

Memorandum 2014-43

**Relationship Between Mediation Confidentiality and Attorney Malpractice
and Other Misconduct: Pennsylvania Law**

As directed by the Legislature,¹ the Commission has been examining the law of other jurisdictions on the relationship between mediation confidentiality and attorney malpractice and other misconduct. In addition to studying the Uniform Mediation Act (“UMA”), the Commission identified five populous and influential non-UMA states for particular attention: Florida, Massachusetts, New York, Pennsylvania, and Texas. This memorandum describes the law in Pennsylvania.²

In the discussion that follows, the staff refers to some unpublished decisions. In doing so, we do not mean to suggest that those decisions have any precedential value in their respective jurisdictions. Rather, we are merely bringing the unpublished opinions to the Commission’s attention so that it can consider them to the extent, if any, that they shed light on how to frame California law.

We begin by describing the Pennsylvania statute providing protection for mediation communications. Next, we relate some history regarding Pennsylvania’s position on the UMA. We then examine the case law interpreting the Pennsylvania statute. Finally, we discuss some articles exploring how that statute applies to malpractice and other misconduct in the mediation context.

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

2. For descriptions of the law in Florida, Massachusetts, and New York, see Memorandum 2014-35. The staff plans to describe Texas law in Memorandum 2014-44.

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

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

PENNSYLVANIA'S STATUTORY SCHEME

Pennsylvania's statute protecting mediation materials (Section 5949) was enacted in 1996 and has not been changed since then. The key provision says that "mediation communications" and "mediation documents" are privileged, protects such materials from compelled discovery, and makes them inadmissible:

(a) *General rule.* — Except as provided in subsection (b), all mediation communications and mediation documents are privileged. Disclosure of mediation communications and mediation documents may not be required or compelled through discovery or any other process. Mediation communications and mediation documents shall not be admissible as evidence in any action or proceeding, including, but not limited to, a judicial, administrative or arbitration action or proceeding.³

The statute defines a "mediation communication" as a "communication, verbal or nonverbal, oral or written, made by, between or among a party, mediator, mediation program or any other person present to further the mediation process when the communication occurs during a mediation session or outside a session when made to or by the mediator or mediation program."⁴ A "mediation document" is "[w]ritten material, including copies, prepared for the purpose of, in the course of or pursuant to mediation."⁵ The term encompasses, but is not limited to, "memoranda, notes, files, records and work product of a mediator, mediation program or party."⁶

The statute applies broadly: It defines "mediation" as the "deliberate and knowing use of a third person by disputing parties to help them reach a resolution of their dispute."⁷ A mediation "commences at the time of initial contact with a mediator or mediation program."⁸

The statute is subject to four express exceptions, some of which are similar to exceptions recognized in California. Specifically, those exceptions are:

- **Settlement document.** "A settlement document may be introduced in an action or proceeding to enforce the settlement agreement expressed in the document, unless the settlement

3. Pa. Cons. Stat. § 5949(a). See also Pa. R. Civ. Proc. § 4011(d) ("No discovery, including discovery of electronically stored information, shall be permitted which ... is prohibited by any law barring disclosure of mediation communications and mediation documents").

4. Pa. Cons. Stat. § 5949(c).

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

document by its terms states that it is unenforceable or not intended to be legally binding.”⁹

*Under specified conditions, California similarly permits the introduction of a written or oral settlement agreement “prepared in the course of, or pursuant to, a mediation.”*¹⁰

- **Criminal matter.** “To the extent that the communication or conduct is relevant evidence in a criminal matter,” Pennsylvania’s privilege does not apply to (1) “a communication of a threat that bodily injury may be inflicted on a person,” (2) “a communication of a threat that damage may be inflicted on real or personal property under circumstances constituting a felony,” or (3) “conduct during a mediation session causing direct bodily injury to a person.”¹¹

*In contrast, California’s statute protecting mediation communications does not apply in any criminal case.*¹² *The statute is also inapplicable to conduct, unless the conduct is intended as an assertion.*¹³

- **Fraudulent communication.** Pennsylvania’s privilege “does not apply to a fraudulent communication during mediation that is relevant evidence in an action to enforce or set aside a mediated agreement reached as a result of that fraudulent communication.”¹⁴

*California does not have a comparable exception. A written settlement agreement, which is prepared in or pursuant to mediation and signed by the settling parties, may be admitted into evidence “to show fraud, duress, or illegality that is relevant to an issue in dispute.”*¹⁵ *If a party accepts a settlement offer in reliance on a promise or other representation made during a mediation, the party may obtain protection by having the promise or other representation incorporated into the settlement agreement.*

