Study K-402 April 3, 2015

Memorandum 2015-13

Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct: Public Comment

In 2013, Stanford Law School established a Law and Public Policy Laboratory with a teaching mission (hereafter, "Policy Lab") and contacted the staff about the possibility of having Policy Lab students participate in the Commission's work.[1] As previously reported to the Commission, the staff prepared two project descriptions relating to its mediation confidentiality study, in hopes that Stanford students (or other persons) might be interested in pursuing them.[2] Since then, two Stanford students have undertaken some of that work, under the supervision of Prof. Janet Martinez. They have now finalized their papers and submitted them for consideration:

The Commission also received the following new comments:

The Policy Lab papers and other new communications are discussed below.

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

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

2. See Memorandum 2013-47, pp. 13-15 & Exhibit pp. 5-8. The staff also coordinated with Prof. Robert Weisberg, who supervised Policy Lab students in connection with the Commission's study of state and local agency access to customer information from communication service providers (Study G-300).

The Commission is fortunate to have the benefit of the papers prepared by Amelia Green and Jordan Rice. The staff wishes to express its appreciation for their contributions to this study.

Amelia Green's Paper: ***Mediation Confidentiality and Attorney Malpractice: The Potential for the Use of* In Camera *Proceedings to Balance Confidentiality with Accountability***

Amelia Green's paper is entitled *Mediation Confidentiality and Attorney Malpractice: The Potential for the Use of* In Camera *Proceedings to Balance Confidentiality with Accountability*. Her paper "does not seek to express a view as to whether the creation of a new exception to California's mediation confidentiality statutes is a favorable policy."[3] Rather, it "explores whether, in the event that the Commission finds that creating an attorney malpractice exception is appropriate, the use of *in camera* proceedings would be a viable procedural mechanism that might assist in balancing the policy interests of maintaining confidentiality in mediation and holding attorneys accountable for malpractice."[4]

The paper begins by providing background information on mediation confidentiality.[5] It then discusses how courts have used *in camera* proceedings in connection with exceptions to the attorney-client privilege[6] and the informant privilege.[7] Ms. Green next explores "how *in camera* proceedings might be used in the context of mediation confidentiality and attorney malpractice."[8] Finally, she examines the potential advantages and disadvantages of such an approach.[9]

Ms. Green's paper will be valuable as the Commission begins to evaluate different options, especially if the Commission is interested in exploring an *in camera* approach. The staff will refer back to it as this study proceeds.

3. Exhibit p. 1.
4. *Id*.
5. See Exhibit pp. 2-9.
6. See Exhibit pp. 9-14.
7. See Exhibit pp. 14-16.
8. See Exhibit pp. 16-18.
9. See Exhibit pp. 18-20.

Jordan Rice's Paper: ***Balancing Mediation Confidentiality with the Need to Admit Evidence of Attorney Malpractice: Evidentiary Corroboration Requirements as a Potential Solution***

In addressing how to balance the competing interests at stake in this study, some sources have questioned whether the allegations of a single unhappy mediation participant should be sufficient to warrant disclosure of mediation communications that were made with an expectation of confidentiality. That led the staff to wonder (without any preconceived notions, one way or the other) whether some kind of corroboration requirement could be useful in this context.

Jordan Rice's paper (entitled *Balancing Mediation Confidentiality with the Need to Admit Evidence of Attorney Malpractice: Evidentiary Corroboration Requirements as a Potential Solution*) addresses that point. After providing background information on mediation confidentiality,[10] it examines some existing corroboration requirements in other contexts.[11] Mr. Rice then explains "how a corroboration requirement could be used to strike a balance between mediation confidentiality and attorney accountability,"[12] and assesses "the potential advantages and drawbacks of adding a corroboration requirement in this context …."[13] He recommends against the use of such a requirement.[14]

Mr. Rice plans to attend the upcoming meeting with Prof. Martinez. He will give a short presentation of his paper. We look forward to hearing what he has to say and being able to ask him a few questions.

OTHER COMMENTS

The other new communications address a variety of points, as discussed below. Input from knowledgeable sources is critical in the Commission's study process, and the Commission is grateful for the time and effort the commentators put into reviewing Commission materials and sharing their thoughts.

Comments of Magistrate Judge Brazil

In his comments, Magistrate Judge Wayne Brazil (ret.) compliments the Commission on Memorandum 2015-5 (empirical data).[15] He also describes two recent articles with empirical data:

10. See Exhibit pp. 24-28.
11. See Exhibit pp. 28-39.
12. See Exhibit pp. 39-43.
13. See *id.*
14. See Exhibit pp. 43-44.
15. See Exhibit p. 45.

(1) A publication he wrote entitled *A Broad Brush Interpretive History of ADR in the United States and An Exploration of the Sources, Character, and Implications of Formalism in a Court-Sponsored ADR* Program. Judge Brazil points out that this publication "presents and explores the implications of some of the data from the Northern District's ADR program, data that further support the view that litigants and lawyers value ADR, especially mediation."[16]

(2) An article by Daniel and Lisa Klerman of USC Gould School of Law, entitled *Inside the Caucus: An Empirical Analysis of Mediation from Within*. Judge Brazil says this article "has no bearing, directly, on confidentiality issues, but does lend some support to the broader notion that mediation can be valuable — and is valued by litigants and lawyers in many cases."[17] He also notes that the "universe about which this article speaks is very limited: one mediator, only employment cases, only in southern California, etc."[18]

The staff has not yet carefully reviewed the sources identified by Judge Brazil. We will do so before the upcoming meeting and share what we learn with the Commission.

