Study K-402 April 2, 2015

Memorandum 2015-4

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

The memorandum introducing this study (Memorandum 2013-39)[1] provides background information on California law relating to mediation confidentiality, and describes the California Supreme Court's decisions on the topic: *Foxgate Homeowners' Ass'n v. Bramalea California, Inc.*,[2] *Rojas v. Superior Court*,[3] *Fair v. Bakhtiari*,[4] *Simmons v. Ghaderi*,[5] and, most importantly, *Cassel v. Superior Court*, which directly addressed the relationship between mediation confidentiality and legal malpractice.[6] Various other staff memoranda include additional information about pertinent California law. This memorandum discusses some California case law that we have not previously discussed, at least not in detail.

The memorandum begins by describing two court of appeal cases that the Legislature specifically asked[7] the Commission to consider in this study: *Wimsatt v. Superior Court*[8] and *Porter v. Wyner* (a depublished decision).[9] Both of those cases involved allegations that an attorney engaged in misconduct in the mediation process.

Next, the memorandum describes some other court of appeal decisions (and a couple of federal cases) involving allegations that an attorney, mediator, or other

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. 26 Cal. 4th 1, 25 P.3d 1117, 128 Cal. Rptr. 2d 642 (2001) (discussed in Memorandum 2013-39, pp. 18-20).

3. 33 Cal. 4th 407, 93 P.3d 260, 15 Cal. Rptr. 3d 643 (2004) (discussed in Memorandum 2013-39, pp. 20-22).

4. 40 Cal. 4th 189, 147 P.3d 653, 51 Cal. Rptr. 3d 871 (2006) (discussed in Memorandum 2013-39, pp. 22-23).

5. 44 Cal. 4th 570, 187 P.3d 934, 80 Cal. Rptr. 3d 83 (2008) (discussed in Memorandum 2013-39, pp. 23-25).

6. 51 Cal. 4th 113, 244 P.3d 1080, 119 Cal. Rptr. 3d 437 (2011) (discussed in Memorandum 2013-39, pp. 25-29 & in other materials for this study).

7. See 2012 Cal. Stat. res. ch. 108 (ACR 98 (Wagner & Gorell)).

8. 152 Cal. App. 4th 137, 61 Cal. Rptr. 3d 200 (2007).

9. 107 Cal. Rptr. 3d 653 (2010) (formerly published at 183 Cal. App. 4th 949).

mediation participant engaged in misconduct in the mediation process. We then discuss a few cases in which mediation evidence was allegedly relevant to prove or disprove non-mediation misconduct. Finally, we briefly mention a number of cases addressing various other aspects of mediation confidentiality that might be relevant in this study.

WIMSATT LITIGATION[10]

The *Wimsatt* litigation started with a personal injury case brought by Corey Kausch, in which he was represented by William Wimsatt and the Magaña law firm (collectively, "Magaña"). The personal injury case was mediated but did not settle. Several months later, a second mediation was conducted and the personal injury case settled.

After the personal injury case settled, Kausch sued Magaña for legal malpractice, alleging that Magaña breached its fiduciary duty by submitting an unauthorized settlement demand on the eve of the second mediation. Kausch said he learned of this potentially unauthorized act from a confidential mediation brief that the defendants (not his own attorneys) submitted to the mediator in the personal injury lawsuit. Kausch alleged that the unauthorized settlement demand undermined his position at the second mediation and impaired his ability to obtain a satisfactory settlement.

Discovery Issues in the Trial Court

To support his claim, Kausch took Wimsatt's deposition and waived the attorney-client privilege. Wimsatt testified that he had not lowered the settlement demand as Kausch alleged.

Kausch then sought discovery of the mediation briefs, some emails written the day before the second mediation, and any evidence of an alleged conversation in which Wimsatt lowered Kausch's settlement demand without authorization. Magaña sought a protective order, contending that the information sought was protected from disclosure under the mediation confidentiality statutes (Evidence Code Sections 1115-1128).

The trial judge denied the application for a protective order. He reasoned that (1) Kausch was seeking to show that Wimsatt lied in his deposition, and (2) the mediation confidentiality statutes did not apply because "'the [L]egislature did

10. For previous staff memoranda referring to various aspects of *Wimsatt*, see Memorandum 2014-6, at p. 14 & nn. 17, 29, 41, 43 & 53; Memorandum 2014-59, p. 8 & n.43.

not intend confidentiality of mediation proceedings to be so complete as to shield perjury or inconsistent statements.'"[11] In recognizing such an exception to mediation confidentiality, the trial judge relied on *Rinaker v. Superior Court*.[12] Magaña disagreed with his ruling and sought a writ of mandate in the court of appeals.

Appellate Decision on the Discovery Issues

In response to the writ of mandate, the court of appeals issued an opinion describing California's strict mediation confidentiality scheme and the California Supreme Court's decisions in *Foxgate* and *Rojas*.[13] The opinion also pointed out that mediation briefs "are part and parcel of the mediation negotiation process" and "epitomize the types of writings which the mediation confidentiality statutes have been designed to protect from disclosure."[14] The court further explained that the requested emails "were materially related to the mediation that was to be held the next day" and "would not have existed had the mediation briefs not been written."[15]

The court of appeals therefore held that the mediation briefs and eve-of-mediation emails were protected by the mediation confidentiality statutes.[16] It considered that result necessary because the California Supreme Court had repeatedly "refused to judicially create exceptions to the statutory scheme, even in situations where justice seems to call for a different result."[17] The court of appeals said it was "bound to follow this precedent."[18] It 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."[19]

The court of appeals further held, however, that "Magaña ha[d] *not* shown that the contents of the conversation in which Wimsatt purportedly lowered

11. *Wimsatt*, 152 Cal. App. 4th at 148, *quoting* the trial judge.
12. 62 Cal. App. 4th 155, 74 Cal. Rptr. 2d 464 (1998). *Rinaker* was a juvenile deliquency case in which mediation confidentiality conflicted with the minors' need to use mediation evidence in presenting their defense. The court of appeals held that the juvenile court should have conducted an *in camera* hearing and weighed (1) the need for mediation confidentiality against (2) the minors' need for a mediator's testimony to vindicate their constitutional rights of confrontation. *Rinaker* is discussed later in this memorandum. See also Memorandum 2014-45, pp. 6-7, 12-13.
13. *Wimsatt*, 152 Cal. App. 4th at 149-58.
14. *Id.* at 158.
15. *Id.* at 159.
16. *Id.* at 149, 158-59.
17. *Id.* at 152.
18. *Id.* at 163.
19. *Id.* at 162.

Kausch's settlement demand [were] protected by mediation confidentiality."[20] It explained that Magaña, as the moving party, had to show that the conversation was protected by mediation confidentiality.[21] The court said Magaña failed to meet that burden because it "ha[d] not brought forth any evidence to demonstrate that the conversation [was] linked to the second mediation or that it [was] anything other than expected posturing that occurs in most civil litigation."[22]

Having reached those conclusions, the court of appeals made clear that it was uncomfortable with the ruling precluding discovery of the mediation briefs and eve-of-mediation emails. It noted that two Texas cases had used a less stringent approach to mediation confidentiality,[23] and it said:

> The stringent result we reach here means that when clients, such as Kausch, participate in mediation *they are, in effect, relinquishing all claims for new and independent torts arising from mediation,* including legal malpractice causes of action against their own counsel. Certainly clients, who have a fiduciary relationship with their lawyers, do not understand that this result is a by-product of an agreement to mediate. *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*.
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> The inequities of California's mediation statutes have not gone unnoticed. Peter Robinson, the associate director of the Straus Institute for Dispute Resolution and assistant professor of law at Pepperdine University School of Law, has gathered a number of cases across the country in which courts have been asked to enforce or avoid mediated agreements. He suggests strict confidentiality (such as codified in Evid. Code § 1115 *et seq.*) results in absurd enforcement, when contrasted with another approach to the enforcement of mediated settlements. The nonexhaustive list of cases includes situations raising arguments about whether a mediated agreement was reached, whether there was fraud, duress or mistake, and whether the agreement violated public policy. The situations include cases where a party was lied to by her own attorney, the mediator, and a third party; parties claimed their own attorney coerced them into signing a settlement agreement; a mother waived parental rights; and the parties agreed to perform an illegal act in the mediated agreement.
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> As Professor Robinson notes, a strict approach to mediation confidentiality often prevents courts from "exploring and justly

20. *Id.* at 149 (emphasis added).
21. *Id.* at 160.
22. *Id.* at 160.
23. *Id.* at 163 n.15. The Texas cases were *Avary v. Bank of America, N.A.*, 72 S.W. 3d 779 (Tex. App. 2002), and *Alford v. Bryant,* 137 S.W.3d 916 (Tex. App. 2004). Both cases were discussed in Memorandum 2014-44, pp. 7-15.

> deciding controversies that might arise out of mediated agreements." The California cases we discussed above are illustrative. They have allowed to go unpunished sanctionable conduct that frustrated the purpose of mediation, foreclosed litigants from gathering evidence that might prove toxic molds and other microbes created health hazards, precluded a propria persona litigant from proving the terms of a mediated agreement, and shielded from view evidence of criminal conduct.
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> *Given the number of cases in which the fair and equitable administration of justice has been thwarted, perhaps it is time for the Legislature to reconsider California's broad and expansive mediation confidentiality statutes and to craft ones that would permit countervailing public policies be considered.*
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> In light of the harsh and inequitable results of the mediation confidentiality statutes, such as those set out above, *the parties and their attorneys should be warned of the unintended consequences of agreeing to mediate a dispute.* If they do not intend to be bound by the mediation confidentiality statutes, then they should "make [it] clear at the outset that something other than a mediation is intended."[24]

Later Developments

After the court of appeals resolved the discovery dispute, Kausch's malpractice suit returned to the trial court. The procedural history is complicated, but the key point is that Magaña brought a motion in limine "to preclude Kausch from introducing all evidence in his case-in-chief because mediation confidentiality precluded the introduction of vital evidence."[25] The trial court granted that motion, made certain other rulings, and then entered judgment in favor of Magaña**.** Kausch appealed.