- **Preexisting evidence.** “Any document which otherwise exists, or existed independent of the mediation and is not otherwise covered by this section, is not subject to [Pennsylvania’s] privilege.”¹⁶

*California has a similar exception.*¹⁷

9. Pa. Cons. Stat. § 5949(b)(1).

10. See Cal. Evid. Code §§ 1123, 1124.

11. Pa. Cons. Stat. § 5949(b)(2).

12. See, e.g., *Cassel v. Superior Court*, 51 Cal. 4th 113, 119, 244 P.3d 1080, 119 Cal. Rptr. 3d 437 (2011).

13. See *Radford v. Shehorn*, 187 Cal. App. 4th 852, 857, 114 Cal. Rptr. 3d 499 (2010).

14. Pa. Cons. Stat. § 5949(b)(3).

15. Cal. Evid. Code § 1123(d).

16. Pa. Cons. Stat. § 5949(b)(4).

17. See Cal. Evid. Code § 1120(a).

Like the California law governing protection of mediation communications, the Pennsylvania statute does not expressly address professional malpractice or other professional misconduct of any kind.

THE UNIFORM MEDIATION ACT IN PENNSYLVANIA

Pennsylvania has not enacted the UMA. It is clear, however, that the UMA received some consideration in Pennsylvania legal and mediation circles.

The UMA was a joint effort of the National Conference of Commissioners on Uniform State Laws (“NCCUSL,” now known as the “Uniform Law Commission” or “ULC”) and the American Bar Association (“ABA”). The ABA’s drafting committee included a member from Pennsylvania.¹⁸ NCCUSL approved the UMA in August 2001; the ABA approved it six months later, at a meeting in Philadelphia.

In the summer of 2001, the Pennsylvania Bar Association (“PBA”) formed a subcommittee of its ADR Committee to review the UMA. According to a PBA newsletter issued that fall, the subcommittee head planned to recommend at an upcoming committee meeting “that Pennsylvania should *not* modify existing Pennsylvania law in order to adopt the Uniform Mediation Act.”¹⁹ The staff did not find any other PBA materials reporting on this matter.

The Philadelphia Bar Association also considered the UMA. In January 2002, it adopted a resolution opposing adoption of the UMA:

WHEREAS, the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) has approved and recommended for enactment a Uniform Mediation Act (the “Proposed Mediation Act”); and

WHEREAS, Section 9(d) of the Proposed Mediation Act fails to protect the reasonable expectations of confidentiality by the parties engaging in mediation, is inconsistent with and significantly inferior to the Pennsylvania mediation confidentiality statute, 42 Pa. C.S. § 5949, and is otherwise fatally flawed;

NOW, THEREFORE BE IT RESOLVED that the Philadelphia Bar Association opposes adoption of the Proposed Mediation Act in its present form and urges the House of Delegates of the American

18. The UMA is available at http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf. The membership of the drafting committees is shown in the introductory material.

19. Pennsylvania Bar Ass’n, *Message from the Chairs*, Arbitration & Mediation Newsletter (Fall 2001), p.1 (emphasis in original).

Bar Association to oppose adoption of the Proposed Mediation Act in its present form at its February 2002 meeting in Philadelphia.²⁰

The UMA provision criticized in the above resolution (Section 9(d)) precludes a mediator from asserting the UMA privilege if the mediator fails to comply with the conflict of interest disclosure requirements of the UMA. That provision caused concern in other jurisdictions as well:

The uniform act has recently come under fire from a handful of state and local bar associations, particularly Texas and Pennsylvania, who say the act does not go far enough in protecting confidential mediation communications from being disclosed in future proceedings....

The Uniform Mediation Act would create a privilege for mediators and mediation participants to refuse to disclose and prevent others from disclosing mediation communications in future proceedings. However, that privilege would be taken away when a mediator fails to disclose conflicts of interest. This provision led to the passage of formal resolutions of opposition by the Pennsylvania and Texas bar associations, as well as the International Academy of Mediators and the ADR section of the Maryland bar association.²¹

Due to the expressed concerns, members of the UMA drafting committee met with representatives of those bar associations before the ABA vote on the UMA. “[A]fter extensive discussions,” the groups withdrew their opposition and “the act passed with ‘no record of dissent’ from a state bar association or ABA section.”²² It is not clear to the staff whether both the PBA and the Philadelphia Bar Association withdrew their opposition, or only the PBA.

