Study K-402 December 9, 2014

Memorandum 2014-59

Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct: Additional Comments on Miscellaneous Other States

In this study on the relationship between mediation confidentiality and attorney malpractice and other misconduct, the Commission[1] has taken a close look at the Uniform Mediation Act and the states that have adopted it,[2] as well as the law of Florida,[3] Massachusetts,[4] New York,[5] Pennsylvania,[6] and Texas.[7] Memorandum 2014-58, prepared for the upcoming December meeting, examines federal law on the subject.

The Commission has also considered a table with information about the pertinent law in other states,[8] and a memorandum summarizing some of that information.[9] This memorandum provides additional information about a few of those states: It discusses a Connecticut case, two cases from Oregon, an Indiana case and subsequent developments, and some data from a number of states that have a grievance system for a complaint against a mediator.

CONNECTICUT

The Connecticut entry in the table mentioned above refers to *Sharon Motor Lodge v. Tai*,[10] an unpublished Connecticut superior court opinion with a complicated procedural history. The underlying dispute was a legal malpractice

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

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

2. See Memorandum 2014-14; First Supplement to Memorandum 2014-14; Memorandum 2014-24.
3. See Memorandum 2014-35, pp. 4-25.
4. See Memorandum 2014-35, pp. 25-32.
5. See Memorandum 2014-35, pp. 32-40.
6. See Memorandum 2014-43.
7. See Memorandum 2014-44.
8. See Memorandum 2014-35, Exhibit pp. 5-42.
9. See First Supplement to Memorandum 2014-35.
10. 2006 Conn. Super. LEXIS 643 (Conn. Super. Ct. 2006).

claim, but that point is essentially irrelevant for purposes of this study, because the case did not involve an attempt to use mediation evidence to prove or disprove that claim.

Instead, the legal malpractice claim was mediated, and a new dispute subsequently arose, regarding whether the mediation resulted in an enforceable settlement. There appears to have been no allegation that anyone committed malpractice at the mediation, but there was contradictory testimony regarding whether the defendant's attorney had settlement authority and said as much during the mediation, and whether the parties reached a settlement.[11]

Attempting to show that there was a settlement, despite the lack of a signed agreement, the plaintiffs made repeated attempts to obtain discovery and testimony from the mediator, in different procedural postures. There is no need to recount the full history here; suffice it to say that the trial court made repeated interlocutory rulings, there were multiple interlocutory appeals, and eventually the plaintiffs sought to take the mediator's deposition for discovery purposes, as opposed to admission of the evidence.[12]

Construing Connecticut's mediation confidentiality statute,[13] the court stated that

> a party that seeks the disclosure of privileged mediation communications can obtain such material on the basis that disclosure is required in that "the interest of justice outweighs the need for confidentiality" if the party shows that it has a substantial need for the materials, i.e., that the materials are essential to its claims or defenses, that it would suffer undue hardship if the materials were not disclosed, and that these two considerations outweigh the interests of preserving the confidentiality of the communications.[14]

Applying that standard to the case before it, the court decided to permit the mediator's deposition.[15]

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11. See *id.* at *2-*3 ("The plaintiffs allege that the defendant's attorney represented that he had authority to settle, and that, at the second mediation session, … the parties reached a settlement …. The defendant disagrees, contending that his attorney did not have authority to enter into a settlement on behalf of his malpractice insurance carrier and that, therefore, the parties did not reach a settlement."), * 4 ("the defendant argued that the mediator's understanding of the settlement was the result of a miscommunication, and both the defendant's attorney and a representative of his malpractice insurance carrier denied that they had reached a settlement with the plaintiffs.").
12. See *id.* at *1-*10.
13. Conn. Gen. Stat. § 52-235d.
14. *Sharon Motor Lodge,* 2006 Conn. Super. LEXIS 643, at *27-*28.
15. *Id.* at *35.

It explained that "it would not serve the policy considerations of encouraging settlement by mediation or the policy favoring disclosure if a party was able to use mediation proceedings to engage in behavior that is prejudicial to the rights of other parties and then use the mediation privilege to insulate himself or herself from liability."[16] In its view, such conduct is counter to the policy of ensuring that an agreement reached in mediation is enforced, thereby promoting judicial economy, the very reason for encouraging mediation.[17]

Thus, although *Sharon Motor Lodge* started as a legal malpractice action, it turned into a protracted dispute over the enforceability of a settlement agreement allegedly reached in a mediation, which was not reduced to a writing signed by the parties. That is precisely the type of problem that the Commission sought to address in its recommendation that led to the enactment of California's current mediation confidentiality statute.[18] Because a settlement agreement must be in writing and fully signed to be admissible and thus enforceable in California,[19] or orally memorialized in accordance with a statutory procedure,[20] the type of enforcement problem addressed in *Sharon Motor Lodge* would not arise here. Accordingly, although the case may initially appear significant for purposes of this study, it actually has little relevance to the questions at hand.