The court of appeal affirmed the judgment in an unpublished decision, explaining that when it ruled on the discovery motion "the record lacked sufficient information" from which it could conclude that the statements allegedly lowering the settlement demand were linked to the mediation.[26] In contrast, in the later appeal it was clear that "Kausch would be unable to address any issues with regard to whether the settlement was appropriate because to do so would require facts that are inextricably connected to the mediation and the settlement reached therein."[27]

The court of appeal summarized its decision as follows:

24. *Id.* at 163 (citations omitted, emphasis added).
25. Kausch v. Wimsatt, 2009 Cal. App. Unpub. LEXIS 8566, at **26.
26. *Id.* at *17.
27. *Id.* at *43-*44.

> This is the second appeal involving the same case. As a logical extension of our holding in *Wimsatt I., we are forced to conclude that an 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.[28]

In reaching that decision, the court of appeal made clear that it was *not* holding "that *all* plaintiffs are foreclosed from pursuing all legal malpractice-related lawsuits when the client's case is settled in mediation."[29] Instead, said the court, the key "is whether the accusations can be proven *without delving into what occurred in the mediation* and without using any communication made 'for the purpose of, in the course of, or pursuant to, a mediation or mediation consultation ….'"[30]

PORTER LITIGATION[31]

The second court of appeal decision mentioned in the legislative resolution requiring this study is *Porter*. The history of the *Porter* litigation is long and complicated. The staff will try to explain it clearly, without going into unnecessary detail.

Some aspects of the *Porter* litigation have been fully resolved at both the trial and appellate levels, but other aspects remain pending. **Commissioners and other interested persons should bear this in mind, and be careful not to do anything that might interfere with the pending matters.**

The Underlying Federal Litigation

The *Porter* litigation stems from efforts by John Porter and Deborah Blair Porter ("the Porters") to obtain certain special education services for their autistic son. They filed a federal suit against their local school district, the California Department of Education, and various other entities and individuals for violation of the Individuals with Disabilities Education Act ("IDEA") and a number of

28. *Id.* at *2 (emphasis added).
29. *Id.* at *42 n.12 (emphasis added).
30. *Id.*, *quoting* Evid. Code § 1119 (emphasis added).
31. For previous staff memoranda referring to various aspects of *Porter*, see Memorandum 2014-6, p. 11 & nn. 17, 42, 51, 63; see also First Supplement to Memorandum 2013-47, p. 4 & Exhibit pp. 17-23 (comments and materials from Deborah Blair Porter).

other claims.[32] In that litigation, they were represented by Steven Wyner and his law firm (collectively, "Wyner").

Following an appeal that went all the way to the U.S. Supreme Court, the federal district court granted a partial summary adjudication on liability and appointed a special master to oversee the education of the Porters' child. The Porters filed a second motion for partial summary adjudication, but before the court heard that motion, the parties participated in a private mediation.

Nineteen people, excluding the mediator, signed a confidentiality agreement for the mediation.[33] The confidentiality agreement "expressly provided that the provisions of Evidence Code sections 1115 through 1128 and 703.5 would apply to the mediation."[34]

At the end of the mediation session, the school district and the Department of Education signed a stipulation for a large settlement in favor of the Porters. The mediation participants contemplated that further settlement documentation would be prepared later. Although the stipulation did not specify as much, Wyner and the Porters came to an understanding that $1,650,000 of the settlement would be allocated to attorney fees and costs.[35]

A few days after the mediation session, Wyner became aware of a possibility that the settlement proceeds might be taxable. Wyner informed the Porters of this possibility and recommended that the Porters retain a tax attorney to provide advice on how to structure the settlement.

The Porters hired a tax attorney as recommended. They also signed an agreement in which Wyner agreed to pay half of the tax attorney's fees, and, in exchange, the Porters agreed to release Wyner from liability for any tax advice given to the Porters.[36] Although various changes were made to the draft release at their request, the Porters later testified that "they signed under duress because they were concerned the settlement would unravel if they refused."[37]

Thereafter, the Porters and the other parties to the federal lawsuit signed a formal settlement agreement encompassing the terms negotiated at the mediation session, including payment of $1,650,000 to Wyner for attorney fees and costs. Wyner also signed the document, under the words "APPROVED AS

32. See *Porter v. Board of Trustees,* 123 F. Supp. 2d 1187 (C.D. Cal. 2000), *rev'd & remanded,* 307 F.3d 1064 (9th Cir. 2002), *cert. denied,* 537 .S. 1194 (2003).
33. *Porter v. Wyner,* 107 Cal. Rptr. 3d 653, 655 (2010) (formerly published at 183 Cal. App. 4th 949).
34. *Id.* at 656.
35. *Id.*
36. *Id.*
37. *Id.* at 656 n.5.

TO FORM." The district court approved the settlement, the federal lawsuit was dismissed, and the federal defendants made payments in compliance with the settlement terms.

The California Litigation Between the Porters and their Counsel

After the federal lawsuit concluded, disputes arose between the Porters and Wyner regarding (1) incorrect tax advice Wyner allegedly gave to the Porters regarding settlement proceeds, (2) whether Wyner was supposed to reimburse the Porters for certain payments the Porters made to Wyner before the settlement, and (3) whether Wyner was required to pay certain amounts to Ms. Porter for services she rendered as a paralegal in the federal lawsuit. The Porters brought suit against Wyner for legal malpractice, breach of fiduciary duty, constructive fraud, negligent misrepresentation, breach of fee agreement, rescission, unjust enrichment, and liability for unpaid wages. Wyner cross-complained for breach of the agreement regarding hiring of the tax attorney.

The trial court sustained a demurrer to the Porters' claim of malpractice because the Porters admitted that they suffered no injury from Wyner's allegedly incorrect tax advice.[38] The other claims proceeded to trial.

Jury Trial

At the start of the trial, Wyner brought a motion in limine to exclude any evidence subject to mediation confidentiality. The Porters opposed the motion on multiple grounds. In a conference with the judge, Wyner withdrew the motion and stated that the withdrawal was based on the arguments raised by the Porters, including the issue of waiver. The court then allowed counsel to reopen discovery to permit witnesses to answer questions to which mediation confidentiality objections were previously raised.

At trial, both sides testified about what occurred at the mediation. The jury returned a verdict in favor of the Porters for $262,000, plus interest ($211,000 for Ms. Porter's services as a paralegal and $51,000 for breach of the attorney-client fee agreement). The jury also found that the Porters did not breach the agreement regarding hiring of the tax attorney, and concluded that the agreement should be rescinded. The jury further found, however, that Wyner did not breach any fiduciary duty and was not liable for constructive fraud, negligent misrepresentation, or unjust enrichment.

38. *Id.* at 658 n.7.

Motion for a New Trial

About a month after the jury verdict, the California Supreme Court decided *Simmons v. Ghaderi*,[39] holding that any waiver of mediation confidentiality must be express, not implied, and must either be written or orally memorialized in accordance with a statutory procedure.[40] Based on *Simmons*, Wyner moved for a new trial,[41] arguing that the mediation evidence was improperly placed before the jury. Wyner said that was an irregularity in the proceedings, which prevented a fair trial. The trial court agreed and vacated the judgment. The Porters appealed.[42]

***Porter I* (Depublished): Mediation Confidentiality Does Not Apply to Attorney-Client Communications**

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

> The confidentiality aspect which protects and shrouds the mediation process should not be extended to protect anything other than a frank, candid and open exchange regarding events in the past by and between disputants. *It was not meant to subsume a secondary and ancillary set of communications by and between a client and his own counsel, irrespective of whether such communications took place in the presence of the mediator or not.*[43]

The majority explained that extending mediation confidentiality to attorney-client conversations would be inconsistent with Evidence Code Section 958,[44] which says there is no attorney-client privilege "as to a communication relevant

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39. 44 Cal. 4th 570, 187 P.3d 934, 80 Cal. Rptr. 3d 83 (2008).
40. For further discussion of *Simmons*, see Memorandum 2013-39, pp. 23-25.
41. Wyner also brought a motion for a judgment notwithstanding the verdict (JNOV). The trial court ruled that this motion was moot in light of its ruling on the motion for a new trial.

When the Porters appealed from the granting of a new trial, Wyner cross-appealed from the JNOV ruling. In its first *Porter* opinion, the court of appeal remanded the JNOV issue to the trial court to "address the admissibility of evidence within the scope of mediation confidentiality under the principles [the court of appeal] ha[d]referenced out it [its] opinion, and determine whether the Porters proved their case." *Porter*, 107 Cal. Rptr. 3d at 666.

After its first *Porter* opinion was depublished and the matter returned to the court of appeal to reconsider in light of *Cassel v. Superior Court*, 51 Cal. 4th 113, 244 P.3d 1080, 119 Cal. Rptr. 3d 437 (2011), the court of appeal again remanded the JNOV issue to the trial court to resolve, this time in light of its second *Porter* opinion. See Porter v. Wyner, 2011 Cal. App. Unpub. LEXIS 5610, at *40-*42 (hereafter, "*Porter II*").

Thereafter, the trial court denied the JNOV motion, Wyner again appealed, and the court of appeal affirmed the trial court's denial of JNOV. See Wyner v. Porter, 2013 Cal. App. Unpub. LEXIS 9125 (2013) (hereafter, "*Porter III*").