Comments of Stephen Schrey

Stephen Schrey is "a full-time ADR neutral in a mediation and arbitration practice in San Francisco and Northern California."[19] Before commencing his current practice in 2013, he was "a partner in large law firms, trying and litigating a variety of civil cases for most of [his] 38+ years in practice in California and other jurisdictions."[20] He developed his ADR practice while he was still litigating, and he "represented clients in dozens of mediations as an advocate."[21]

He says that he and his clients "regarded mediation confidentiality as a fundamental aspect of the mediation process."[22] In explaining this point, he emphasizes the importance of finality in resolving a dispute:

> Without the long-standing protection of confidentiality for mediations in California, it is safe to say that many if not all of my clients would have balked even at the prospect of entering into a mediation where any of the discussions — depending on the

16. *Id.*
17. *Id.*
18. *Id.*
19. Exhibit p. 46.
20. *Id.*
21. *Id.*
22. *Id.*

> alleged issue — could later be sought in discovery. The concept of a mediated resolution of disputes is largely founded on the finality of any settlement reached in the confidential mediation process. *If a seemingly final resolution of a dispute would still leave a risk that in a potential malpractice claim between the opposing lawyer and his client, my clients and/or myself could be forced to testify as to communications between them, the incentive to use mediation would drastically diminish.* This is particularly so for institutional parties such as banks and insurance companies.[23]

Mr. Schrey further notes that "little, if any, data exists" on "alleged legal malpractice occurring during the mediation process …."[24] He suspects that there are "several reasons for this paucity of data other than a plague of lawyer malfeasance being unfairly shielded by the Evidence Code."[25] Specifically, he says:

(1) Lawyering skills "vary in mediation advocacy just as in trial," but such differences in ability alone "do not support a cognizable legal malpractice claim."[26]

(2) "[A] party's unhappiness with the outcome of a mediation after it has concluded is far from unusual — hence the cliché that if both sides are a little unhappy with a settlement it must have been a good one — but not one infected with lawyer negligence."[27]

(3) "[I]t is more likely than not that the few reported cases of alleged lawyer malpractice were in reality cases of serious buyer's remorse as much as lawyer incompetence."[28]

Mr. Schrey thus strenuously disagrees with the notion of revising California's existing mediation confidentiality statutes.[29] He explains:

> When this lack of any substantial evidence of lawyer malpractice in mediation is weighed against the probability that current users of mediation in California will cease doing so, it seems clear this would be a consequence our judicial system cannot afford. Even if parties continue to mediate, moreover, if they cannot be candid in a process where candor is critical …, the damage to our entire mediation scheme would be enormous, reducing mediation to an exchange of pre-existing talking points that would typically preclude any resolution. I believe that on balance it is clear that no change is warranted. The notion of changing our

23. *Id.* (emphasis added).
24. *Id.*
25. *Id.*
26. *Id.*
27. Exhibit pp. 46-47.
28. Exhibit p. 47.
29. Exhibit p. 46.

mediation protections is a misguided solution in search of a problem that simply doesn't exist.[30]

Comments of Eric van Ginkel

Like Judge Brazil, Prof. Eric van Ginkel (Straus Institute for Dispute Resolution, Pepperdine University School of Law) compliments the Commission on Memorandum 2015-5 (empirical data).[31] He adds one remark to the discussion in that memorandum: "[E]ach Commissioner should decide for him/herself whether the quantitative analysis of dissatisfaction should be a guideline to what laws to adopt regarding mediation in general and mediation confidentiality in particular."[32]

Prof. van Ginkel also says there appears to be a recurring problem that mediators conduct marathon sessions that continue "deep into the night when there comes a time that the parties are numb and sign just about anything that is put in front of them."[33] He views this as "[a]n example of a situation many people just accept and which is hard to challenge in California given the extent to which our confidentiality laws bar disclosure about this course of action."[34]

Comments of Nancy Yeend

In her comments, mediator Nancy Yeend raises a series of questions:

- *ADA violation.* "What if the mediation was scheduled to be held at the offices of one of the attorneys, or perhaps the mediator's office, and there was an ADA violation?"[35] "Would the present confidentiality statute preclude the individual, who was not accommodated, from being able to fully participate and would the ADA violations be hidden by confidentiality?"[36]
- *Slip and fall during mediation.* "What if a person slipped and fell during the mediation? How would the private insurance claim investigation be handled. Would the information regarding the accident be precluded from disclosure by the present mediation confidentiality statute?"
- *State Bar monitoring of attorney conduct.* According to Memorandum 2005-5, "the Bar has no data on attorney malpractice during mediations, but then how could it with the present law? How can

30. Exhibit p. 47.
31. Exhibit p. 48.
32. *Id.*
33. *Id.*
34. *Id.*
35. Exhibit p. 49.
36. *Id.*

> the California State Bar effectively protect the public, when attorney malpractice is protected?"[37]

Ms. Yeend concludes by saying that it "is one thing to protect the conversations and negotiations that occur between the parties as they attempt to find a settlement, but it appears to be a very different situation to protect other instances that might occur that have no relationship to finding a resolution."[38] She queries whether California's "exceedingly broad confidentiality statutes" could "violate other laws or deny other rights to the participants."[39]

Comments of Spencer Young

Spencer Young says that his law office "supports confidentiality in mediations."[40] He explains:

> It is in the public interest for people to be able to speak frankly during settlement discussions and know that the[ir] words will not become evidence. This is particularly important given the strain on the courts today and the need to resolve cases efficiently and fairly.[41]

He urges the Commission to "uphold the current protections for the benefit of the citizens of California."[42]