OREGON

Two cases from Oregon deserve discussion here. Unlike *Sharon Motor Lodge*, these cases bear directly on the topic under consideration.

Fehr v. Kennedy

The first case is *Fehr v. Kennedy*, a legal malpractice action filed in federal court based on diversity of citizenship.[21] The action stemmed from John Kennedy's representation of the Fehrs in consolidated state court cases between the Fehrs and Advanced Seismic Hardware ("ASH").[22] The state court cases were mediated, but the mediation failed to result in a settlement. Afterwards, the case was tried and the Fehrs lost badly.

16. *Id.* at *34.
17. *Id.* at *35.
18. See *Mediation Confidentiality*, 26 Cal. L. Revision Comm'n Reports 407, 414 n.6 & accompanying text, 423-24 (1996).
19. See Evid. Code § 1123.
20. See Evid. Code §§ 1118, 1124.
21. 2009 U.S. Dist. LEXIS 63748 (D. Oregon 2009), *aff'd*, 2010 U.S. App. LEXIS 16953 (9th Cir. 2010).
22. The cases also involved some related parties.

The Fehrs then sued Mr. Kennedy and his law firm, alleging that he failed to properly represent them at the mediation:

> The Fehrs allege that at the mediation, Kennedy failed to assess and advise them of the risk of going to trial and specifically discounted and contradicted the mediator's assessment of the likelihood of success of ASH's claims and the consequences of a loss at trial. Kennedy's failures allegedly caused the Fehrs to reject an offer to settle the case which was much more favorable than the result achieved at trial.[23]

The defendants moved for summary judgment, contending that the Fehrs could not prove their malpractice claim without introducing mediation communications, which could not be disclosed under the Oregon statute protecting such communications. As the federal district court explained,

> Without the disclosures, defendants maintain that the Fehrs are unable to prove that ASH offered a settlement which was less than the judgment entered against the Fehrs after the bench trial. Likewise, defendants maintain that the Fehrs cannot prove that Kennedy discounted and contradicted the mediator's assessment of the case and failed to explain the consequences of a loss at trial. According to defendants, the Fehrs' case depends entirely on mediation communications ….[24]

In an unpublished opinion, the federal district court agreed and granted the motion for summary judgment. It rejected the Fehrs' arguments that (1) the Oregon statute did not apply to the legal malpractice case and (2) the Oregon statute violated the free speech provision in the Oregon Constitution.

The Fehrs further argued that the Oregon statute did not protect "their private communications with Kennedy, outside the presence of the mediator and not disclosed to the other parties to the mediation …."[25] That argument was essentially the same as one raised in the California case of *Cassel v. Superior Court*: the claim that California's "mediation confidentiality statutes do not protect such private attorney-client communications — even if they occurred in connection with a mediation — against the client's claims that the attorneys committed legal malpractice."[26]

The Oregon district court found it unnecessary to resolve the point. The Fehrs had conceded that a draft settlement proposal was a "mediation communication"

23. *Fehr*, 2009 U.S. Dist. LEXIS 63748, at *4.
24. *Id.* at *5.
25. *Id.* at *12.
26. 51 Cal. 4th 113, 123, 244 P.3d 1080, 119 Cal. Rptr. 3d 437 (2011).

within the meaning of the Oregon statute protecting such communications. Consequently, the district court ruled that the draft settlement proposal was inadmissible. It further found that without the draft settlement proposal, the Fehrs "cannot prove that a possible settlement would have been a better outcome than the result of the bench trial."[27]

The Fehrs appealed to the Ninth Circuit, which affirmed the district court's decision in an unpublished opinion.[28] The Ninth Circuit explained:

> The Fehrs' action against Kennedy for legal malpractice is a "subsequent adjudicatory proceeding" within the meaning of the statute. Accordingly, the Fehrs may not introduce any confidential mediation communications to prove their legal malpractice claim. Or. Rev. Stat. § 36.222(6). Without admitting confidential mediation communications, the record is devoid of any evidence of legal malpractice. Therefore, the Fehrs have failed to raise a genuine issue of material fact, and the district court was justified in granting summary judgment in favor of Kennedy.[29]