42. Wyner cross-appealed. See note 41 *supra*.
43. *Porter*, 107 Cal. Rptr. at 662 (emphasis added).
44. *Id.* at 661-62.

to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship." According to the majority, extending mediation confidentiality to the attorney-client relationship would render Section 958 a nullity, because then the "mediation process and its attendant confidentiality would trump the attorney-client privilege and preclude the waiver of it by the very holder of the privilege."[45] The majority did not think the Legislature intended for "a well-established and recognized privilege and waiver process" to be "thwarted by a nonprivileged statutory scheme designed to protect a wholly different set of disputants."[46]

In the majority's view,

> To expand the mediation privilege to also cover communications between a lawyer and his client would seriously impair and undermine not only the attorney-client relationship but would likewise create a chilling effect on the use of mediations. In fact, clients would be precluded from pursuing any remedy against their own counsel for professional deficiencies occurring during the mediation process as well as representations made to the client to induce settlement.[47]

The majority "decline[d] to extend the confidentiality component to a relationship neither envisioned nor contemplated by statute."[48]

Dissent: Mediation Confidentiality Encompasses Attorney-Client Communications

In dissent, Justice Flier noted that the only reason the attorney-client discussion in question occurred "was because a mediation was taking place and efforts were being made to settle the case in this mediation."[49] He therefore concluded that the discussion was "for the purpose of, in the course of, and pursuant to a mediation," as contemplated by the mediation confidentiality statute (Evidence Code Section 1119).[50]

Justice Flier also pointed out that the majority opinion "sweepingly exempts all client-lawyer communications from mediation confidentiality."[51] In his view,

45. *Id.* at 661.
46. *Id.* at 661-62.
47. *Id.* at 662.
48. *Id.* at 665.
49. *Id.* at 665.
50. *Id.* at 666-67 (Flier, J., dissenting).
51. *Id.* at 667.

that approach was mistaken; instead, "such a drastic exception must be made by the Legislature under carefully crafted statutory standards."[52]

Review by the California Supreme Court

After the court of appeal issued its decision, Wyner petitioned the California Supreme Court for review. The Court granted review, but deferred briefing pending its consideration and disposition of *Cassel*.[53]

Upon deciding *Cassel* in 2011, the Court transferred the *Porter* case back to the court of appeal. The Court instructed the court of appeal to vacate its earlier decision and reconsider the cause in light of *Cassel*.[54]

***Porter II* (Unpublished): Under *Cassel*, Mediation Confidentiality Includes Attorney-Client Communications, So a New Trial Is Needed**

On reconsideration, the court of appeal issued a unanimous, unpublished opinion, in which it concluded that "*Cassel* is controlling and the mediation confidentiality provisions demonstrate that the trial court did not abuse its discretion in granting a new trial."[55] The court rejected the Porters' contentions that "(1) the facts in this case are distinguishable, (2) respondents twice waived mediation confidentiality, (3) respondents were estopped from belatedly raising mediation confidentiality, (4) respondents were equitably estopped from raising mediation confidentiality, and (5) upholding the application of *Simmons* would lead to absurd results."[56] In short, the court of appeal concluded that a new trial was necessary because evidence of mediation communications (including mediation-related attorney-client communications and other mediation evidence) was erroneously presented to the jury.[57]

Subsequent Developments: The Attorney-Client Dispute Is Still Unresolved

The new trial between the Porters and Wyner has not yet taken place. The court and parties have been busy resolving various mediation confidentiality issues, including some issues that were the subject of another unpublished appellate decision (*Porter III*).[58] According to Deborah Blair Porter, **three motions in limine relating to mediation confidentiality are currently pending,** and the

52. *Id.*
53. See 2010 Cal. LEXIS 7269, 233 P.3d 1088, 111 Cal. Rptr. 3d 693 (2010).
54. See 2011 Cal. LEXIS 3636, 250 P.3d 180, 123 Cal. Rptr. 3d 577 (2011); see also 2011 Cal. LEXIS 10768 (2011).
55. See 2011 Cal. App. Unpub. LEXIS 5610, *20 (2011).
56. *Id.* at *17-*18; see *id.* at *20-*40.
57. See *id.* at *20-*40.
58. See *supra* note 41 (discussing JNOV motion).

new trial is set to take place in August.[59] As members of the Commission may remember, Ms. Porter testified at the Commission meeting in Los Angeles in August 2013, and submitted written comments afterwards.[60]

ADDITIONAL COURT OF APPEAL DECISIONS INVOLVING ALLEGATIONS THAT A MEDIATION PARTICIPANT ENGAGED IN MISCONDUCT IN THE MEDIATION PROCESS

The two cases discussed above both involved allegations that attorney misconduct occurred in the mediation process. In *Wimsatt,* a client alleged that his attorney made an unauthorized settlement demand on the eve of mediation. In *Porter,* clients alleged that during mediation their counsel gave them incorrect tax advice and made fee-related promises that counsel later failed to keep.

In addition to *Wimsatt, Porter,* and the California Supreme Court cases previously discussed, the staff found some other court of appeal decisions (and a couple of federal cases) involving allegations that a mediation participant engaged in misconduct in the mediation process. For analytical purposes, it is helpful to separate those decisions into several different categories:

(1) Alleged mediation-related misconduct by an attorney.
(2) Alleged mediation-related misconduct by a mediator.
(3) Alleged mediation-related misconduct by an opponent.
(4) Alleged mediation-related misconduct by an insurer.
(5) Alleged failure to comply with a court order or court rule to mediate.

We discuss each category in turn below.

Alleged Mediation-Related Misconduct by an Attorney

In addition to *Wimsatt* and *Porter,* the staff found three other published court of appeal decisions involving allegations that attorney misconduct occurred in the mediation process (aside from noncompliance with a court order or court rule to mediate, which we will discuss separately later in this memorandum). As explained below, the allegations were unsuccessful in each of those cases, but the court of appeal resolved mediation confidentiality issues in only two of the cases.

59. Email from D.B. Porter to B. Gaal (3/6/15) (on file with Commission).
60. See Minutes (Aug. 2013), p. 1; First Supplement to Memorandum 2013-47, p. 4 & Exhibit pp. 17-23 & materials referenced therein.

Chan

In *Chan v. Lund*,[61] Bill Chan filed suit against his neighbors over the cutting of a number of cypress trees on his property. A settlement was reached in a mediation on the eve of trial and reduced to writing.

Thereafter, however, Mr. Chan contended that the settlement was void because his attorney obtained his consent through extortion. Mr. Chan also contended that he was entitled to rescind the settlement "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.'"[62] More specifically,

> The attorney's alleged coercion was essentially twofold. First, he allegedly threatened on the eve of trial to withdraw from the case if Chan refused to participate in a further session with [the mediator] or if Chan refused to make concessions to settle the matter. Chan alleged that his attorney failed to advise him at the time he made these threats that he would be required to obtain court approval to withdraw from the case and that there were ethical rules prohibiting such withdrawal where reasonable steps are not taken to avoid prejudicing the client's rights. Second, during mediation, the attorney allegedly induced Chan to accept the Settlement by agreeing to discount his fees by $10,000 in exchange for Chan's agreement."[63]

The trial court determined that the settlement agreement was enforceable and the court of appeals affirmed on grounds unrelated to mediation confidentiality.[64] With regard to mediation confidentiality, Mr. Chan contended on appeal that he was denied due process because the trial court did not allow him to present evidence from the mediator. The court of appeal found, however,

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61. 188 Cal. App. 4th 1159, 116 Cal. Rptr. 3d 122 (2011).
62. *Id.* at 1164.
63. *Id.* (footnote omitted).
64. Among other things, the court of appeal explained:
    (1) Mr. Chan's extortion claim failed because it was unclear that his attorney's alleged threat to withdraw caused Mr. Chan to settle. *Id.* at 1170-72. In addition, extortion requires surrender of property to the extortionist, but Mr. Chan did not surrender any property to his attorney. *Id.* at 1172.
    (2) Mr. Chan's duress claim failed because his attorney was not a party to the settlement and there was no evidence that the settling parties were aware of his attorney's alleged threat to withdraw. *Id.* at 1174. Duress is only grounds for rescission if a contracting party actually engaged in it or knows it has taken place and seeks to take advantage of it by enforcing the contract. *Id.*
    (3) Mr. Chan's undue influence claim failed for the same reasons as his duress claim. *Id.* at 1178-79. The same was true of his fraud claim. *Id.* at 1179.

that there was "no specific order or ruling in which the [trial] court held that Chan was barred from introducing evidence to oppose enforcement of the settlement …."[65] Consequently, the court of appeal concluded that it "need not address Chan's constitutional argument."[66]

Mr. Chan sought review in the California Supreme Court and the United States Supreme Court, but neither of those courts granted review.[67] Like Deborah Blair Porter, he has been participating in the Commission's study.[68]

Provost

Another case involving alleged mediation misconduct is *Provost v. Regents of the University of California*.[69] In that case, a mediation resulted in a settlement agreement. Thereafter, however, one of the parties claimed that the agreement was unenforceable because his counsel, his opponents' counsel, and the mediator coerced him into signing it through threats of criminal prosecution.[70] The trial court ruled that the settlement agreement was enforceable, and the party appealed.

"Without commenting on the substance of the alleged duress and coercion," the court of appeal held that the trial court "correctly determined the evidence plaintiff proffered in support of his claim was protected from disclosure by the mediation privilege."[71] The plaintiff argued that the situation was "so egregious" the confidentiality requirement could not shield it. But the court of appeal said that "in banning any court-created exceptions to the statutory confidentiality protections, the Supreme Court emphasized that *the Legislature had weighed the possibility of some unfair results against the strong public policy supporting mediation and come down on the side of mediation*."[72]

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65. *Id.* at 1180.
66. *Id.*
67. See Chan v. Lund, 2011 U.S. LEXIS 4733 (2011); Chan v. Lund, 2011 Cal. LEXIS 263 (2011).
68. Mr. Chan testified at the Commission meeting in June 2014, and submitted written comments on two occasions. See Third Supplement to Memorandum 2014-60, Exhibit pp. 1-2; First Supplement to Memorandum 2013-47, Exhibit p. 5.
69. 201 Cal. App. 4th 1289, 135 Cal. Rptr. 3d 591 (2011).
70. See *id.* at 1302.
71. *Id.*
72. *Id.* at 1303 (emphasis added).

The court of appeal also explained that although mediation confidentiality does not apply in a criminal prosecution, "this action in which plaintiff seeks to rely on mediation discussions is not a criminal action and his claim that the statements 'constitute' a crime does not exempt him from the statutory mandate of confidentiality." *Id.* at 1304.

Amis

Very recently, a court of appeal issued another published decision involving allegations that an attorney committed misconduct during a mediation. In *Amis v. Greenberg Traurig LLP*,[73] a client sued his former counsel for breach of fiduciary duty, legal malpractice, and breach of conflict waiver, in connection with a mediated settlement. The client contended that his former counsel (1) failed to adequately advise him of the risks under the proposed settlement agreement, (2) drafted the settlement agreement and judgment in a way that converted corporate obligations into his personal obligations, and (3) breached the conflict waiver by failing to negotiate a settlement that was contingent on having a particular entity purchase certain assets in an amount sufficient to fund the settlement. Due to mediation confidentiality, the trial court rejected the client's arguments and granted summary judgment in favor of his former counsel.