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

37. *Id.*
38. *Id.*
39. *Id.*
40. Exhibit p. 50.
41. *Id.*
42. *Id.*

Mediation Confidentiality and Attorney Malpractice: The Potential for the Use of *In Camera* Proceedings to Balance Confidentiality with Accountability

By Amelia Green

Introduction

Pursuant to the request of the California legislature, the California Law Revision Commission is conducting a study exploring the relationship between California's current mediation confidentiality law and attorney malpractice and other misconduct. Under California's current law, mediation communications are generally protected from disclosure in subsequent civil proceedings. Moreover, the current law does not allow for an exception to this rule when a party is seeking to bring a suit against her mediation attorney for committing malpractice in connection with the attorney's representation of her in the mediation. The California legislature has tasked the Law Revision Commission with "mak[ing] any recommendations that it deems appropriate for the revision of California law to balance the competing public interests between confidentiality and accountability."[1] This paper does not seek to express a view as to whether the creation of a new exception to California's mediation confidentiality statutes is a favorable policy. Instead, this paper explores whether, in the event that the Commission finds that creating an attorney malpractice exception is appropriate, the use of *in camera* proceedings would be a viable procedural mechanism that might assist in balancing the policy interests of maintaining confidentiality in mediation and holding attorneys accountable for malpractice.

With the goal of examining how *in camera* proceedings might balance confidentiality with accountability, this paper first explains California's current statutes governing mediation confidentiality. Next the paper explores how California courts have interpreted the mediation confidentiality statutes, including in the context of attorney malpractice suits. What follows is a

[1] 2012 Cal. Stat. res. ch. 108 (ACR 98 (Wagner & Gorrell)).

discussion of how the courts have invoked *in camera* proceedings as a procedural mechanism in determining exceptions to attorney-client privilege and the informant privilege. Finally, this paper concludes with a discussion of how *in camera* proceedings might be used in the context of mediation confidentiality and attorney malpractice and the advantages and disadvantages of such an approach.

I. California's Current Law with Respect to Mediation Confidentiality

California's Evidence Code describes the current statutory scheme governing the confidentiality of mediation communications and reflects a strong policy in favor of protecting the confidentiality of mediation communications. In particular, Evidence Code section 1119 operates as the primary statute protecting mediation communications from disclosure and does so in two key ways. First, the statute restricts the use of mediation communications in subsequent court proceedings. The statute provides that any oral communication or writing "made for the purpose of, in the course of, or pursuant to, a mediation" *shall not* be "admissible or subject to discovery . . . in any arbitration, administrative adjudication, civil action or other noncriminal proceeding."[2] Second, the statute includes a general confidentiality provision, providing that "all communications, negotiations or settlement discussions by and between participants in the course of a mediation . . . shall remain confidential."[3] By protecting communications of "all participants," the statute protects not only the communications of the disputants in a mediation, but also the communications of their attorneys, the mediator and any other persons that participate in the mediation. The disclosure restrictions of section 1119 are given further power by their broad application. Pursuant to the Evidence Code, mediation is defined broadly to

[2] Cal. Evid. Code § 1119 (a)-(b).
[3] Evid. Code § 1119(c).

include any "process in which a neutral person or persons facilitate communications between disputants to assist them in reaching a mutually acceptable agreement."[4]

Other sections of the California Evidence Code stand to bolster the confidentiality provisions established by section 1119. For example, subject to limited exceptions, the Evidence Code precludes mediators from testifying in subsequent civil proceedings with regard to statements or conduct that occurred during a mediation.[5] Moreover, in the absence of the express agreement of the parties, a mediator is prohibited from reporting to a judge or other decision-maker about what occurred during a mediation "other than a report that is mandated by court rule or other law and states only whether an agreement has been reached."[6]

While the Evidence Code does proscribe some statutory exceptions to the strict rules of mediation confidentiality, the exceptions are narrowly defined. For example, mediation confidentiality may be waived with regard to a particular communication but only if *all persons* participating in the mediation, including the disputants' attorneys and the mediator, expressly agree to do so.[7] Moreover, written settlement agreements reached during mediation are subject to disclosure only if the agreement itself provides that it is not confidential or otherwise includes express terms indicating that it is enforceable or binding.[8]

California's strict statutory scheme protecting mediation communications from disclosure reflects a legislative decision to promote the use of mediation as an alternative to litigation. The legislature has found that "it is in the public interest for mediation to be encouraged," and heralded mediation as a "simplified and economical procedure for obtaining prompt and

[4] Evid. Code § 1115(a).
[5] *See* Evid. Code § 703.5.
[6] Evid. Code § 1121.
[7] Evid. Code § 1122.
[8] Evid. Code § 1123.

equitable resolutions of . . . disputes."[9] To this end, California's statutory scheme reflects the legislative judgment that confidentiality is essential to the promotion of mediation as an effective dispute resolution mechanism. As the California Supreme Court has noted, the purpose of confidentiality in mediation is to "promote a candid and informal exchange regarding events in the past. This frank exchange is achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings."[10] Thus, behind California's statutory scheme protecting the confidentiality of mediation communications lies the legislature's policy judgment that candor leads to successful mediation and successful mediation encourages the future use of mediation to resolve disputes.