Thus, the *Fehr* result is much like the California Supreme Court's decision in *Cassel*. Not surprisingly, it has generated some attention. For example, a Florida law professor compared *Fehr* to two Florida cases (previously described for the Commission[30]) in which evidence of alleged attorney misconduct was admitted pursuant to a statutory exception to Florida's statute protecting mediation communications.[31] The professor said that the *Fehr* case "highlights the importance of statutory exceptions specifically drafted to cover intended exceptions to mediation confidentiality and privilege."[32]

An Oregon mediator, O. Meredith Wilson, Jr., was more cautious in expressing his views. In a short article, he used *Fehr* to demonstrate that Oregon's mediation confidentiality statute "may make it impossible to prove a claim arising out of conduct at a mediation."[33] He then posed a number of questions:

> The mediation confidentiality rules raise some interesting questions for a lawyer mediator. When must a lawyer mediator

27. *Fehr*, 2009 U.S. Dist. LEXIS 63748, at *13.
28. *Fehr v. Kennedy*, 2010 U.S. App. LEXIS 16953 (9th Cir. 2010). Two justices joined the Ninth Circuit opinion; a third justice concurred in the result.
29. *Id.* at *4.
30. See Memorandum 2014-35, p. 18.
31. See Fran Tetunic, *Act Deux: Confidentiality After the Florida Mediation Confidentiality and Privilege Act*, 36 Nova L. Rev. 79, 108 (Fall 2011).
32. *Id.* (footnote omitted).
33. O. Meredith Wilson, Jr., *Some Consequences of Mediation Confidentiality* (undated), *available at* http://home.innsofcourt.org/.

> report misconduct by counsel in mediation to the bar? When must misrepresentation or misconduct be reported to the court? When must the mediator resign?[34]

He concluded by observing that "[t]he interaction of mediation confidentiality with other obligations is complex and sometimes troubling.[35]

Alfieri v. Solomon

The other Oregon case of interest is *Alfieri v. Solomon*,[36] which the Oregon Court of Appeals decided in an unpublished opinion issued in June of this year. Like *Fehr,* this case was a legal malpractice action in which the plaintiff sought to introduce communications from a mediation in which the defendant attorney had represented him.

The basic facts (as alleged by the plaintiff and assumed by the court to be true) and procedural history were as follows:

> Before the mediation conference, defendant advised plaintiff regarding the potential value of settling the underlying lawsuit. No resolution was reached at the mediation conference. The day after the mediation conference, the mediator suggested a settlement package to the parties. Over the next 16 days, defendant continued to advise plaintiff regarding the proposed settlement package. During that time, defendant again advised plaintiff regarding the potential value of settling the underlying lawsuit, but significantly reduced the dollar value of his recommendation. Plaintiff ultimately signed a settlement agreement that incorporated the settlement amount proposed by the mediator. The parties agreed that the terms of the agreement and the settlement amount would remain confidential. After signing the agreement, plaintiff continued to seek advice from defendant regarding the enforceability of the agreement; during that period, defendant failed to advise plaintiff that the former employer had not complied with some of the agreement's terms, calling into question the enforceability of the agreement.
>
> Plaintiff sued defendant for legal malpractice, alleging that defendant had been negligent and had breached his fiduciary duty to plaintiff. The allegations included communications by the mediator, the content of communications between plaintiff and defendant during the 16-day period after the mediation conference (the post-mediation conference period), the settlement amount and contents of the final settlement agreement, and the content of

34. *Id*.
35. *Id*.
36. 2014 Ore. App. LEXIS 767 (Ore. Ct. App. 2014).