On appeal, the Second District Court of Appeal acknowledged the California Supreme Court's "near categorical prohibition against judicially crafted exceptions to the mediation confidentiality statutes …."[74] It explained that the case was governed by *Cassel*:

> Applying *Cassel* to the undisputed facts of this case, we reach the same conclusion as the trial court. [The client] cannot prove that any act or omission by [his former counsel] caused him to enter the settlement agreement and, hence, to suffer his alleged injuries, because all communications he had with [his former counsel] regarding the settlement agreement occurred in the context of mediation.[75]

As in *Wimsatt*, the court of appeal said that although it sympathized with the client's assertion that mediation confidentiality was never intended to protect attorneys from malpractice claims, "that seemingly unintended consequence *is for the Legislature, not the courts, to correct.*"[76]

The court of appeal further held that "a malpractice plaintiff cannot circumvent mediation confidentiality by advancing inferences about his former attorney's supposed acts or omissions during an underlying mediation."[77] The court explained that "[t]o permit such an inference would allow [the client] to attempt to accomplish indirectly what the statutes prohibit him from doing

73. 2015 Cal. App. LEXIS 247 (2015).
74. *Id.* at *1.
75. *Id.* at *14.
76. *Id.* (emphasis added).
77. *Id.* at *1.

directly — namely, proving [his former counsel] advised him to execute the settlement agreement during the mediation."[78] The court also noted that "insofar as there is no statutory exception to mediation confidentiality that permits [his former counsel] to rebut the inference by showing what advice it actually gave [the client] during mediation, the relevant authorities all counsel against permitting the inference to be drawn."[79] The court of appeal thus affirmed the entry of summary judgment against the client.

The staff does not know whether the client in *Amis* plans to file a petition for review in the California Supreme Court. We will attempt to find out. **Unless it is clear that the case is fully resolved, the Commission should be cautious about discussing its specifics.**

Unpublished Decisions

Through extensive but not exhaustive research, the staff also found a number of unpublished court of appeal decisions involving allegations that attorney misconduct occurred in the mediation process. Not surprisingly, the more recent ones follow *Cassel*. These include:

- *Mellor v. Oaks*.[80] The client in this legal malpractice case alleged that his attorneys negligently allowed defaults of other defendants to be taken, leaving him exposed as the only defendant. The client further alleged that his attorneys had failed to prepare for trial while agreeing to a dispute resolution process (mediation-arbitration) and an unreasonable settlement that disfavored him.[81] 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.[82]
- *Hadley v. The Cochran Firm*.[83] This case involved claims for legal malpractice, breach of fiduciary duties, and fraud. The 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."[84] The trial court dismissed the complaint, "concluding that because the alleged deception occurred during a mediation, the mediation confidentiality provisions of the Evidence Code prevented

78. *Id.* at *16.
79. *Id.*
80. 2011 Cal. App. Unpub. LEXIS 8797 (2011).
81. See *id.* at *2.
82. *Id.* at *12.
83. 2012 Cal. Unpub. LEXIS 5743 (2012).
84. *Id.* at *1.

plaintiffs from proving their claims."[85] The court of appeal affirmed on the same ground.[86]

- *Gossett v. St. John*.[87] In this legal malpractice case, a client alleged that his attorneys failed to inform him that (1) he would be personally liable under a mediated settlement agreement, and (2) he should obtain separate counsel before signing the agreement. The trial court sustained a demurrer to the complaint and the court of appeal affirmed because "the individual claims asserted in [the] complaint are entirely based on what [the defendant attorneys] said — or did not say — at the mediation."[88]

Another unpublished case, *In re Malcolm*,[89] predates *Cassel*, but employs quite similar reasoning. *Malcolm* stemmed from a marital dissolution mediation that resulted in a settlement. After the mediation, the husband sued his former attorneys, alleging that "the attorneys committed malpractice by failing to include a general statement of release from Wife and failing to obtain his new spouse's consent to the settlement."[90] The husband sought to depose one of his former attorneys, but the defendant attorneys and his former wife objected based on mediation confidentiality.

The trial court denied the requested discovery and the court of appeals affirmed, explaining:

> The Legislature has not enacted an exception to section 1119 for discovery and disclosure of mediation communications between an attorney and his or her client for use in an ensuring malpractice action, and this Court may not create one. *This Court must preserve the valuable function that mediation proceedings play by protecting the confidentiality of such proceedings*.[91]

The court of appeals also noted that the husband had "made no showing" that the lower court's ruling prejudiced his substantive rights to pursue a malpractice action against his former attorneys.[92] Thus, the husband was still "free to prosecute his malpractice action … using the property settlement and other nonconfidential evidence."[93]

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85. *Id.* at *2.
86. See *id.* at *4-*11. For further discussion of a situation like the one in *Hadley,* see Memorandum 2014-43, pp. 14-17.
87. 2011 Cal. Unpub. LEXIS 3586 (2011).
88. *Id.* at *12.
89. 2004 Cal. Unpub. LEXIS 10675 (2004).
90. *Id.* at *2.
91. *Id.* at *11 (emphasis added).
92. *Id.* at *12.
93. *Id.*

Three more unpublished court of appeal opinions involved allegations of attorney misconduct during mediation, but those opinions do not address any mediation confidentiality issues. In one of them, a woman moved to set aside a mediated settlement agreement, alleging that she felt under extreme duress during the mediation and "her attorney's use of prescription medication made him 'slower' and not capable of acting in her best interest."[94] The trial court denied her motion and she appealed, but the court of appeal dismissed the appeal on procedural grounds.[95] The other two cases also involved attempts to undo a mediated settlement agreement: One client alleged that her attorney exerted undue influence to convince her to settle;[96] the other client alleged that his attorney pressured him to settle without fully explaining the settlement and his opponents fraudulently induced him to settle through misrepresentations.[97] In both cases, the court of appeal enforced the mediated settlement agreement, rejecting the clients' contentions on grounds other than mediation confidentiality.

Lastly, the staff found *Benesch v. Green*,[98] an unpublished federal district court decision in which a woman alleged that during a mediation her attorney had induced her to sign a settlement term sheet that failed to meet her goal of protecting her daughter's inheritance rights. She sued the attorney for malpractice and the attorney moved for summary judgment "on the ground that California's mediation confidentiality provisions preclude Plaintiff from establishing her malpractice claim and Defendant from meaningfully defending herself."[99]

In response, 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.[100] The district court nonetheless denied the summary judgment motion without prejudice, because the plaintiff had not

94. Jones v. Wells Fargo Bank, 2002 Cal. Unpub. LEXIS 10901, at *5 (2002).
95. See *id.* at *6-*12.
96. See Berg v. Bregman, 2002 Cal. App. Unpub. LEXIS 9371 (2002).
97. See Gelfand v. Gabriel, 2002 Cal. App. Unpub. LEXIS 6026 (2002).
98. 2009 U.S. Dist. LEXIS 117641 (2009).
99. *Id.* at *3.
100. *Id.* at *22.

yet had an opportunity to explore "the question of what evidence would be left after application of the mediation confidentiality statutes …."[101]

Benesch preceded the California Supreme Court's decision in *Cassel*. The California Supreme Court described *Benesch* carefully in its *Cassel* opinion,[102] and expressly stated that it "agreed with" the district judge's analysis regarding mediation-related attorney-client communications.[103]

Alleged Mediation-Related Misconduct by a Mediator

As discussed above, in *Provost* a party unsuccessfully sought to undo a mediated settlement on the ground that counsel *and the mediator* had used threats of criminal prosecution to coerce the party to settle. In addition to *Provost,* the staff found a few other court of appeal decisions involving allegations of mediator misconduct. Those cases are described below.

Woolsey

In re Marriage of Woolsey[104] involved a church-sponsored mediation of a marital dissolution case, which resulted in a signed settlement regarding division of property, support, and child custody. Later, the husband contended that the settlement was unenforceable on a number of grounds. Of particular note, he contended in the trial court that the settlement agreement was unenforceable because *the mediator* engaged in undue influence during the mediation.[105] On appeal, the husband changed his argument and asserted that *his wife* engaged in undue influence during the mediation.[106] Relying on *Cassel* and Evidence Code Section 1119, the court of appeal rejected both arguments: It concluded that the husband "cannot establish undue influence by [his wife] *or any other participant in the mediation* under the mediation confidentiality provisions of Evidence Code section 1119."[107]

The husband maintained, however, that he did not need to introduce any mediation evidence, because the marital settlement agreement was unequal, and a presumption of undue influence arises from an unequal marital settlement agreement, which his wife failed to overcome. The court of appeal disagreed. It explained that although a presumption of undue influence normally arises from

101. *Id.* at *25.
102. See 51 Cal. 4th at 134-35.
103. 51 Cal. 4th at 135.
104. 220 Cal. App. 4th 881, 163 Cal. Rptr. 3d 551 (2013).
105. *Id.* at 900.
106. *Id.*
107. *Id.* at 901 (emphasis added).

an unequal marital settlement agreement, "there is no presumption of undue influence in marital settlement agreements reached as a result of mediation."[108]

For that point, the court of appeal relied on *In re Kieturakis* (discussed later in this memorandum),[109] which involved alleged undue influence by an opponent in connection with a mediated agreement. The *Woolsey* court also explained:

> [M]ediators strive to render negotiations fair and voluntary. Combined with the mediation confidentiality that Evidence Code section 1119 imposes, *a presumption of undue influence undermines the strong public policy in favor of mediation.* The Legislature has already addressed the requirements of admissible mediated agreements. It is not our province to impose a new requirement that mediated agreements must declare they are free from undue influence if they are to be valid.[110]

Woolsey thus relied on the mediation confidentiality statutes and the public policy favoring mediation as grounds for rejecting a claim of mediator and/or party misconduct.

Furia

Another case involving alleged mediator misconduct is *Furia v. Helm.*[111] Unlike *Provost* and *Woolsey,* this case does not involve any discussion of mediation confidentiality.