II. Judicial Interpretation of California's Mediation Confidentiality Statutes

California courts have construed the legislature's terms of mediation confidentiality strictly, finding the confidentiality provisions of the statutory scheme to be "clear and absolute,"[11] "unqualifiedly bar[ring] disclosure of communications made during mediation absent an express statutory exception."[12] The California Supreme Court has held that judicially crafted exceptions to the statute are only appropriate when the application of mediation confidentiality would violate due process or lead to absurd results that clearly undermine the statutory purpose.[13]

The court has held true to its stated reluctance to create exceptions to the mediation confidentiality statutes even when the equities of a case or countervailing policy considerations have suggested that an exception might be appropriate. For example, in *Foxgate Homeowners Association, Inc. v. Bramalea California, Inc.*, the California Supreme Court disapproved a lower

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[9] Cal. Civ. Code § 1775(c).
[10] Foxgate Homeowners' Ass'n, Inc. v. Bramalea Cal., Inc., 26 Cal. 4th 1, 14 (2001).
[11] Cassel v. Superior Court, 51 Cal. 4th 113, 118 (2011).
[12] *Foxgate*, 26 Cal. 4th at 15.
[13] *Cassel*, 51 Cal 4th at 119.

court's creation of an implied exception to the mediation confidentiality statutes in order to consider the report of a mediator that a defendant may have engaged in bad faith tactics in mediation.[14] The California Supreme Court found that setting aside a lower court's order imposing sanctions was appropriate because the lower court's consideration of the mediator's report was impermissible under the relevant mediation confidentiality statute.[15]

Three years later, in *Rojas v. Superior Court*,[16] the California Supreme Court again found that equitable considerations would not warrant a judicial exception to the statutory scheme for mediation confidentiality. The court held that the mediation statutes were not subject to a "good cause" exception and precluded tenants that were suing the owner of an apartment complex from compelling the disclosure of evidence from a prior mediation that might have proven that toxic molds at the complex had created health hazards.[17]

Although the California Supreme Court has refused to create exceptions to the mediation confidentiality statutes pursuant to equitable considerations, some California courts have allowed for exceptions as warranted by due process. For example, in *Rinaker v. Superior Court*,[18] the California Court of Appeal for the Third District considered a case in which a juvenile accused of vandalism sought to compel a mediator to testify in his juvenile delinquency proceeding to statements made by the victim in a related mediation. Although the *Rinaker* court recognized that juvenile delinquency proceedings are civil actions and section 1119 of the Evidence Code precludes the introduction of mediation communications in civil proceedings, the court still found that it may be appropriate to compel the mediator to testify about the victim's mediation statements in order to protect the juvenile's constitutional due process right to cross-examine and

[14] *Foxgate,* 26 Cal. 4th at 9.
[15] *Id.* at 4, 18.
[16] 33 Cal. 4th 407 (2004).
[17] *Id.* at 412-13.
[18] Rinaker v. Superior Court, 62 Cal. App. 4th 155 (1998).

impeach an adverse witness.[19] Notably, however, the Court of Appeals ordered that on remand the lower court conduct an *in camera* hearing to determine whether having the mediator testify in open court would be warranted.[20] The court explained that an *in camera* hearing would "permit the juvenile court to maintain the confidentiality of the mediation process while the court considers factors bearing upon whether the minors' right to effective impeachment compels breach of the confidential mediation process."[21]

III. Mediation Confidentiality and Attorney Malpractice

The focus of the current study before the California Law Revision Commission is the relationship between mediation confidentiality and attorney malpractice and other misconduct. As discussed, California's mediation confidentiality statutes do include some narrow exceptions, however there is no express exception to the statutes allowing for the admissibility of mediation communications in malpractice suits. In *Cassel v. Superior Court*,[22] the California Supreme Court took up the question of the applicability of the mediation confidentiality statutes to legal malpractice actions. The court found that mediation-related discussions between an attorney and a client are confidential and are neither discoverable nor admissible to prove a legal malpractice claim.[23]

In *Cassel*, a plaintiff brought a malpractice lawsuit against his former attorney, claiming that the attorney had coerced him to settle in a mediation for a lower amount than he had agreed.[24] In the malpractice suit, the plaintiff sought to introduce into evidence private discussions with his former attorney concerning mediation settlement strategies.[25] Nevertheless,

[19] *Id.* at 160-61.
[20] *Id.* at 169-71.
[21] *Id.* at 171.
[22] 54 Cal. 4th 113 (2011).
[23] *Id.* at 119.
[24] *Id.* at 118.
[25] *Id.* at 118.

the *Cassel* court found that the plain language of the mediation confidentiality statutes precluded the introduction of such communications into evidence.

First, the *Cassel* court found that even though the attorney-client communications in question had occurred outside of the presence of the mediator and the other disputants, they were still inadmissible. The court reasoned that because the mediation confidentiality statutes protect "anything said or any admission made" for the "purpose of" or "pursuant to" mediation, discussions in preparation for or during a mediation are protected, regardless of whether they are private communications between a disputant and his attorney.[26] Furthermore, the court explained that because the mediation statutes expressly protect mediation communications by and between all "participants," the disclosure protections not only extend to statements made by the disputants in connection to the mediation, but also to their attorneys.[27] The court emphasized that the legislature had designed mediation confidentiality statutes broadly for the "maximum protection for the privacy of communications in the mediation context" and that the resolution of any competing policy concerns should be left to the legislature.[28]

In light of the *Cassel* decision, many have called for revisions to the mediation confidentiality statutes to provide for an exception in the case of attorney malpractice suits. Given that the statutes preclude the introduction of evidence of any communications or writings made for the purpose of or pursuant to a mediation, it is very difficult for any disputant who brings a mediation-related malpractice suit against her attorney to prove that the attorney did not adequately represent her. As one court recognized, the strict application of the mediation confidentiality statutes means that "when . . . clients participate in mediation, they are, in effect, relinquishing all claims for new and independent torts arising from mediation, including legal

[26] *Id.* at 128. *See also* Evid. Code § 1119.
[27] *Cassel*, 51 Cal. 4th at 132-34.
[28] *Id.* at 124, 132-33

malpractice actions against their own counsel."[29] Some argue that if the mediation confidentiality statutes were revised to incorporate an exception for attorney malpractice suits, a mediation disputant's right to bring an action against her attorney for malpractice during the mediation would be more adequately protected.