Although the Philadelphia Bar Association’s resolution specifically referred to UMA Section 9(d), the staff found some evidence that its opposition to the UMA rested on other grounds as well. In particular, a 2006 article in a Philadelphia law journal indicates that there was criticism of the UMA provisions relating to professional misconduct or malpractice:

The Uniform Mediation Act ...specifically exempts from the privilege mediation communications sought to prove or disprove a claim of professional misconduct or malpractice by the mediator or a party, nonparty participant or representative of a party, based on conduct occurring during the mediation. Opposition to these

20. See <http://www.philadelphiabar.org/page/BoardResolution939591282002?appNum=2>.

21. See <http://www.google.com/search?client=safari&rls=en&q=aba+house+of+delegates+pennsylvania+bars'+opposition+uniform+mediation+act&ie=UTF-8&oe=UTF-8>.

22. *Id.*

provisions quickly developed in the Philadelphia Bar Association prior to the act's approval by the American Bar Association.²³

We will attempt to contact the author of the article to find out more about this.

For whatever reason, the UMA encountered resistance in Pennsylvania, just as it did in Massachusetts and New York (as discussed previously²⁴). Although that opposition was apparently withdrawn for purposes of the ABA vote, the staff did not find any current or past legislation seeking to enact the UMA in Pennsylvania.

CASE LAW ON PENNSYLVANIA'S PROTECTION OF MEDIATION COMMUNICATIONS

When the PBA and Philadelphia Bar Association were considering the UMA, there was "a dearth of decisions from either state or federal courts concerning Pennsylvania's mediation privilege."²⁵ A federal district court remedied that situation shortly thereafter, in *U.S. Fidelity & Guaranty Co. v. Dick Corp.*²⁶

The Requirement of a "Clear Nexus" to the Mediation and "Active Participation of the Mediator"

The *Dick* case involved an unsuccessful mediation, followed by further settlement discussions that eventually resulted in a settlement among several defendants and nonparties. Thereafter, the plaintiff sought discovery of the settlement agreement and an amendment to a construction agreement. The defendants sought to invoke Section 5949's protection for mediation communications, but a discovery master rejected their argument and the federal district court upheld that ruling on appeal.

In so doing, the court sought to "distinguish between garden variety settlement discussions, which are not protected, and those which are a part of the mediation process and are privileged."²⁷ The court decided that "communications purely between the parties and not involving the active participation of the mediator are not privileged."²⁸ It explained:

[D]iscussions among parties outside the presence of the mediator and not occurring at a mediation proceeding are not privileged.

23. Abraham Gafni, *Does the Mediation Privilege Apply in Legal Malpractice Cases?*, The Legal Intelligencer (Oct. 25, 2011), p. 2.

24. See Memorandum 2014-35, pp. 30-32, 36-39.

25. *U.S. Fidelity & Guaranty Co. v. Dick Corp.*, 215 F.R.D. 503, 505 (W.D. Pa. 2003).

26. 215 F.R.D. 503 (W.D. Pa. 2003).

27. *Id.* at 505.

28. *Id.*

Where the mediator has no direct involvement in the discussions and where the discussions were not designated by the parties to be a part of an ongoing mediation process, the rationale underlying the mediation privilege (i.e., that confidentiality will make the mediation more effective) is not implicated. The mere fact that discussions subsequent to a mediation relate to the same subject as the mediation does not mean that all documents and communications related to that subject are “to further the mediation process” or prepared for the purpose of, in the course of, or pursuant to mediation.²⁹

Two years later, another federal court applied the same standard in an unpublished yet widely cited case (*United States Fidelity & Guaranty Co. v. Bilt-Rite Contractors, Inc.*³⁰), but concluded that the particular documents in question had “a clear nexus” to a mediation and were thus protected by Pennsylvania’s mediation privilege.³¹

The staff is not certain how the *Dick* standard would apply to the “private attorney-client discussions immediately preceding, and during the mediation concerning mediation settlement strategies and defendants’ efforts to persuade [their client] to reach a settlement in the mediation” that the California Supreme Court excluded from evidence in *Cassel v. Superior Court*.³² We suspect a Pennsylvania court would say that those discussions are privileged because they have a “clear nexus” to the mediation. It is possible, however, that the court would consider those discussions unprivileged because they did not involve the “active participation of the mediator.”