The case arose when Hugh Helm III, an attorney representing certain clients, attempted to mediate a dispute between his clients and David Furia dba Furia Construction Company. Helm made statements indicating that he would try to mediate fairly, yet he also made statements indicating that his loyalty would lie with his clients, at least if the mediation was unsuccessful. After the mediation, Furia sued Helm for legal malpractice and fraudulent misrepresentation and concealment. Furia alleged that during the mediation, Helm wrongfully advised Furia to withdraw from the remodel project he was doing for Helm's clients. The trial court rejected Furia's claims and he appealed.

In its opinion, the court of appeal said it had "some misgivings about the manner in which Helm accepted dual responsibilities …."[112] The court did not

108. *Id.* The court of appeal also determined that "[p]arties who agree to settle their dispute by private mediation may … agree to make financial disclosures that do not meet the technical procedural requirements of [Family Code] sections 2104 and 2105." *Id.* at 892. It explained that "[r]equiring technical compliance with disclosure rules designed for adversarial litigation would undermine the strong public policy of allowing parties to choose speedy and less costly avenues for resolving their disputes." *Id.* (emphasis added).

109. 138 Cal. App. 4th 567, 41 Cal. Rptr. 3d 119 (2006).

110. *Woolsey,* 220 Cal. App. 4th at 902-03 (emphasis added; citations omitted).

111. 111 Cal. App. 4th 945, 4 Cal. Rptr. 3d 357 (2003).

resolve whether it was proper for Helm to have accepted such dual responsibilities, because the only issue before it was "whether Helm breached any obligations he may have assumed towards Furia."[113]

The court of appeal decided that "[i]n agreeing to act as neutral mediator, Helm did not assume the duties of Furia's attorney, but he did assume the duty of performing as a mediator with the skill and prudence ordinarily to be expected of one performing that role."[114] The court of appeal further concluded that the duties of a mediator include properly disclosing any conflicts of interest to each mediation participant. The court had "no doubt that an attorney accepting the role of mediator has the same duty of full disclosure as an attorney accepting the representation of clients with actual or potentially conflicting interests."[115] It explained:

> Mediators may not provide legal advice, but they are in a position to influence the positions taken by the conflicting parties whose dispute they are mediating. … *A party to mediation may well give more weight to the suggestions of the mediator if under the belief that the mediator is neutral than if that party regards the mediator as aligned with the interests of the adversary.* For the same reasons that full disclosure is necessary before an attorney may represent divergent interests, *before an attorney agrees to serve for compensation as a mediator, there must be "complete disclosure of all facts and circumstances which, in the attorney's honest judgment, may influence [the party's] choice,* holding the attorney civil liable for loss cause by lack of disclosure."[116]

The court of appeal therefore concluded that Furia had sufficiently alleged that Helm breached a duty owing to Furia.[117] The court further concluded, however, that Furia's claims had no merit, because he could not establish that he had abandoned the remodel project. Not only was the evidence insufficient to establish such abandonment, but Furia was also judicially estopped from contending that he had abandoned the project.[118] The court of appeal thus affirmed the judgment against Furia.

Although Furia lost his case, the appellate decision imposes a broad conflict-of-interest disclosure obligation on mediators. That obligation might not be

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112. *Id.* at 948.
113. *Id.* at 953 n.7.
114. *Id.* at 954.
115. *Id.*
116. *Id.* at 955, *quoting Ishmael v. Millington*, 241 Cal. App. 2d 520, 526-527, 50 Cal. Rptr. 592 (1966) (emphasis added by CLRC staff).
117. *Furia*, 111 Cal. App. 4th at 955.
118. *Id.* at 957.

consistent with the scope of the mediation confidentiality statutes. See in particular Evidence Code Section 1120(b)(3), which creates a mediation confidentiality exception for "[d]isclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute." **The issue might warrant further examination later in this study.**[119]

Unpublished Decision

In its research, the staff also found one unpublished California decision involving allegations of mediator misconduct.[120] In *Abrams v. Dromy*,[121] the "main theory at trial was that the mediation process was a sham, orchestrated by either Dromy or Abrams together with [the purported mediator] to defraud the other."[122] In evaluating that theory, the trial court admitted evidence regarding the mediation discussions.

On appeal, the court agreed that admission of the mediation evidence was proper. It explained that "[f]or the jury to effectively determine the role of the mediator as a neutral participant necessitates invading the confidentiality of the mediation."[123] According to the court, the conflict between the positions of Dromy and Abrams "justifie[d] an exception to the protection of confidentiality."[124]

The court of appeal did not discuss the mediation confidentiality statutes in any detail. The exception it recognized in *Abrams* appears inconsistent with the Supreme Court's repeated admonitions against judicially-created exceptions to the mediation confidentiality statutes. That is understandable, because *Abrams*

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119. See also Memorandum 2014-58, p. 27.

120. In addition, we found an unpublished case in which a party to a mediated settlement agreement moved to set aside the agreement, asserting that she "executed the agreement under specified unilateral mistakes of fact and law and suffered from an unfair agreement." *In re* Van Horn, 2003 Cal. App. Unpub. LEXIS 7574 (2003). She sought to depose the mediator on matters arising from the mediation, including his "lack of neutrality and representations about her legal rights." *Id.* at *3. As best the staff can tell, she did not actually allege that the mediator engaged in wrongdoing; she just sought to raise doubts about his impartiality sufficient to invoke an exception to Evidence Code Section 703.5 (making a mediator incompetent to testify). The court of appeal determined that the exception in question "does not logically apply in the mediation context," because "a mediator makes no decision" and the exception "exists to allow a limited challenge for bias or prejudice to a third-party's *decision* that emanates from a judicial or quasi-judicial proceeding." *Id.* at *16 (emphasis added). The court also determined that due to Section 703.5 and the other mediation confidentiality statutes, the party was not entitled to depose the mediator. See *id.* at *5-*17.

121. 2004 Cal. Unpub. LEXIS 6461 (2004).

122. *Id.* at *15.

123. *Id.*

124. *Id.*

predates *Rojas, Fair, Simmons*, and *Cassel*. It seems unlikely, however, that a court of appeal would reach the same result under similar facts today.

Alleged Mediation-Related Misconduct by an Opponent

Two of the cases discussed above involved allegations that an opponent engaged in mediation-related misconduct:

(1) *Woolsey* (the case in which the husband initially alleged that the mediator engaged in undue influence, and later alleged that his wife did so).
(2) *Gelfand* (the unpublished decision in which a client alleged that his attorney pressured him to settle without fully explaining the settlement and his opponents fraudulently induced him to settle through misrepresentations).

The only other published case the staff found involving alleged misconduct by a mediation opponent was *Kieturakis,* which the court relied on in *Woolsey*.

Kieturakis

Kieturakis was a dissolution case in which the wife moved to set aside a mediated marital settlement agreement due to alleged fraud, duress, and lack of disclosure.[125] The trial court found that the settlement favored the husband and thus there was a presumption that the husband engaged in undue influence.

The trial court allowed the husband to rebut that presumption using mediation evidence, over the wife's objection and over the mediator's objection to testifying. The trial court considered that evidentiary ruling "the most difficult" legal issue it had ever faced.[126] In trying to convince the court to rule otherwise, the mediator "indicated that the seven attorneys in her office had provided mediation services and consultations to *over 50,000 people in the preceding 12 years,* and that *none of them* had ever been required to testify in court concerning those matters."[127]

In large measure, the mediation evidence defeated the wife's case.[128] The trial court entered judgment against the wife and she appealed.

The court of appeal held that "the presumption of undue influence in marital transactions *must yield to the policies favoring mediation and finality of judgments*."[129] Consequently, the court ruled that the husband should not have been required to

125. 138 Cal. App. 4th at 61.
126. *Id.* at 75.
127. *Id.* at 67 (emphasis added).
128. *Id.*
129. *Id.* (emphasis added).

bear the burden of proof. "In view of this conclusion and in the particular circumstances of this case," the court further determined that "any error in admitting evidence from the mediation was harmless."[130]

The court of appeal explained its reasoning at length. Among other things, it noted that voluntary participation and self-determination are fundamental principles of mediation. It also observed that divorce mediators generally attempt to balance the negotiating power between parties and ensure that parties are acting of their own free will. According to the court, these factors tend to produce agreements that are fair and voluntary, not coerced.[131]

The court of appeal also stressed that "[i]f there is a price to be paid in fairness to preserve mediation confidentiality, the cases have required that it be paid by parties challenging, not defending, what transpired in the mediation."[132] In other words,

> In choosing between a rule that may allow some unfair agreements to stand and a rule that jeopardizes all unequal agreements, we must not lose sight of the fact that California has a strong policy of encouraging settlements. *Given that strong policy, the rule that promotes certainty and finality must govern.*[133]

The *Kieturakis* court thus relied on the mediation confidentiality statutes and the public policy favoring mediation as grounds for rejecting a claim of party misconduct (just as the *Woolsey* court did when it followed *Kieturakis* several years later).

Unpublished Decision Involving Alleged Mediation-Related Misconduct by an Opponent

In addition to the three published cases already discussed (*Woolsey*, *Gelfand*, and *Kieturakis*), the staff found an unpublished decision involving alleged mediation-related misconduct by an opponent: *In re Marriage of Hodges*.[134] This was a marital dissolution case in which the trial court allowed a mediator to testify regarding an application for sanctions due to mediation misconduct. The trial court awarded sanctions (attorney's fees) to the husband, based mainly on the wife's "unwillingness to settle the matter,"[135] in violation of Family Code Section 271(a), which provides:

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130. *Id.*
131. *Id.* at 85.
132. *Id.* at 87.
133. *Id.* (emphasis added; citations, quotation marks, and brackets omitted).
134. 2001 Cal. App. Unpub. LEXIS 1562 (2001).
135. *In re* Hodges, 2001 Cal. App. Unpub. LEXIS 1562 (2001).

> 271. (a) Notwithstanding any other provision of this code, the court may base an award of attorney's fees and costs on the extent to which the conduct of each party or attorney *furthers or frustrates the policy of the law to promote settlement of litigation* ….[136]

The wife appealed, arguing that the mediator should not have been permitted to testify.