To be sure, the current mediation confidentiality statutes do not preclude the introduction of *all* potential evidence that might be useful in bringing a legal malpractice claim against a mediation attorney. For example, the statutes provide that if documentary evidence would be admissible outside the context of a mediation, the documentary evidence does not become inadmissible simply because it was used in a mediation.[30] Thus, a plaintiff in a legal malpractice case may introduce into evidence any writings that were used in a mediation, as long as they were not prepared for the purpose of the mediation. Furthermore, while mediation-related attorney-client *communications* are protected under the statutes, there is no prohibition from a client introducing evidence of her attorney's *conduct* during the mediation.[31]

Nevertheless, California's current mediation confidentiality statutory scheme poses a major challenge to parties who seek to bring a legal malpractice suit against their mediation attorneys. Some have questioned the wisdom of the current statutory scheme, calling for a clear exception to mediation statutes so that attorneys who commit malpractice during mediation proceedings may be held accountable. Indeed, other jurisdictions have deemed such exceptions to mediation confidentiality law appropriate. For example, the Uniform Mediation Act, which has been adopted in close to a dozen states, includes an express exception to its protection of mediation communications when such communications are "sought or offered to prove or

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[29] Wimsatt v. Superior Court, 152 Cal. App. 4th 137 (2007).
[30] Evid. Code § 1120(a).
[31] While California Evidence Code section 1121 prohibits mediators from reporting to a court regarding the conduct of parties during a mediation, the statutes impose no such similar limitations on disputants.

disprove a claim or complaint of professional misconduct or malpractice filed against . . . a representative of a party based on conduct occurring during a mediation."[32] Nevertheless, other commentators have cautioned against creating exceptions to California's mediation confidentiality scheme, highlighting the risk that reduced confidentiality protections would have a chilling effect on the use of mediation to resolve disputes.

The California Law Revision Commission has been tasked by the California legislature with "mak[ing] any recommendations that it deems appropriate for the revision of California law to balance the competing public interests between confidentiality and accountability" with respect to the intersection between mediation confidentiality and attorney malpractice or misconduct.[33] This paper does not seek to express a view as to whether California's mediation confidentiality statutes should be revised to provide for an exception in the case of attorney malpractice cases or what the scope of such an exception should be. Instead, this paper seeks to analyze the potential usefulness of *in camera* proceedings as a procedural technique to balance the competing confidentiality and disclosure interests in the event that the Law Revision Commission and the California legislature find that creating an exception to mediation confidentiality in attorney malpractice suits is appropriate.

IV. The *In Camera* Proceeding

An *in camera* proceeding is conducted in the "the judge's private chambers" or in "the courtroom with all spectators excluded."[34] Courts have commonly used *in camera* proceedings as a procedural technique to balance a need for disclosure of relevant information in a court proceeding against a need to limit access to that information. For example, if one party in litigation is seeking to compel the disclosure of certain information but the opposing party asserts

[32] Uniform Mediation Act § 6(a)(6).
[33] 2012 Cal. Stat. res. ch. 108 (ACR 98 (Wagner & Gorrell)).
[34] BLACK'S LAW DICTIONARY (9th ed. 2009).

that the information is confidential or privileged, an *in camera* proceeding can help resolve the dispute without compromising potentially confidential information. In practice, the judge could hold an *in camera* hearing or inspection of the contested information to protect the information from public disclosure while she determines whether the information is in fact appropriate for disclosure in open court or otherwise inadmissible evidence.

This paper seeks to explore the potential for use of *in camera* proceedings in the event that an attorney malpractice exception is created to California's mediation confidentiality statutes. This section first analyzes how courts have availed *in camera* proceedings when determining whether to apply exceptions to attorney-client privilege and the informant privilege. The section then discusses how the law that has developed around the use of *in camera* proceedings in these specific contexts might inform whether the use of such proceedings would be appropriate in the context of creating an attorney malpractice exception to California's mediation confidentiality statutes.

A. *In Camera* Proceedings and the Crime-Fraud Exception

In federal courts, judges have routinely used *in camera* proceedings to determine whether the crime-fraud exception to attorney-client privilege is applicable in a case. The attorney-client privilege, developed from and governed by common law, is the evidentiary privilege protecting a client's communications to her attorney from disclosure to third parties. Similar to California's mediation confidentiality statutes, the rationale for the attorney-client privilege is best understood as being motivated by a desire for candor. The attorney-client privilege seeks to encourage "full and frank communication between attorneys and clients" in order to "promote broad public interests in the observance of law and the administration of justice."[35] In other words, for attorneys to be able to render effective and comprehensive legal advice, clients must

[35] Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

feel at liberty to disclose information to them about past crimes and indiscretions without fear that such information will be shared with third parties.