Other Limitations on the Statutory Protection

What appears to be the first published Pennsylvania decision interpreting Section 5949 was issued the same year as *Bilt-Rite*. In *Aetna, Inc. v. Lexington Ins. Co.*,³³ a Pennsylvania trial court considered a dispute regarding the terms of a settlement that was reached in a mediation. The court decided the dispute against the plaintiff, and the plaintiff then contended that the court had violated Section 5949 in reaching that result. The court disagreed, justifying its conclusion on two different grounds:

29. *Id.* at 506.

30. 2005 U.S. Dist. LEXIS 9299 (2005).

31. *Id.* at *21.

32. 51 Cal. 4th 113, 118, 244 P.3d 1080, 119 Cal. Rptr. 3d 437 (2011).

33. 76 Pa. D. & C.4th 19 (2005).

- (1) It did “not consider the communications or disclosures made during the course of the mediation process,” but only “[t]he fact of *what was not discussed*.”³⁴
- (2) Even if it did “consider communications related to the mediation in order to ascertain the parties’ intent with regard to the Settlement Agreement, the purpose of the Pennsylvania statute would not [have been] defeated,” because it was merely interpreting the mediated settlement agreement, not resolving the dispute that was mediated.³⁵

Like the *Dick* decision, the *Aetna* case thus enunciated limitations on the breadth of Pennsylvania’s mediation privilege.

In *Executive Risk Indemnity, Inc. v. Cigna Corp.*,³⁶ another Pennsylvania trial judge enumerated a further limitation: A party that “did not participate in the preparation for the mediation, did not sign the mediation agreement and was asked to leave when its representatives arrived” did “not have standing to claim the mediation privilege protection.”³⁷ Only the mediation participants could assert the mediation privilege, which the judge described as “one of the broadest privileges in Pennsylvania,” because

[i]t absolutely protects not only results but all communications including any demands for settlement or offers in compromise from disclosure. The only exceptions are for evidence necessary for litigation surrounding a settlement itself and for criminal conduct during the mediation.³⁸

Citing only a dissenting opinion, a statute of limited application, and a piece of commentary, the judge went on to say that “[t]he laws of New York and Pennsylvania do not differ in the protections afforded mediation communications.”³⁹ The staff is unconvinced of this point, as reflected in the analysis of New York law we previously provided.⁴⁰

A recent Pennsylvania decision, examining Pennsylvania’s mediation privilege by way of analogy, focused on another constraint on the statutory protection: the exception relating to criminal conduct. In *Commonwealth v.*

34. *Id.* at 27 (emphasis in original).

35. *Id.* at 28.

36. 81 Pa. D. & C.4th 410 (2006).

37. *Id.* at 430.

38. *Id.* at 429.

39. *Id.* at 430.

40. See Memorandum 2014-35, pp. 32-40 (noting, among other things, that “New York does not have a statute or rule that broadly or generally addresses mediation communications”).

Kunkle,⁴¹ the court asserted that a mediation communication may be subject to disclosure in a criminal prosecution *to the extent that the communication is relevant in a criminal matter*.⁴² The court seemingly ignored the three limitations stated in Section 5949(b)(2) itself, indicating that

To the extent that the communication or conduct is relevant evidence in a criminal matter, the privilege and limitation set forth in subsection (a) does not apply to:

(i) *a communication of a threat that bodily injury may be inflicted on a person;*

(ii) *a communication of a threat that damage may be inflicted on real or personal property under circumstances constituting a felony; or*

(iii) *conduct during a mediation session causing direct bodily injury to a person.*⁴³

The *Kunkle* case thus creates some uncertainty regarding the scope of the exception relating to criminal conduct; that exception might be broader than initially appears from the statutory language.

Somewhat similarly, although Section 5949 does not refer to waiver, a recent federal court decision holds that Pennsylvania's mediation privilege can be inadvertently waived, at least if mediation materials are inadvertently produced in a federal proceeding. In *Stewart Title Guaranty Co. v. Owlett & Lewis, P.C.*,⁴⁴ the court applied the waiver principles of Federal Rule of Evidence 502 "by analogy,"⁴⁵ and concluded that the defendant waived the privilege because "it did not take reasonable steps to prevent disclosure of privileged documents, and it did not take reasonable steps to rectify its errors."⁴⁶ The staff did not find any Pennsylvania case providing guidance on waiver of the mediation privilege.⁴⁷

***In Camera* Review**

Another case involving Section 5949 bears mentioning, even though it is unpublished. In *American International Specialty Lines Ins. Co. v. Chubb Custom Ins. Co.*,⁴⁸ the defendant sought production of certain documents, but the court held

41. 79 A.3d 1173 (Pa. Super. Ct. 2013), *pet. for allowance of appeal pending*.