Relying on *Foxgate,* the court of appeal agreed that admission of the mediator's testimony was erroneous. It explained:

> [A]s Family Code section 271 does not create an express exception to the terms of Evidence Code sections 730.5, 1119, and 1121, the relevance of [the wife's] statements or conduct during settlement negotiations cannot support use of the mediator's testimony against [the wife] at the hearing on sanctions.…
>
> The court in *Foxgate* has set forth a bright-line rule that prohibits the use of such information in *any proceeding* and no matter *how relevant*, absent an express statutory exception to the mediation confidentiality provisions. As none is present here, the testimony of [the mediator] was improper and inadmissible.[137]

The court of appeal further explained that the error was prejudicial and the sanctions order must be reversed:

> Undoubtedly, the improper use of the testimony of [the mediator] as to [the wife's] unwillingness to settle the matter, particularly as this is the main basis for imposing fees under Family code section [271], was prejudicial, materially affected her rights, and supports reversal of the court's order imposing sanctions. *To have a supposedly impartial mediator testify against a party on an issue central to a court's decision can only be said to be highly damaging to that party's position. Indeed, that is one of the reasons for the strict rule of confidentiality and the incompetency of mediators to testify as witnesses.* Because of the highly prejudicial nature of [the mediator's] testimony and the strict precepts concerning confidentiality of mediation sessions, we reverse the court's award of $25,000 in sanctions in this matter.[138]

Hodges is thus similar to *Woolsey* and *Kieturakis* in construing the mediation confidentiality statutes to preclude use of mediation communications to show that an opponent engaged in misconduct during mediation.[139]

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136. Emphasis added.
137. *Id.* at *46 (emphasis in original).
138. *Id.* at *47-*48 (emphasis in original).
139. Another, somewhat similar, unpublished case is *In re Beetley,* 2009 Cal. App. Unpub. LEXIS 3608. In *Beetley,* a wife sought to set aside a judgment based on a mediated settlement agreement. She raised numerous arguments for reaching that result (e.g., her husband's financial disclosures were inadequate, she did not understand the settlement agreement, she was under the influence

Alleged Mediation-Related Misconduct by an Insurer

The staff is aware of two published cases involving the application of California law to alleged mediation-related misconduct by an insurer (aside from noncompliance with a court order or court rule to mediate). Those cases are discussed below.

Travelers

In *Travelers Casualty & Surety Co. v. Superior Court*,[140] the Diocese of Orange ("Orange") was sued by numerous persons for childhood sex abuse by priests. Judge Lichtman of the Los Angeles County Superior Court attempted to mediate the claims against Orange and other dioceses. In that process, he entered a so-called "Valuation Order." A substantial portion of that order was "devoted to Judge Lichtman's belief that the insurers had stymied all attempts at settling the cases through their threat of coverage forfeiture should the Church settle in an amount that had not been properly adjudicated."[141]

Orange's insurers filed a writ petition, asking the court of appeal to vacate the Valuation Order. The court of appeal granted the writ as requested, explaining that Judge Lichtman "exceeded his authority by making factual findings and otherwise *preparing a coercive order in violation of the fundamental principles governing mediation proceedings*."[142]

In reaching that result, the court of appeal used a footnote to clarify that it "*express[ed] no opinion* as to the propriety of the insurers' alleged misconduct

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of medications during the mediation, she was tired, stressed, and crying during the 10-hour mediation, she did not understand the mediation procedures, the settlement agreement contained unlawful terms). It is not clear to the staff whether she was alleging that her husband committed misconduct during the mediation, as opposed to other stages of the litigation process. As best we can tell, she did not allege that anyone else engaged in misconduct. The trial court ruled against her and the court of appeal affirmed, relying in part on the mediation confidentiality statutes. Among other things, the court of appeal said:

> The matters set out in wife's declaration do not sit in a vacuum. They necessarily involve the questions whether wife did engage in the mediation process and what she was asked and told with respect to its parameters and effects, and whether she told anyone what her expectations were and explained to anyone about her asserted inability to engage in, or continue engaging in, the mediation and enter into the settlement agreement. We will not presume that she remained mute during the entire ten hours and did not indicate her surprise at/objection to mediation matters of which she now complains. By her declaration about the mediation, wife is asking to have the court look into what transpired at the mediation. We cannot consider such things as they fall under the mediation privilege.

Id. at *24.

140. 126 Cal. App. 4th 1131, 24 Cal. Rptr. 3d 751 (2005).
141. *Id.* at 1138.
142. *Id.* at 1135 (emphasis added).

during the mediation and settlement process."[143] It "simply note[d] that if, as Judge Lichtman apparently believe[d], they … acted in bad faith toward their insured, they run the risk of liability for such conduct." [144]

The court of appeal also declined to resolve certain mediation confidentiality issues, which hinged on whether an insurer may invoke the protections of particular mediation confidentiality statutes. The court said those issues were premature, because "the Church will not allow the Valuation Order to be disclosed at this time, [so] it must remain confidential and may not be used without the Church's consent."[145] The court explained that the issue regarding an insurer's status would only become ripe for adjudication if the Church consented to the disclosure or use of the Valuation Order.[146]

The court of appeal thus avoided both the mediation misconduct issues and the mediation confidentiality issues in *Travelers.* In dictum, however, it expressed its view on one of the mediation confidentiality issues:

> Even though we need not reach the issue, we believe that the plaintiffs' interpretation of section 1121 is wrong. *While section 1121 states that no report by the mediator may be filed unless "all parties to the mediation" agree, that provision cannot be read narrowly to include only parties to an action, and exclude participating insurers.* When interpreting this provision, we must give it a reasonable and commonsense reading that is consistent with the Legislature's apparent approach and will not lead to an absurd result. As part of this task, we must read section 1121 together with the rest of the mediation confidentiality statutes and harmonize them.… In light of the Legislature's apparent purpose of extending some aspects of mediation confidentiality to participants such as the insurers, not just the parties to an action, we construe the phrase "parties to the mediation" as used in section 1121 to include such participants.[147]

The court of appeal thus made clear in dictum that, in some circumstances, an insurer may invoke the mediation confidentiality statutes to prevent disclosure and reporting of mediation information, including information bearing on alleged mediation misconduct.

143. *Id.* at 1143 n.14 (emphasis added).
144. *Id.*
145. *Id.* at 1146.
146. *Id.* at 1146 n.18.
147. *Id.* (emphasis added).

Milhouse

A very recent case involving alleged mediation misconduct by an insurer is the federal district court's decision in *Milhouse v. Travelers Commercial Ins. Co.*,[148] which was decided under California law. The district court's opinion was attached to, and discussed to some extent in, an earlier staff memorandum.[149] An appeal is currently pending before the Ninth Circuit. **In light of the pending appeal, the staff hesitates to say more about *Milhouse* at this time**.

Alleged Failure to Comply With a Court Requirement to Mediate

Several cases involving alleged mediation misconduct concern noncompliance with a court order or court rule to mediate. In an earlier memorandum, the staff noted that such cases appear only marginally relevant to the Commission's study, "because California does not require a party to make a settlement offer (or other progress towards settlement) to comply with a court order to mediate, and other types of noncompliance might be subject to proof, at least to some degree, without revising California's protections for mediation communications."[150] In support of that statement, the staff cited the portion of *Foxgate* in which the California Supreme Court explained that it was permissible to introduce evidence regarding a party's failure to bring experts to a mediation as ordered:

> To the extent that the declaration of counsel stated that the mediator had ordered the parties to be present with their experts, there was no violation [of mediation confidentiality]. As noted earlier, neither section 1119 nor section 1121 prohibits a party from revealing or reporting to the court about noncommunicative conduct, including violation of the orders of a mediator or the court during mediation.[151]

In researching the current memorandum, the staff found a couple of published decisions that are similar to this aspect of *Foxgate.* Those cases are described below.

Campagnone

Campagnone v. Enjoyable Pools & Spas Service & Repairs, Inc.[152] concerned an insurer's failure to attend a court-ordered appellate mediation as required by a

148. 982 F. Supp. 2d 1088 (C.D. Cal. 2013).
149. See Memorandum 2014-27, pp. 2-3 & Exhibit pp. 11-26.
150. Memorandum 2014-35, p. 3.
151. *Foxgate,* 26 Cal. 4th at 18 n.14.
152. 163 Cal. App. 4th 566, 77 Cal. Rptr. 3d 551 (2008).

local rule. The court of appeal considered that a serious transgression, because (1) "court-ordered mediation of certain cases on appeal has been a resounding success,"[153] (2) "[f]or mediation to be effective … when potential insurance coverage may apply, a representative of a party's insurance carrier must attend all mediation sessions in person, with full settlement authority,"[154] and (3) "[f]ailure to comply with this rule can doom appellate mediation, thus undermining the beneficial purposes of the mediation process and wasting the time of all involved in the mediation."[155]

The court of appeal concluded that the mediation confidentiality rules "do not prohibit 'a party' from 'advising the court about *conduct* during mediation that might warrant sanctions.'"[156] According to the court, the "failure to have all persons or representatives attend court-ordered appellate mediation, as required by local rule 1(d)(9), is conduct that a party, but not a mediator, may report to the court as a basis for monetary sanctions."[157]

Under the particular circumstances of the case before it, however, the appellate court did not impose sanctions. It considered that the proper result, because (1) the insurer was not informed of the court-ordered appellate mediation, and (2) although the local rule implicitly imposed a duty on the insured party and its counsel to so inform the insurer, until the appellate court issued its opinion there was "no published decision leaving no doubt that the duty resides in the party and the party's counsel."[158]

Ellerbee

Although the court of appeal decided to excuse the sanctionable conduct in *Campagnone,* the court of appeal in *Ellerbee v. County of Los Angeles*[159] did not. The mediator in that case, acting pursuant to the California Rules of Court, required

153. *Id.* at 566. The court explained:

> At last count, the parties in over 50 percent of the matters ordered to mediation in the Third Appellate District have settled their cases prior to the preparation of the appellate record, briefing, and oral argument. By doing so, they saved substantial time and expense, achieved a result acceptable to each party, and moved on with their lives or businesses rather than having prolonged the litigation. The court has also benefited by the fact its resources that otherwise would be devoted to those matters are being used to promptly resolve other appellate cases.

Id. at 569.