Despite the importance of the attorney-client privilege in fostering candor between the attorney and client, "the privilege takes flight if the relation is abused."[36] According to the crime-fraud exception, when a client consults with her attorney for the purpose of advice in furtherance of a crime or fraud, those attorney-client communications are not protected.[37] In federal court proceedings, the proponent of the crime-fraud exception seeking disclosure of an attorney-client communication generally must make a prima facie showing that (1) a crime or fraud was committed and (2) the communication between the attorney and client in question was "in furtherance" of a crime or fraud.[38] Since the holder of the privilege is the client, it is the client's intent that matters and it is immaterial whether the attorney was aware that the client was seeking advice in furtherance of a crime or fraud.[39]

In federal courts, an *in camera* hearing or examination is often the procedure by which the crime-fraud exception is administered. If warranted, a judge may choose to conduct an *in camera* review of the alleged privileged material before ruling on whether crime-fraud exception applies.[40]

The Supreme Court directly addressed this procedure in *United States v. Zolin*.[41] In the *Zolin* case, a party asserted the attorney-client privilege when refusing to comply with a production request from the IRS.[42] In response, the IRS asserted the crime-fraud exception and requested that the trial judge review the contested communications *in camera* to determine

[36] Clark v. United States, 289 U.S. 1, 15 (1933)
[37] United States v. Zolin, 491 U.S. 554, 563 (1989); *Clark*, 289 U.S. at 15.
[38] FEDERAL TESTIMONIAL PRIVILEGES § 2:36 (2d ed. 2007)
[39] EDWARD J. IMWINKELRIED, THE NEW WIGMORE: A TREATISE ON EVIDENCE, EVIDENTIARY PRIVILEGES § 6.13.2.d(1), at 1176-77 (2d ed. 2010).
[40] *Id.* § 6.13.2.d(2), at 1184.
[41] 491 U.S. 554 (1989).
[42] *Id.* at 557-59.

whether their contents warranted the protection of the privilege.[43] The Supreme Court took up the case to determine whether an *in camera* review was appropriate.

The *Zolin* Court began its analysis by first finding that an *in camera* review may be appropriate in certain circumstances to determine the applicability of the crime-fraud exception and that such a review of the contested documents would not in itself defeat their privileged nature.[44] However, the Court found that before a court engages in such an *in camera* review, the proponents of the crime-fraud exception must first meet a threshold showing. Reasoning that an *in camera* inspection is less of an intrusion on confidentiality than is public disclosure, the Court found that this threshold showing "need not be stringent."[45] The court held that a judge need only "require a showing of a factual basis adequate to support a good faith belief by a reasonable person that an *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies."[46] Nevertheless, the Court also held that the ultimate decision of whether to engage in an *in camera* review still remains in the discretion of the trial judge, even if the initial threshold burden is met.[47] The Court indicated that the judge should decide whether to hold an *in camera* review by considering the "facts and circumstances of the particular case, including among other things, the volume of the materials [to be reviewed], the relative importance to the case of the alleged privileged information, and the likelihood that evidence produced through *in camera* review . . . will establish that the crime-fraud exception does apply."[48] Finally, the *Zolin* Court found that when determining whether to conduct an *in*

[43] *Id.*
[44] *Id.* at 569-570.
[45] *Id. at* 572.
[46] *Id.*
[47] *Id.*
[48] *Id.*

camera review, the trial court could consider any relevant evidence not yet found to be privileged, including the contested communication itself.[49]

Aside from its holding in the *Zolin* decision, the Supreme Court has not otherwise addressed how federal trial courts should conduct *in camera* proceedings with respect to the crime-fraud exception. However, as the *Zolin* decision suggests, the nature of the *in camera* proceeding will depend on the particularities of the case. For example, as contemplated in *Zolin*, the judge might review the contested communications during the *in camera* proceedings. However, in other contexts the judge might first subject a party to questioning regarding the alleged crime or fraud or ask the attorney to testify *in camera* to the content of oral discussions with the client. Furthermore, different federal jurisdictions have adopted varied procedural techniques for the *in camera* hearing. For example, some jurisdictions permit judges to follow a "sampling" procedure when the quantity of contested documents is so large that a review of each and every document to determine whether the crime-fraud exception should apply would not be feasible.[50] Other jurisdictions have expressed a preference that a separate trial judge or special master conduct an *in camera* proceeding in order to avoid potential bias on the part of the trial judge assigned to the case in the event that the contested communications are found to be privileged.[51]

Nevertheless, it is of note that when the judge or special master is making her final decision after the *in camera* proceeding as to whether the crime-fraud exception should apply, she need not engage in a balancing test. For example, it would be inappropriate for the judge to consider whether there are alternative means for the party seeking disclosure to acquire

[49] *Id.* at 574.
[50] IMWINKELRIED, supra note 39, § 6.13.2.d(2).
[51] In re Marriage of Decker, 606 N.E. 2d 1094, 1107 (Ill. 1992)

equivalent information as to what is contained in the contested documents or communications.[52] Once the party seeking disclosure pursuant to the crime-fraud exception meets its burden of proving a prima facie case that the communications in question were in furtherance of a crime or fraud, the crime-fraud exception kicks in and attorney-client privilege no longer protects those communications.[53]

B. *In Camera* Proceedings and the Informant Privilege

The informant privilege is another area of the law in which courts have used *in camera* proceedings to balance a policy interest in keeping certain information confidential against countervailing concerns that weigh in favor of disclosure of that information. The informant privilege is a common law doctrine which gives the government the right to refuse to disclose the identity of a confidential informant in court proceedings.[54] Under the doctrine, the only privileged information is the *identity* of the informant, however the content of a communication may also be deemed privileged when the communication itself would tend to reveal the identity of the informant.[55] The "purpose of the [informant] privilege is the furtherance and protection of the public interest in effective law enforcement."[56] The idea is that by protecting the identity of informants, the privilege encourages people to come forward and report violations of the law to law enforcement officials.