42. *Id.* at 1189.

43. Emphasis added.

44. 297 F.R.D. 232 (M.D. Pa. 2013).

45. *Id.* at 241.

46. *Id.* at 242.

47. We did find a recent, unpublished federal decision that *might* have involved a waiver of the mediation privilege. See *Bayer v. CitiMortgage, Inc.*, 2014 U.S. Dist. LEXIS 117111 (M.D. Pa. 2014) (enforcing oral agreement reached in mediation, without any discussion of Section 5949 or mediation confidentiality).

48. 2011 Phila. Ct. Com. Pl. LEXIS 265 (2011).

that some of those documents were protected by the attorney-client or work product privilege and others were protected by Pennsylvania's mediation privilege.⁴⁹

The defendant further argued that the court could not properly restrict discovery of the documents unless it first conducted an *in camera* review and ruled on each document after inspecting it.⁵⁰ But the court disagreed, explaining that the case cited by the defendant "does not require *in camera* review in all discovery disputes," instead a court "has discretion to order same when circumstances necessitate."⁵¹ Thus, the court concluded that it "acted properly in adjudicating [defendant's] motions without requesting an *in camera* review."⁵² In its view, "[t]he privilege log's descriptions coupled with the pleadings were sufficient for a determination."⁵³

This point from *Chubb* may be worth considering if the Commission decides to explore the possibility of using an *in camera* approach in this study. While it might be appropriate to require an *in camera* inspection before *ordering production* of a document claimed to be protected from disclosure, it may not always be necessary, and may at times be overly burdensome on the court and litigants, to require an *in camera* inspection before *denying production* of such a document.

APPLICATION OF PENNSYLVANIA LAW TO MEDIATION MALPRACTICE OR OTHER MEDIATION MISCONDUCT

The staff was not able to find any case in which the court discusses how Pennsylvania's mediation privilege would apply to malpractice or other professional misconduct occurring in, or otherwise connected to, a mediation. But we did find an unpublished federal decision, *McKissock & Hoffman, P.C. v. Waldron*,⁵⁴ that came close.

The underlying facts are as follows: Two companies had a business dispute, which was litigated in federal court and mediated by the Chief Mediator for the Third Circuit. After the mediation, one of the companies sued its law firm in a Pennsylvania court, alleging that the firm committed malpractice during the

49. See *id.* at *9-*15.

50. *Id.* at *15.

51. *Id.* at *16.

52. *Id.* at *15.

53. *Id.* at *17.

54. 2011 U.S. Dist. LEXIS 86834 (2011).

mediation by failing to advise the company to accept a particular settlement offer. The firm denied that the offer was ever made and sought to depose the Chief Mediator. For several reasons, the Clerk of the Third Circuit denied the firm's request to permit the Chief Mediator to testify. The firm then sued in federal district court, alleging that the Clerk had violated the Administrative Procedure Act ("APA").

The federal district court dismissed the lawsuit, explaining in the unpublished *McKissock* decision that there was no violation of the APA. Because of the posture of the case, the court did not need to discuss whether permitting the Chief Mediator to testify would be a violation of mediation confidentiality. 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."⁵⁵

Abraham Gafni's Article

In a 2011 article in *The Legal Intelligencer*, Abraham Gafni (a mediator, arbitrator, and law professor) discussed the issue in detail, and also referred to both the UMA and the California Supreme Court's decision in *Cassel*.⁵⁶ Mr. Gafni noted that "[w]hether and to what extent the Pennsylvania mediation privilege statute applies to legal malpractice cases has not been decided."⁵⁷ He saw arguments on both sides.

In particular, Mr. Gafni offered two reasons why the privilege might apply to mediation-related legal malpractice:

- The statute does not contain any express exception for mediation-related legal malpractice. Rather, the statutory language "on its face would appear to relate to any communications among any of the mediation participants, including those between client and attorney."⁵⁸
- "[A]llowing such an exception to the mediation privilege might adversely affect parties other than the client and attorney."⁵⁹ For instance, "the opposing parties in the mediation may be concerned independently about the disclosure of business information

55. Gafni, *supra* note 23, at 1.

56. Gafni, *supra* note 23. Mr. Gafni's article is available at <http://adoption.com/pdfs/11OCT-Does-the-MediationPrivilegeApply-in-LegalMalpracticeCases.pdf>.