154. *Id.* at 569.
155. *Id.* at 570.
156. *Id.* at 571, *quoting Foxgate* at 13-14 (emphasis in *Foxgate*).
157. *Id.* at 572.
158. *Id.* at 573.
159. 187 Cal. App. 4th 1206, 114 Cal. Rptr. 3d 756 (2010).

all parties with settlement authority to attend the mediation in person (not by phone). Nonetheless, two of the defendants failed to attend. Their attorney informed the mediator that a party with settlement authority was available by phone, but that was not true. The trial court imposed sanctions of over $6,000. The defense attorney and one of the defendants appealed from the order imposing sanctions.

On appeal, the defense attorney argued that "the order imposing sanctions was impermissible, because … the motion violated the rules protecting the confidentiality of communications made during mediations."[160] Citing *Campagnone,* the court of appeal bluntly rejected his claim, saying simply: "He is mistaken."[161]

Collectively, *Foxgate, Campagnone,* and *Ellerbee* appear to indicate that California's mediation confidentiality statutes do not prevent the admission of evidence showing whether a person attended a mediation as required by a court order or court rule. Under those authorities, a failure to comply with such a requirement is thus sanctionable; the mediation confidentiality statutes do not stand in the way of that step.

An unpublished decision by the Second District Court of Appeal suggests otherwise, however, at least in certain circumstances. That decision is discussed below.

Elder v. Schwan Food Co.

In *Elder v. Schwan Food Co.,*[162] the Second District Court of Appeal "consider[ed] whether to impose sanctions on [the appellant] for failing to participate in court-ordered appellate mediation."[163] The court declined to do so, "based upon the limitations of the mediation confidentiality statutes, which prevent us from considering statements made during mediation that might explain [the appellant's] failure to appear at the mediation."[164]

In an opinion authored by Justice Aldrich (who also wrote the opinion in *Wimsatt*) the court accepted as true that the appellant failed to attend the mediation, and that such conduct was admissible under the mediation confidentiality statutes as discussed in *Campagnone*.[165] The court pointed out,

160. *Id.* at 1216.
161. *Id.* at 1217.
162. 2011 Cal. Unpub. LEXIS 3544 (2011).
163. *Id.* at *2.
164. *Id.* (citation omitted).
165. *Id.* at *23.

however, that "*Campagnone* and the mediation confidentiality statutes state that we cannot inquire further into communications during the mediation."[166] The court said that created an unfair situation:

> [U]nder *Campagnone*, the [respondent] is permitted to report to the court that [the appellant] did not attend the mediation, but the mediation confidentiality statutes prevent [the appellant] from presenting a non-sanctionable excuse disclosed during the course of mediation. This is an anomalous and unfair result.[167]

The court went on to reiterate some of the sentiments it voiced in *Wimsatt*:

> We realize, as we stated in [Wimsatt], the construction of the mediation confidentiality statutes may seem to lead to unjust results. As the Supreme Court acknowledged in [*Foxgate*], its holding left unpunished sanctionable conduct. Likewise, these limitations prohibit us from learning circumstances that would exonerate a party defending a sanctions motion alleging bad faith conduct during mediation. The Legislature, however, has weighed and balanced the policy that promotes effective mediation by requiring confidentiality against a policy that might better encourage participation in the mediation process. It is for the Legislature, not the courts, to balance the competing policy concerns. As we stated in *Wimsatt*, the harsh and inequitable results have not gone unnoticed. We have repeatedly implored the Legislature to reconsider California's broad and expansive mediation confidentiality statutes.[168]

In reaching its decision, the court noted that the parties' declarations regarding the existence of a valid excuse "expressly refer to communications during mediation."[169] The court did not discuss whether the respondent could have invoked Evidence Code Section 1120(a)[170] and proved a valid excuse (e.g., the respondent was sick) without using mediation communications. The court's opinion seems to implicitly negate that possibility, but the court did not expressly state as much.[171]

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166. *Id.* at *23-*24.
167. *Id.* at *24 (citation omitted).
168. *Id.* at *27.
169. *Id.* at *26.
170. "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 mediation consultation."
171. The staff's research also disclosed a few other unpublished decisions in which a party alleged that an opponent failed to comply with a court order or court rule to mediate. As best we can tell, none of the opponents argued that the mediation confidentiality statutes precluded proof of the opponent's failure to comply with the requirement to mediate. See *In re* Schuneman, 2004 Cal. Unpub. LEXIS 2508 (2004) (party sought sanctions for opponent's alleged failure to participate in good faith in court-ordered appellate mediation, but court denied such sanctions

COURT OF APPEAL DECISIONS IN WHICH MEDIATION EVIDENCE WAS ALLEGEDLY RELEVANT TO PROVE OR DISPROVE NON-MEDIATION MISCONDUCT

In addition to the cases involving allegations of mediation misconduct, the staff found two published court of appeal decisions in which mediation evidence was allegedly relevant to prove or disprove non-mediation misconduct. We describe those cases below.[172]

Rinaker

An important decision in this category was *Rinaker*, a juvenile delinquency case in which the minors were charged with vandalism. We have previously discussed *Rinaker* to some extent,[173] but the Commission might find it useful to hear more detail.

The minors in *Rinaker* sought to compel a mediator to testify, in order to *disprove* the charges against them (they anticipated that the mediator would confirm that the man accusing them of vandalism said during mediation of a related case that he did not actually see who committed the vandalism). The mediator objected to testifying, relying on the mediation confidentiality statutes and California's constitutional right of privacy. The trial court ruled against her, and the mediator sought a writ in the court of appeal.

Like the trial court, the appellate court concluded that "when balanced against the competing goals of preventing perjury and preserving the integrity of the truth-seeking process of trial in a juvenile delinquency proceeding, *the interest in promoting settlements … through confidential mediation … must yield to the constitutional right to effective impeachment*."[174] The court of appeal agreed, however, with the mediator's argument that "before allowing the minors to question the mediator under oath … concerning statements made during

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because party seeking them failed to comply with confidentiality requirement for appTellate mediation program); Columbus Antiques & Decorative Ctr., Inc. v. Waste Mgmt., 2003 Cal. App. Unpub. LEXIS 7427 (2003) (upholding order dismissing case for failure to comply with various litigation requirements, including failure to attend court-ordered mediation); Estate of Caldwell, 2003 Cal. App. Unpub. LEXIS 8206 (2003) (overturning attorney's fee award against party who left mediation early, because "even if there had been evidence of bad faith conduct in mediation — which there was not — it would not be sufficient to justify awarding all attorneys' fees and costs incurred by the other beneficiaries.")

172. The staff also found an unpublished decision in which mediation evidence was allegedly relevant to prove or disprove non-mediation misconduct: *Ezra v. State*, 2010 Cal. App. Unpub. LEXIS 7078 (2010). In that case, a party tried to introduce mediation communications to show that a Form 1099 was filed with the IRS "to retaliate against her for pursuing certain employee rights …." *Id.* at *1-*2. The trial court excluded the mediation communications on grounds of mediation confidentiality, and the court of appeal affirmed. See *id.* at *7-*16.

173. See Memorandum 2014-45, pp. 6-7, 12-13; see also discussion of "*Wimsatt* Litigation" *supra*.

174. *Rinaker*, 62 Cal. App. 4th at 167-68.

confidential mediation, *the juvenile court should have conducted an in camera hearing* to weigh the 'constitutionally based claim of need against the statutory privilege' and determine whether the minors have established that [her] testimony is necessary to 'vindicate their rights of confrontation.'"[175] The court explained that "[r]equiring an in camera hearing maintains the confidentiality of the mediation process while the juvenile court considers factors bearing upon whether the minors' constitutional right of effective impeachment compels breach of the confidential mediation process."[176]

The court of appeal went on to provide some guidance about how to conduct the *in camera* hearing. It said:

> (1) During the *in camera* hearing, the juvenile court can determine whether the mediator is competent to testify regarding the accuser's alleged statement that he did not see who committed the vandalism. "If she denies that [the accuser] made the inconsistent statement attributed to him by the minors, or does not recall whether he made such a statement, that would eliminate the need for her to testify in open court during the juvenile delinquency proceeding."[177]
>
> (2) Assuming the mediator acknowledges she heard the alleged inconsistent statement, "the juvenile court can assess the statement's probative value for the purpose of impeachment."[178] "If the circumstances under which [the accuser] made inconsistent statements during mediation convince the juvenile court that such statements were untrustworthy in the sense they were made for the purpose of compromise rather than as true allegations of the minors' conduct, it follows that the minors' constitutionally based claim of need for the evidence would not outweigh the countervailing public interest in maintaining the confidential[ity] of the mediation process."[179]
>
> (3) "[D]uring the in camera hearing, the juvenile court may be able to determine whether the evidence sought by the minors can be introduced without breaching the confidentiality of mediation."[180] For example, "the court could conclude [the mediator's] testimony would be cumulative to other evidence reasonably available to the minors … [and thus] "is not necessary to vindicate the minor's constitutional right to confront and effectively cross-examine their accuser."[181]

175. *Id.* at 169 (emphasis added).
176. *Id.* at 169.
177. *Id.* at 170.
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.* at 171.

(4) The minors should not be required to demonstrate that there is no other evidence, unrelated to the mediation, that could be used to undermine the accuser's testimony that the minors were the culprits. The mediator is a disinterested witness and may therefore have more credibility than other witnesses. "Hence, even if other witnesses could testify to [the accuser's] inconsistent statements or impeach his veracity in other ways, [the mediator's] testimony could be necessary to vindicate the minors' right of confrontation if the credibility of the other witnesses is suspect."[182]

The court of appeal thus sought to carefully accommodate both of the competing policy interests, and remanded the case to the trial court for further proceedings consistent with its opinion.

Doe 1

Doe 1 v. Superior Court.[183] is a second case in which mediation evidence was allegedly relevant to allegations of non-mediation misconduct. In that case, the Los Angeles Archdiocese prepared written summaries of the personnel records of numerous priests accused of sexually molesting minors. The Archdiocese wanted to make the summaries public, but a group of priests objected, contending that the summaries were prepared for purpose of, in the course of, and pursuant to, a mediation, and were therefore subject to mediation confidentiality. The trial court denied the priests' motion for a protective order, and the priests appealed.