> communications between plaintiff and defendant after plaintiff had signed the settlement agreement (the post-signing period).
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> …[D]efendant moved to strike the portions of plaintiff's complaint relating to the mediation and settlement agreement, contending that those challenged portions of the complaint were "mediation communications" that were both confidential and inadmissible under [Oregon's mediation confidentiality statute]. Defendant also [moved] to dismiss plaintiff's complaint for failure to state ultimate facts sufficient to constitute a claim, arguing that dismissal was required because plaintiff could not allege or prove his damages without the challenged portions of the complaint.… [T]he trial court granted defendant's motion to strike. The court then dismissed the complaint with prejudice.[37]

On appeal, the Oregon Court of Appeals noted that the plaintiff had "agreed to keep the terms of the settlement agreement and settlement amount confidential."[38] Due to that agreement, the court held that the terms of the settlement agreement, the settlement amount, and communications between plaintiff and defendant relating to the substance of the settlement agreement were inadmissible.[39]

With regard to the remaining challenged evidence, the court drew a distinction between (1) communications occurring before plaintiff signed the settlement agreement ("pre-signing communications") and (2) communications occurring afterwards ("post-signing communications"). It explained that the mediation process ended when the parties signed the settlement agreement, and thus the post-signing communications, unlike the pre-signing communications, were "outside the mediation process and … not subject to the blanket nondisclosure rule" in Oregon's mediation confidentiality statute.[40]

The Oregon Court of Appeals thus concluded that the trial court had properly stricken the pre-signing communications, but had erred in excluding the post-signing communications. It further concluded that the dismissal of the malpractice complaint was improper:

> [T]he negligence allegations that are not confidential (and not stricken) are that defendant gave negligent advice to plaintiff post-signing, that is, after plaintiff had already obtained the settlement amount. Thus, conceivably the posture presented for plaintiff to show that he would have achieved a more favorable result had the

37. *Id.* at *2-*3 (footnotes omitted).
38. *Id.* at *9.
39. *Id.* at *9-*10.
40. *Id.* at *16-*17.

> defendant not been negligent is whether plaintiff would have been able to recover additional funds. That posture does not necessarily require plaintiff to plead and prove the settlement amount to the jury because the jury would not need to compare a potential jury award to the settlement amount to determine which was more favorable; rather the jury would compare zero (nothing in addition to the settlement amount) with the additional amount the plaintiff proves he could have achieved if the settlement agreement had been challenged.[41]

Accordingly, the malpractice case could continue, even though some of the plaintiff's proffered evidence was inadmissible under Oregon's mediation confidentiality statute, and other evidence was inadmissible under the terms of the mediated settlement agreement.

As noted in a legal publication, "[t]he court's finding in *Alfieri* that the plaintiff conceivably could plead and prove his claim without breaching the state's mediation confidentiality statute allowed it to avoid a result that some authorities have decried as inequitable."[42] Citing *Cassel* and another California case[43] as examples, the publication explains that "[c]ourts and legislatures have expressed concerns that mediation confidentiality laws — which exist in some form in all jurisdictions — deprive plaintiffs who allege they were steered into bad settlements of essential evidence needed to prove their allegations."[44] The publication goes on to explain that such concerns "were the impetus for a now-pending study by the California Law Revision Commission on 'the relationship between mediation confidentiality and attorney malpractice and other misconduct.'"[45]

INDIANA

"Indiana policy strongly favors the confidentiality of all matters that occur during mediation."[46] In *Horner v. Carter,* an Indiana trial court considered a husband's contention that there was a mistake in drafting a marital settlement agreement reached in a mediation. He argued that the court should allow him "to introduce extrinsic evidence — specifically, communications that occurred during mediation — to show that there was a mistake in the drafting of the

41. *Id.* at *20-*21.
42. ABA/BNA, Lawyers' Manual on Professional Conduct (vol. 30, no. 13), p. 408.
43. Wimsatt v. Superior Court, 152 Cal. App. 4th 137, 61 Cal. Rptr. 3d 200 (2007).
44. ABA/BNA, *supra* note 41, at 408.
45. *Id.*
46. Horner v. Carter, 981 N.E.2d 1210 (Ind. S.Ct. 2013).

agreement."[47] The trial court excluded the evidence pursuant to Indiana's mediation confidentiality rule[48] and entered judgment in favor of the wife.

On appeal, the Indiana Court of Appeals said the trial court had erred in excluding the mediation evidence. It explained that the rule "does not require exclusion when the evidence is offered for a purpose other than 'to prove liability for or invalidity of the claim or its amount.'"[49] The Court of Appeals further stated that allowing a party to use mediation evidence to prove a traditional contract defense is good policy:

> Although confidentiality is an important part of mediation, strict adherence to confidentiality would produce an undesirable result in this context — parties would be denied the opportunity to challenge issues relating to the integrity of the mediation process, such as mistake, fraud, and duress. Allowing the use of mediation communications to establish these traditional contract defenses provides parties their day in court and encourages, rather than deters, participation in mediation.[50]

Nonetheless, the Court of Appeals affirmed the trial court decision, holding that its evidentiary error was harmless.