57. *Id.* at 3.

58. *Id.* at 1.

59. *Id.*

communicated by them during the mediation based upon which the attorney being sued advised the client.”⁶⁰

He also gave two reasons why the privilege might *not* apply to mediation-related legal malpractice:

- Applying Pennsylvania’s mediation privilege in the legal malpractice context “might be perceived as unfairly immunizing the attorney so that an injured client would be left without a remedy.”⁶¹
- A court might view the mediation privilege as analogous to the attorney-client privilege. “In legal malpractice cases, clients are free to waive attorney-client privilege and testify about exchanges with their attorneys who may, by reason of the waiver, defend themselves by relying on such communications.”⁶² A court might decide to apply the same approach to the mediation privilege.

Mr. Gafni went on to assume that “the Pennsylvania statute *does* prohibit the disclosure or admissibility of mediation communications in legal malpractice actions.”⁶³ He then described some issues that could come up if this interpretation was correct.

First, he raised the question mentioned above in discussing *Dick*: Whether “the Pennsylvania statute provides a privilege as to anything said by any of the participants only when the mediation session is being conducted with the mediator but does not apply when the only individuals in the room are the attorney and the client”⁶⁴ He pointed out that this position was “essentially accepted” by the California court of appeal in *Cassel*, but “ultimately rejected” by the California Supreme Court.⁶⁵ He then noted several issues that could arise if Pennsylvania followed that approach, such as (1) whether the mediator’s presence is the determinative factor, as opposed to whether a mediation session is in process, and (2) “whether the privilege would apply to separate meetings between the attorney and client, in which the attorney advises the client of communications allegedly made to him directly by the mediator and upon which legal advice is based.”⁶⁶ **If the Commission decides to explore the idea of making mediation confidentiality inapplicable to private attorney-client**

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 2.

64. *Id.*

65. *Id.*

66. *Id.*

discussions, it should examine and provide guidance on these subsidiary issues.

Second, Mr. Gafni pointed out that there could be uncertainties about when a mediation begins or ends, complicating the process of assessing whether an alleged incident of legal malpractice is, or is not, shielded by Pennsylvania's mediation privilege.⁶⁷ This set of issues is likely to be less acute in California, because California law expressly protects a "mediation consultation"⁶⁸ and provides specific guidance on when a mediation ends.⁶⁹

Third, Mr. Gafni queried whether Pennsylvania's mediation privilege is a "one-way street" with regard to legal malpractice, or operates the same way regardless of whether disclosure of mediation evidence would help or hurt a legal malpractice claim.⁷⁰ He pointed out that both situations can occur:

The mediation privilege as it relates to legal malpractice actions is generally characterized as benefiting attorneys who are insulated from liability. Often ignored, however, is that the privilege may also act to the detriment of the defendant attorney. For example, the plaintiff may be alleging that the attorney provided incorrect information to the client prior to the mediation. The attorney may wish to defend by presenting evidence that correct information was, in fact, provided to the client during the mediation.⁷¹

He observed that the California Supreme Court took an even-handed approach in *Cassel*, "stating that 'the mediation confidentiality statutes work both ways, they prevent either party to the malpractice suit from disclosing the content of their mediation-related communications.'"⁷² As the staff previously pointed out, **if the Commission proposes to modify existing law to allow some disclosure for purposes of a malpractice proceeding, it will need to decide whether to use an even-handed approach, or allow only one side to present mediation communications.**⁷³

Finally, Mr. Gafni asked whether a Pennsylvania lawyer has a duty to advise a client that the mediation privilege may insulate the lawyer from liability for professional negligence.⁷⁴ He did not attempt to answer this question, but

67. *Id.* at 3.

68. See Cal. Evid. Code § 1115(c), 1119.

69. See Cal. Evid. Code § 1125.

70. Gafni, *supra* note 23, at 3.

71. *Id.*

72. *Id.*, quoting *Cassel*, 51 Cal. 4th at 133 n.10.