The court of appeal reversed. It began by noting that "California's Legislature has a strong policy favoring mediation as an alternative to litigation," and "one of the Legislature's fundamental means of encouraging mediation has been the enactment of mediation confidentiality provisions."[184] The court then explained that (1) the Archdiocese could not disclose the written summaries because the mediation confidentiality statute applied (the proceeding in question was a mediation, not a settlement conference),[185] and (2) the objecting priests were mediation participants who had not waived their right to confidentiality.[186]

However, the court of appeal made clear that the restriction on disclosure "applie[d] *only* to the [written summaries] themselves, *not to the underlying sources of information from which [they] were derived* …."[187] Under Evidence Code

182. *Id.*
183. 132 Cal. App. 4th 1160, 34 Cal. Rptr. 3d 248 (2005).
184. 132 Cal. App. 4th at 1165.
185. *Id.* at 1166-67.
186. *Id.* at 1167-70.
187. *Id.* at 1173 (emphasis added).

Section 1120(a), the underlying information was subject to disclosure, because "[t]hat information existed well before the mediation proceedings here — indeed well before the present litigation was commenced."[188] It is thus unclear whether and to what extent the mediation confidentiality provisions impeded proof of the abuse claims.

OTHER COURT OF APPEAL DECISIONS INTERPRETING THE CURRENT MEDIATION CONFIDENTIALITY STATUTES

In addition to the misconduct cases described above and the other cases previously discussed, there are many other decisions (published and unpublished) that interpret and apply California's current mediation confidentiality statutes. For purposes of the Commission's study, one that may be of particular interest is *Kurtin v. Elieff*.[189]

Kurtin

In *Kurtin*, a party to a mediated agreement sought to introduce evidence from the mediation bearing not on alleged misconduct, but on ambiguities in the mediated agreement. The trial court excluded the evidence.

On appeal, the proponent of the evidence contended that exclusion of the mediation evidence prevented him from having a fair trial and violated due process. In his view, the court should either have allowed him to present the evidence or required his opponent to drop the claims against him.

The court of appeal disagreed, cautioning that *"[t]he mediation privilege carries with it different dynamics* than simple attorney malpractice cases where a party can indeed be required to give up an evidentiary privilege as the price of asserting its claim."[190] The court noted that the appellant's theory "simply cannot be squared with what our Supreme Court unanimously both did and said in *Cassel* …."[191] In particular, the court explained that "[t]he California Supreme Court has clearly signaled the policy behind the mediation privilege is so strong that California law is willing to countenance the 'high price' of the loss of relevant evidence to protect the privilege."[192]

188. *Id.*
189. 215 Cal. App. 4th 455, 155 Cal. Rptr. 573 (2013).
190. *Id.* at 474 (emphasis added).
191. *Id.*
192. *Id.* at 470.

The appellant sought to distinguish *Cassel* on the ground that it involved hindering of the *plaintiff's* ability to present a claim, whereas in appellant's case "application of the mediation privilege supposedly hindered his ability *as defendant* to defend against a claim."[193] But the court of appeal could not see "any meaningful difference between plaintiffs and defendants in the mediation privilege situation."[194] It explained that such a distinction would lead to anomalous results and make no sense.[195]

The court of appeal also noted that mediation confidentiality was upheld in both *Provost* and *Kieturakis*,[196] yet both of those cases involved more compelling arguments for disclosure of mediation evidence than the case at hand. Specifically, it said:

> (1) "If evidence of *coercion* in the achievement of a mediated agreement itself was properly excluded by the mediation privilege in *Provost*, how much less compelling is [appellant's] contention that [the opposing party] should forfeit his claim to repayment where the assertion of the privilege entails only an *incidental* loss of evidence from a mediation bearing on allegedly ambiguous contract terms."[197]
>
> (2) "The whole point of the passage in *Kieturakis* was that the mediation statutes reflect such a strong legislative policy that it even allows 'unfair agreements to stand.' As with *Provost*, if the Legislature is willing to allow even unfair mediated agreements to stand as a result of mediation confidentiality, it certainly is willing to stomach whatever incidental unfairness might result from a party's inability to use mediation evidence to explain allegedly ambiguous terms within a mediated agreement."[198]

"In sum," the court of appeal in *Kurtin* concluded, appellant "did not lose this case by asserting a mediation privilege which the Legislature has chosen to zealously protect."[199]

Other Decisions

Other cases interpreting California's current mediation confidentiality statutes address various different matters, such as the following:

193. *Id.* at at 475 (emphasis in original).
194. *Id.*
195. *Id.*
196. *Id.* at 478.
197. *Id.* at 476 (emphasis in original).
198. *Id.* at 477-78.
199. *Id.* at 478.

- *Lappe v. Superior Court*[200] (financial disclosure declarations exchanged in divorce proceeding were required by Family Code, not because of mediation, and thus they were *not* mediation communications even though they were exchanged during mediation).
- *In re Marriage of Daly & Oyster*[201] (stipulated judgment resulting from mediation in dissolution proceeding was admissible and enforceable under Evid. Code § 1123 because it was written settlement agreement signed by settling parties and it included "terms unambiguously signifying the parties' intent to disclose the agreement or be bound by it")
- *Radford v. Shehorn*[202] (mediation confidentiality statutes prohibit mediator from testifying to anything about mediated settlement agreement, including number of pages it contains, but other mediation participants may testify to noncommunicative conduct).
- *Kuller v. Foot Locker Retail, Inc.*[203] (discussing application of mediation confidentiality with regard to hearing on proposed settlement of class action).
- *Rael v. Davis*[204] (document memorializing settlement terms discussed in mediation was not admissible under Evid. Code §§ 1119, 1123, and thus not enforceable, because it was not executed by all mediation participants; same document could not be invoked as basis for awarding attorneys' fees pursuant to Civil Code § 1717).
- *Jeld-Wen, Inc. v. Superior Court*[205] ("trial courts do not have the authority to order parties in a complex civil action to attend and pay for private mediation").
- *Stewart v. Preston Pipeline, Inc.*[206] (mediated settlement agreement signed by plaintiff, plaintiff's attorney, and defendants' attorney, but not by defendants themselves, was enforceable against plaintiff).
- *Eisendrath v. Superior Court*[207] (doctrine of implied waiver does not apply to mediation confidentiality, so confidential mediation communications were not admissible with regard to alleged mistake in mediated marital settlement agreement absent express consent of all mediation participants).
- *Greene v. Dillingham Construction, Inc.*[208] (party contended that attorney's fees should not be awarded under FEHA for any work

200. 232 Cal. App. 4th 774, 181 Cal. Rptr. 3d 510 (2014).
201. 228 Cal. App. 4th 505, 175 Cal. Rptr. 3d 364 (2014).
202. 187 Cal. App. 4th 852, 114 Cal. Rptr. 3d 499 (2010).
203. 168 Cal. App. 4th 116, 85 Cal. Rptr. 3d 20 (2008).
204. 166 Cal. App. 4th 1608, 83 Cal. Rptr. 3d 745 (2008).
205. 146 Cal. App. 4th 536, 53 Cal. Rptr. 3d 115 (2007).
206. 134 Cal. App. 4th 1565, 36 Cal. Rptr. 3d 901 (2005).
207. 109 Cal. App. 4th 351, 134 Cal. Rptr. 2d 716 (2003).
208. 101 Cal. App. 4th 418, _ Cal. Rptr. 3d __ (2002).

done after particular settlement offer was made during mediation, but court rejected that contention, explaining that disclosure of settlement offer would violate mediation confidentiality and proposed approach would frustrate public policy favoring settlement).

- *Continental Casualty Co. v. St. Paul Surplus Lines Ins. Co.*[209] (party who did not participate in mediation cannot invoke mediation confidentiality; parties who violated their duty of confidentiality with one entity may not now use mediation privilege to protect their communications with another entity).

These cases do not seem especially relevant to the topic at hand: "the relationship under current law between mediation confidentiality and attorney malpractice and other misconduct."[210] The staff can provide more information about one or more of them if the Commission thinks that would be helpful.

SUMMARY AND CONCLUDING THOUGHTS

There are a number of California cases involving allegations of mediation misconduct or attempts to use mediation communications to prove or disprove non-mediation misconduct. Some of those cases involved allegations of attorney misconduct, while others involved alleged misconduct by a mediator, party, or insurer.

For purposes of this memorandum, the staff created a separate category for cases involving an alleged failure to comply with a court requirement to mediate. Going forward, the Commission may eventually need to resolve whether such cases warrant special treatment, or should be treated in the same way as other types of alleged misconduct.

The cases discussed in the memorandum continue to illustrate the tension between (1) the policy interest in promoting effective mediation through assurances of confidentiality, and (2) the policy interest in accountability and achieving justice in each individual case. In considering the cases, **the Commission should bear in mind:**

- The published and unpublished decisions discussed in this memorandum are a tiny subset of the many mediations that take place in California each year. As discussed in Memorandum 2015-5, the exact number of such mediations is difficult to determine.

209. 265 F.R.D. 510 (E.D. Cal. 2010).
210. 2012 Cal. Stat. res. ch. 108 (ACR 98 (Wagner & Gorell)).

- The staff's research was extensive, but not exhaustive. We might not have included all of the pertinent decisions.
- Very few cases result in a published decision. Most cases settle without trial or are resolved by a pretrial motion. Of the rare cases that go to trial, not many are appealed and some appeals do not result in an opinion (much less a published one).
- The cases discussed in this memorandum involve *alleged* misconduct. With few exceptions, the opinions do not reveal whether misconduct actually occurred. Commonsense suggests that some of the allegations were meritorious, while others were not.
- Society has an interest not only in punishing, remedying, and deterring actual misconduct, but also in providing a means of airing and resolving allegations of misconduct in a peaceable manner. If society fails to provide such a dispute resolution mechanism, as when a mediation participant alleges mediation misconduct but cannot present the facts due to mediation confidentiality, a disputant may become frustrated by, and angry about, the lack of opportunity to fully air the matter, and society's confidence in the justice system could be undermined.

The staff's background research for this study is close to complete. The Commission will soon be in a position to start making some tentative decisions, including a decision on the proper scope of this study.

Respectfully submitted,

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