The husband further appealed to the Indiana Supreme Court, which disagreed with the Court of Appeals. It held that the mediation evidence could not "be admitted as extrinsic evidence to aid in the construction of an ambiguous agreement."[51] It explained that "Indiana judicial policy strongly urges the amicable resolution of disputes and thus embraces a robust policy of confidentiality of conduct and statements made during negotiation and mediation."[52] In its view, the "benefits of compromise settlement agreements outweigh the risks that such policy may on occasion impede access to otherwise admissible evidence on an issue."[53]

The Indiana Supreme Court thus concluded that the trial court "was correct to exclude the husband's mediation statements from evidence on his petition to modify the parties' settlement agreement."[54] The Court acknowledged, however, that the Uniform Mediation Act takes a different approach to traditional contract

47. Horner v. Carter, 969 N.E.2d 111, 115-15 (Ind. Ct. App. 2012), *vacated*, 981 N.E.2d 1210 (Ind. S.Ct. 2013).
48. Ind. Alternative Dispute Resolution Rule 2.11; see also Ind. R. Evid. 408.
49. *Horner*, 969 N.E.2d at 117.
50. *Id.* (footnote omitted).
51. Horner v. Carter, 981 N.E.2d 1210, 1210 (Ind. S.Ct. 2013).
52. *Id.* (footnote omitted).
53. *Id.*
54. *Id.*

defenses, and that efforts were "presently underway by the Alternative Dispute Resolution Section of the Indiana State Bar Association and the Alternative Dispute Resolution Committee of the Judicial Conference of Indiana to review an possibly propose modifications to the Indiana Rules for Alternative Dispute Resolution."[55]

In July, the staff contacted the ADR Section of the Indiana State Bar Association, to check on the status of the study mentioned by the Indiana Supreme Court. We were specifically interested in whether that study had addressed issues relating to the intersection of mediation confidentiality with legal malpractice and other misconduct.

Attorney Pat Brown, a member of the committee conducting the study and a past-Chair of the ADR Section, responded to the staff's inquiry. He explained that the study is ongoing. As the staff understands it, the concept under consideration is to distinguish between (1) use of mediation evidence in the mediated dispute, which would generally be prohibited, and (2) use of mediation evidence in a collateral matter, which would be permissible in certain circumstances.

Mr. Brown also said the group had not yet given much thought to attorney misconduct. They are interested in the matter, however, and will keep an eye on how the Commission handles it.

The staff has not re-contacted Mr. Brown since July to see how the Indiana study is progressing. We will attempt to do so before the upcoming meeting and will inform the Commission of any significant new developments.

GRIEVANCE SYSTEMS FOR A COMPLAINT AGAINST A MEDIATOR

As noted in the table attached to Memorandum 2014-35, a number of states have a grievance system for resolving a complaint against a mediator.[56] In a 2006 article, a law professor compiled extensive information on those grievance systems.

The professor's article is very interesting. It includes some data about how often certain grievance systems (Florida, Georgia, Maine, Minnesota, and Virginia) resulted in sanctions against a mediator or other findings against a

55. *Id.* at 1210 n.1.

56. See Memorandum 2014-35, Exhibit pp. 12 (Georgia), 17 (Maine), 21 (Minnesota), 29 (North Carolina), 39 (Virginia); see also *id.* at 21-24 (Florida).

mediator.[57] Among other things, the professor found that "[o]f the nearly 9,000 mediators regulated by the states analyzed in this article, less than 100 mediators have received any type of sanction, remedial recommendation, or intervention for conduct inconsistent with ethical standards."[58]

Unless the Commission otherwise directs, the staff will discuss that data in greater detail in a memorandum for the February meeting, along with other empirical data relating to this study. Aside from examining such data and addressing any other points the Commission wants researched, the staff has now finished its presentation of background information on the law of other jurisdictions. That effort has uncovered extensive thought-provoking material, which will receive further analysis and evaluation as this study proceeds.

Respectfully submitted,

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57. Paula Young, *Take It or Leave It, Lump It or Grieve It: Designing Mediator Complaint Systems that Protect Mediators, Unhappy Parties, Attorneys, Courts, the Process, and the Field,* 21 Ohio. St. J. Disp. Resol. 721 (2006).

58. *Id*. at 775.