73. See First Supplement to Memorandum 2014-35, pp. 5-6.

74. Gafni, *supra* note 23, at 3.

pointed out that “[s]ome commentators have even gone so far as to suggest that attorneys must either agree to waive confidentiality (assuming they can do so over the objection of other parties to the mediation) or advise clients that because mediation communications may not be used to support a subsequent legal malpractice claim, they should consider seeking the advice of independent counsel before agreeing to mediation.”⁷⁵

Regardless of whether those commentators are correct, the same basic issue (what, if anything, a lawyer should tell a client about the intersection of mediation confidentiality and legal malpractice) exists in California, as some participants in this study have already pointed out.⁷⁶ **The Commission should consider the possibility of addressing the matter, but should also be careful not to intrude on the province of the State Bar or the judiciary.**

Charles Forer’s Article

While Mr. Gafni alerts readers to many questions, the author of another article published in *The Legal Intelligencer* is more assertive about the meaning of Pennsylvania’s mediation privilege. In an article entitled “*Getting Away with Fraud During the Mediation Process*,”⁷⁷ Charles Forer (a Pennsylvania litigator, arbitrator, and mediator) posed a hypothetical involving an attorney named Bob who had a difficult client named Allan. Bob schemed to escape the relationship by using the mediation privilege in an unethical manner:

On the day before the mediation session, Bob met with Allan to prepare. Bob told Allan all about the mediation process....

The coup de grace: Bob asked Allan to sign the last page of the two-page confidentiality agreement. “Mediation is a confidential process,” Bob explained. “This confirms that none of us can use anything we say or do at the mediation.”

The mediation session unfolded as Bob expected. Allan whined and complained. He rejected the other side’s offer. He refused to make a demand....

At the end of the long day, Bob asked the mediator for a private meeting.... Bob said [that] Allan would accept the other side’s settlement offer on one condition — that Allan did not have to see or talk to the mediator or the other side ever again....

75. *Id.*

76. See, e.g., First Supplement to Memorandum 2013-39, Exhibit p. 2 (comments of Nancy Neal Yeend).

77. Charles Forer, *Getting Away with Fraud During the Mediation Process*, *The Legal Intelligencer* (Nov. 20, 2012). Mr. Forer’s article is available at <http://www.eckertseamans.com/uploads/publications/ForerChesterCoBarAssocJulyAug2013.pdf>.

Meeting with the other side's lawyer a few minutes later, Bob said he would prepare a simple release to memorialize the settlement.

Three weeks later, Bob invited Allan to his office and presented Allan with a settlement check, which Allan threw back in Bob's face, screaming, "I did not settle my case at the mediation." Bob had anticipated this reaction from his always unreasonable client: "Yes, you did settle at the mediation. Here is the settlement agreement you signed." Bob handed him a "Confidential Settlement Agreement and Mutual General Release" with Allan's signature. Bob had appended to the settlement agreement the signature page from the two-page confidentiality agreement Allan signed the day before the mediation.

Bob's plan worked in at least one respect: Allan fired Bob on the spot.

One week later, Allan's new lawyer served Bob with a complaint that pleaded causes of action for malpractice, breach of fiduciary duties, and fraud arising from Bob's representation of Allan. The complaint claimed Bob had tricked Allan into settling his claims by inducing Allan to sign a supposed confidentiality agreement the day before the mediation, and later attaching the confidentiality agreement signature page to the settlement agreement.

Bob [filed] a demurrer: the complaint was legally insufficient because it alleged Bob's purported deception occurred during a mediation session; and the mediation confidentiality privilege precludes any reference to anything said or done at or in the course of the mediation....

*Can Bob successfully hide behind a mediation privilege and thereby keep his deceptive acts under wraps?*⁷⁸

Mr. Forer responds to his own question by saying that the answer is "Yes in California" and "No in Pennsylvania."⁷⁹ He explains that "[i]n *Hadley v. The Cochran Firm*, ... a California Court of Appeal, in an unpublished opinion, rebuffed a malpractice claim based on claims surprisingly similar to the allegations of Bob's case."⁸⁰

He believes the result would be different in Pennsylvania for two reasons. First, he says that "[u]nlike the sweeping California mediation privilege," Pennsylvania's mediation statute "is not ironclad."⁸¹ Rather, it "includes an exception that appears to contemplate Bob's shenanigans"⁸² He points to

78. *Id.* at 1-2 (emphasis added).

79. *Id.* at 2.

80. *Id.*

81. *Id.*

82. *Id.* at 3.

Section 5949(b)(3), which makes the privilege inapplicable to “a fraudulent communication during mediation that is relevant evidence in an action to enforce or set aside a mediated agreement reached as a result of that fraudulent communication.”