Nevertheless, the informant privilege is conditional and subject to exceptions. As the Supreme Court explained in *Roviaro v. United States*, its seminal case discussing the operation of the privilege, the trial judge may require the government to disclose an informant's identity to a defendant "where the disclosure of an informer's identity, or of the contents of his

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[52] IMWINKELRIED, supra note 39, § 6.13.2.d(2), at 1194.
[53] *Id.*
[54] 353 U.S. 53, 59 (1957).
[55] *Id.* at 60.
[56] *Id at* 59.

communication, is relevant and helpful to the defense of an accused, or is essential to the fair determination of [the case]."[57] For example, in *Roviaro,* the Court found that it was appropriate to compel the disclosure of the identity of a police informant because the informant's identity and testimony could be "highly material" to the accused's defense. The Court explained that since the informant was a participant in the defendant's alleged crime and was one of the only witnesses to the defendant's alleged illegal conduct, the informant might have important information that would be favorable to the defense's case.[58]

In *Roviaro*, the Court declined to establish a "fixed rule" of when an exception to the informant privilege should be granted.[59] Instead, the Court noted that determining whether the disclosure of an informant's identity is appropriate would require a trial judge to invoke a balancing test, weighing the "public interest in protecting the flow of information against an individual's right to prepare his defense."[60] Such a balancing test would require consideration of the particularized circumstances of a case including "the crime charged, the possible defenses, the possible significance of the informer's testimony and other relevant factors."[61] Since the *Roviaro* decision, lower courts have found it appropriate to require the disclosure of an informant's identity when the defense is able to demonstrate that the informant was a participant in the alleged offense or otherwise a material witness to facts determining the defendant's guilt or innocence.[62]

Courts have typically invoked *in camera* proceedings to assist in making determinations as to whether an exception to the informant privilege is necessary to preserve a defendant's right

[57] *Id.*
[58] *Id.* at 63-65.
[59] *Id.* at 62.
[60] *Id.*
[61] *Id.*
[62] IMWINKELRIED, supra note 39, § 7.3.2, at 1274-76.

to a fair trial. Once a defendant makes an initial prima facie showing that an exception to the informant's privilege is warranted, a judge may examine the informant *in camera*, before making a decision whether to require the disclosure of the informant's identity.[63] Such a proceeding gives the judge an opportunity to first hear the informant's testimony before determining whether the testimony would be helpful to the defense. While the defendant is excluded from such a hearing so as to preserve the confidentiality of the informant's identity, some jurisdictions do allow the presence of a defense attorney under a protective order.[64]

Similar to the crime-fraud exception, the nature of the *in camera* proceeding to determine whether the informant privilege will apply may vary depending on the jurisdiction. For example, in Alaska, the *in camera* proceeding is strictly limited to "evidence concerning the information possessed by an informant [which might] tend to reveal the informant's identity."[65] In other jurisdictions, courts have used the *in camera* hearing to consider any facts relevant to *Roviaro* balancing or to redact documents that might contain references to the identity of an informer.[66]

C. Application to Mediation Confidentiality and Attorney Malpractice

In the event that the California legislature would like to allow for some flexibility to permit the introduction of mediation communications into evidence in attorney malpractice suits, but does not wish to create a categorical exception to the mediation confidentiality statutes, *in camera* proceedings can be a useful procedural technique to employ. The implementation of a procedural regime where a judge first reviews the relevant mediation communications *in camera* would preserve mediation confidentiality while allowing the judge to determine whether disclosure of the mediation communication in the malpractice suit is actually warranted.

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[63] *Id.* at 1282-83.
[64] *Id.* at 1284.
[65] 26A FED. PRAC. & PROC. EVID. § 5717 (1st ed. 2013)

[66] *Id.*

The study of how *in camera* proceedings have been used in the contexts of the crime-fraud exception and exceptions to the informant privilege serves to highlight some of the relevant considerations that the Law Revision Commission might take into account when considering whether to suggest the of use *in camera* proceedings in the context of mediation confidentiality. As the *Zolin* case highlights, one important consideration is whether an *in camera* proceeding would be conducted on a mandatory basis anytime that a party seeks to disclose a mediation communication or if the party seeking the disclosure must first meet threshold showing before the contested communications are reviewed *in camera*. In the context of the crime-fraud exception, the *Zolin* Court found that the requirement of a minimal threshold showing was appropriate, lest the party seeking disclosure could engage in "groundless fishing expeditions" in efforts to pierce the attorney-client privilege.[67] Such a concern does not seem as relevant in the context of a party seeking to disclose mediation communications in attorney malpractice suits. Presumably, both the plaintiff and her former attorney are each already aware of the content of the mediation communications in question; it is simply a matter of a judge determining whether it is appropriate for such communications to be introduced into evidence. Nevertheless, requiring some sort of threshold showing in advance of an *in camera* proceeding may still be appropriate. It could be too heavy a burden on trial courts to conduct an *in camera* proceeding every time that a party seeks to disclose mediation communications as part of a malpractice lawsuit.

When assessing the potential for the use of *in camera* proceedings, it is also important to consider the ultimate standard the judge conducting the proceeding will use to determine whether disclosure of mediation communications is appropriate. For example, the Law Revision Commission might consider establishing a presumption that mediation communications will not be disclosed in a malpractice suit, but allow for a plaintiff to overcome the presumption if she

[67] *Zolin*, 491 U.S. at 571.

can demonstrate that the need to introduce the communication into evidence to prove the malpractice claim substantially outweighs the need to protect the communication's confidentiality. The Law Revision Commission might also consider the *Roviaro* approach and require the judge conducting the *in camera* hearing to engage in a balancing test tailored to the circumstances of a particular case. In employing such a test, the judge might consider factors such as how reliable and probative the mediation communication might be in proving a malpractice claim, whether the mediation communications in question were private communications between the client and the attorney, or if they also included the mediator and the opposing disputant, and whether the plaintiff would have alternative evidence to prove the malpractice claim in the event that the mediation communications were not allowed into evidence.

