revision Comm'n Reports 531, 595-621 (Appendix 5) (1997).]

Evid. Code § 1117. Scope of chapter

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

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

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

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

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

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

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

[1997-1998 *Annual Report*, 27 Cal. L. Revision Comm'n Reports 531, 595-621 (Appendix 5) (1997).]

Evid. Code § 1118. Recorded oral agreement

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

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

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

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

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

Comment (1997). Section 1118 establishes a procedure for orally memorializing an agreement, in the interest of efficiency. Provisions permitting use of that procedure for certain purposes include Sections 1121 (mediator reports and communications), 1122 (disclosure by agreement), 1123 (written settlement agreements reached through mediation), and 1124 (oral agreements reached through mediation). See also Section 1125 (when mediation ends). For guidance on authority to bind a litigant, see *Williams v. Saunders*, 55 Cal. App. 4th 1158, 64 Cal. Rptr. 2d 571 (1997) (“The litigants’ direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent.”). [*1997-1998 Annual Report*, 27 Cal. L. Revision Comm’n Reports 531, 595-621 (Appendix 5) (1997).]

Comment (2009). Section 1118 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required). [37 Cal. L. Revision Comm’n Reports 211 (2007).]

Evid. Code § 1119. Mediation confidentiality

1119. Except as otherwise provided in this chapter:

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

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

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

Comment. Subdivision (a) of Section 1119 continues without substantive change former Section 1152.5(a)(1), except that its protection explicitly applies in a subsequent arbitration or administrative adjudication, as well as in any civil action or proceeding. See Section 120 (“civil

action” includes civil proceedings). In addition, the protection of Section 1119(a) extends to oral communications made for the purpose of or pursuant to a mediation, not just oral communications made in the course of the mediation.

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

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

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

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

[1997-1998 Annual Report, 27 Cal. L. Revision Comm’n Reports 531, 595-621 (Appendix 5) (1997).]

Evid. Code § 1120. Types of evidence not covered

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

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

- (1) The admissibility of an agreement to mediate a dispute.
- (2) The effect of an agreement not to take a default or an agreement to extend the time within which to act or refrain from acting in a pending civil action.
- (3) Disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute.

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

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

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

[1997-1998 Annual Report, 27 Cal. L. Revision Comm'n Reports 531, 595-621 (Appendix 5) (1997).]

Evid. Code § 1121. Mediator reports and communications

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

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

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

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

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

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

[1997-1998 Annual Report, 27 Cal. L. Revision Comm'n Reports 531, 595-621 (Appendix 5) (1997).]

Evid. Code § 1122. Disclosure by agreement

1122. (a) A communication or a writing, as defined in Section 250, that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if either of the following conditions is satisfied:

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

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

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

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

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

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

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

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

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

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

[1997-1998 *Annual Report*, 27 Cal. L. Revision Comm’n Reports 531, 595-621 (Appendix 5) (1997).]

Evid. Code § 1123. Written settlement agreements reached through mediation

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

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

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

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

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

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

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

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

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

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

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

See Section 1115(a) (“mediation” defined).

[1997-1998 *Annual Report*, 27 Cal. L. Revision Comm’n Reports 531, 595-621 (Appendix 5) (1997).]

Evid. Code § 1124. Oral agreements reached through mediation

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

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

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

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

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

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

Subdivision (b) parallels Section 1123(c).

Subdivision (c) parallels Section 1123(d).

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

See Section 1115(a) (“mediation” defined).

[1997-1998 *Annual Report*, 27 Cal. L. Revision Comm’n Reports 531, 595-621 (Appendix 5) (1997).]

Evid. Code § 1125. When mediation ends

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

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

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

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

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

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

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

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

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

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

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

Under subdivision (a)(1), if mediation participants reach an oral compromise and reduce it to a written settlement fully resolving their dispute, confidentiality extends until the agreement is signed by all the parties. For guidance on binding a disputant to a settlement agreement, see *Williams v. Saunders*, 55 Cal. App. 4th 1158, 64 Cal. Rptr. 2d 571 (1997) (“The litigants’ direct

participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent.”).

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

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

Subdivision (c) limits the effect of Section 1125.

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

[1997-1998 Annual Report, 27 Cal. L. Revision Comm’n Reports 531, 595-621 (Appendix 5) (1997).]

Evid. Code § 1126. Effect of end of mediation

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

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

See Section 1115(a) (“mediation” defined).

[1997-1998 Annual Report, 27 Cal. L. Revision Comm’n Reports 531, 595-621 (Appendix 5) (1997).]

Evid. Code § 1127. Attorney’s fees

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

Comment. Section 1127 continues former Section 1152.5(d) without substantive change, except to clarify that either a court or another adjudicative body (e.g., an arbitrator or administrative tribunal) may award the fees and costs. Because Section 1115 (definitions) defines “mediator” to include not only the neutral person who takes the lead in conducting a mediation, but also any neutral who assists in the mediation, fees are available regardless of the role played by the person subjected to discovery.

See Section 1115(b) (“mediator” defined).

[1997-1998 Annual Report, 27 Cal. L. Revision Comm’n Reports 531, 595-621 (Appendix 5) (1997).]

Evid. Code § 1128. Irregularity in proceedings

1128. Any reference to a mediation during any subsequent trial is an irregularity in the proceedings of the trial for the purposes of Section 657 of the Code of Civil

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

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

See Section 1115 ("mediation" defined).

[1997-1998 *Annual Report*, 27 Cal. L. Revision Comm'n Reports 531, 595-621 (Appendix 5) (1997).]