Second, Mr. Forer says that “the Pennsylvania statute probably does not ‘protect’ Bob’s pre-mediation session communications with Allan in the first place.”⁸³ He explains:

Bob’s assertion that he spoke to Allan the day before the mediation started — outside the presence of the mediator — does not confer privileged status on communications and documents shared only by Bob and Allan, and not involving the mediator. Reason: *communications between the parties or between a party and his/her lawyer, and not involving the active participation of the mediator, are not privileged.*⁸⁴

Mr. Forer thus interprets Pennsylvania’s mediation privilege to be inapplicable to a private attorney-client discussion immediately preceding or during a mediation. As previously discussed, the staff was not able to find any court decision addressing this point; the matter does not appear to have been definitively resolved.

Mr. Forer concludes his article by saying that “Bob should have followed his childhood fantasies and set up shop in California.”⁸⁵ It is possible, however, that Bob would not fully escape punishment in California either. California’s protection for mediation communications does not extend to a criminal case.⁸⁶ A creative California prosecutor might find a way to prosecute Bob’s fraudulent behavior.

It also seems conceivable, though perhaps unlikely, that Allan could still pursue the claims purportedly settled. A mediated settlement agreement is admissible (and thus enforceable) in California only if it is “signed by the settling parties.”⁸⁷ The agreement must also be properly authenticated — i.e., the proponent must introduce evidence “sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is”⁸⁸

83. *Id.*

84. *Id.* (emphasis added).

85. *Id.*

86. See, e.g., *Cassel v. Superior Court*, 51 Cal. 4th 113, 119, 244 P.3d 1080, 119 Cal. Rptr. 3d 437 (2011).

87. Cal. Evid. Code § 1123.

88. Cal. Evid. Code § 1400.

A California court might thus permit Allan to testify that the document purporting to be a mediated settlement agreement is not what it purports to be; his signature appears on it, but he never signed a document in that form. He could not provide any details without violating the mediation confidentiality statute, and Bob presumably would testify to the contrary. Their bare, conflicting statements regarding authenticity would amount to an unsatisfying swearing contest, because the truth could not be tested by examining the underlying fact situation. But Allan's demeanor might be more credible than Bob's, and that might be sufficient to preclude introduction of the purported settlement agreement and prevent enforcement of it against Allan.

The staff does not see a way, however, for Allan to prove Bob's malpractice in California. As the court of appeal stated in the unpublished *Hadley* opinion to which Mr. Forer refers,

plaintiffs cannot establish their claims without delving into the circumstances under which they were allegedly fraudulently induced to sign a document at the mediation that their counsel later represented to be a settlement agreement. The trier of fact must necessarily consider the circumstances under which the purported settlement agreement came to exist. To the extent counsel's alleged deception occurred at the mediation, it was "in the course of, or pursuant to, a mediation" under the expansive interpretation given to those terms. As *Cassel* makes clear, section 1119 renders such evidence inadmissible, even if it would "unfairly" shield an attorney from liability.⁸⁹

SUMMARY OF PENNSYLVANIA LAW

Pennsylvania's statute protecting mediation communications and mediation documents has been in place since 1996. It defines "mediation" broadly. It says mediation materials are privileged, protects them from compelled discovery, and makes them inadmissible. The statute has four express exceptions, including one for "a fraudulent communication during mediation that is relevant evidence in an action to enforce or set aside a mediated agreement reached as a result of that fraudulent communication." The statute does not expressly address professional malpractice or other professional misconduct of any kind.

89. *Hadley v. The Cochran Firm*, 2012 Cal. App. Unpub. LEXIS 5743 (Cal. Ct. App. 2012), at *9-*10 (citations omitted).

Pennsylvania's legal and mediation communities examined the UMA shortly after it was approved by NCCUSL and the ABA. They had some concerns about it, and the UMA does not appear to have gained significant traction in the state.

A number of published opinions have interpreted various aspects of Pennsylvania's mediation privilege. There does not appear to be any decision applying the statute to professional malpractice or other professional misconduct.

Some cases hold that Pennsylvania's privilege only applies to a communication with a "clear nexus" to a mediation, involving "active participation of the mediator." It is not clear whether a private attorney-client discussion immediately preceding or during a mediation would meet that requirement. As some Pennsylvania commentators have pointed out, that point might be important in a case involving allegations of mediation-related legal malpractice or other attorney misconduct.

Respectfully submitted,

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