One of the key advantages of *in camera* proceedings is that the form of the proceeding is adaptable to the needs of a particular case. For example, in the context of an attorney malpractice suit, an *in camera* proceeding may take the form of a hearing in which the judge might hear testimony from a disputant regarding the alleged malpractice that occurred during the mediation. In other malpractice cases, an *in camera* proceeding might simply entail a judge reviewing a settlement term sheet or email communication related to the mediation that a plaintiff alleges are important evidence to proving a malpractice claim. Furthermore, *in camera* proceedings can serve as a screening mechanism, ensuring that mediation communications are only introduced into evidence after a judge has deemed that the disclosure is actually necessary. On a case by case basis, the judge can balance the need for disclosure of the information against the important policy rationales for protecting the confidentiality of mediation communications.

However, there are also disadvantages to the use of *in camera* proceedings. By allowing for case-specific determinations on whether exceptions to mediation confidentiality are warranted, *in camera* proceedings would introduce an element of unpredictability. Instead of a categorical rule which mediation participants can rely on in advance of the mediation, mediation participants will have to become comfortable with the fact that whether mediation communications will ultimately be protected from disclosure in a subsequent malpractice suit will be left to the discretion of the judge. Additionally, *in camera* proceedings may introduce an unnecessary level of complexity to court proceedings where a plaintiff is making a malpractice claim against her mediation attorney. This would be a particular risk when mediation communications make up the entirety of the evidence supporting a plaintiff's malpractice claim. In such situations, it is possible that the *in camera* proceeding would devolve into a mini-trial within the malpractice suit itself. Furthermore, conducting *in camera* proceedings might be time consuming, especially considering limited judicial resources.

Nevertheless, in spite of the potential disadvantages, the use of *in camera* proceedings are a viable option in the event that the Law Revision Commission does not wish to create a categorical exception to mediation confidentiality statutes for malpractice suits, but does wish to permit the introduction of mediation communications into evidence in limited circumstances.

Conclusion

In sum, the use of *in camera* proceedings is a procedural mechanism that courts have used in variety of contexts to balance a policy interest in protecting the confidentiality of communications against other interests that might warrant the disclosure of such information. While the procedural mechanism does present some disadvantages, there is rich potential for the

use of *in camera* proceedings to balance the competing public policy interests of confidentiality and accountability at the intersection of mediation confidentiality and attorney malpractice suits.

Balancing Mediation Confidentiality with the Need to Admit Evidence of Attorney Malpractice: Evidentiary Corroboration Requirements as a Potential Solution

Jordan Rice
March 10, 2015

Introduction

The California Legislature has instructed the California Law Revision Commission (CLRC) to analyze "the relationship . . . between mediation confidentiality and attorney malpractice" and "make any recommendations that [the CLRC] deems appropriate for the revision of California law to balance the competing public interests between confidentiality and accountability."[1] As part of that project, I have been asked to prepare the following memorandum exploring whether instituting a corroboration requirement for evidence from a mediation tending to prove or disprove a claim of attorney malpractice would help strike the proper balance between holding attorneys accountable for their conduct while maintaining a strong degree of confidentiality in mediations.

California law presently embodies a policy preference to encourage meaningful participation in mediations. Therefore communications from mediations are, with few exceptions, confidential and inadmissible in civil litigation. By cloaking mediations under a veil of confidentiality—the theory goes—parties need not fear jeopardizing their claims or defenses if the mediation proves unsuccessful. Thus, parties will engage in mediation more frequently and with greater candor, avoiding costly litigation.

There is, however, a negative byproduct of this strict rule of mediation confidentiality. If a malpractice claim or defense turns on evidence from a mediation conference, it is inadmissible. For example, if an attorney were negligent in rejecting a particular offer of settlement made during a mediation conference, the attorney's client would have no means of remedying the damage resulting from the attorney's malpractice because the client would be unable to introduce any evidence proving the malpractice claim. Consequently, attorneys are effectively granted immunity to commit malpractice during mediations.

[1] 2012 Cal. Stat. res. ch. 108 (ACR 98 (Wagner & Gorell)).

Pursuant to the Legislature's instructions, the CLRC is exploring potential solutions to cure this unfortunate consequence of mediation confidentiality while still attempting to preserve the policy goal of encouraging participation and candor in mediation. In this memorandum, I analyze the merits of adding a corroboration requirement to a rule of evidence allowing for the admissibility of evidence from a mediation that tends to prove or disprove a claim of legal malpractice.

Corroboration requirements exist as an extra safeguard protecting against some sort of undesirable outcome like a wrongful conviction or the admission of evidence that would mislead or prejudice a jury. Such a requirement can take numerous forms—for example, mandating that two witnesses attest to something instead of one, or requiring that the circumstances surrounding the proffered evidence persuasively assure the proffered evidence's trustworthiness.[2] In the mediation context, a corroboration requirement would function as an added protection ensuring that if the veil of confidentiality surrounding a mediation is to be lifted, it is only done only for trustworthy, useful evidence.

In Part I, I briefly summarize California's current treatment of mediation confidentiality in its evidentiary code and accompanying case law. In Part II, I examine prominent examples of corroboration requirements, analyze their underlying purpose, and explore how courts institute them in practice. Finally, in Part III, I explain how a corroboration requirement could be used to strike a balance between mediation confidentiality and attorney accountability. Additionally in this Part, I evaluate the potential advantages and drawbacks of adding a corroboration

[2] For two prominent examples of corroboration, see U.S. CONST. art. III, § 2 (requiring "the testimony of two witnesses to the same overt act" for a conviction of treason to be valid, unless the accused confesses in open court); FED. R. EVID. 804(b)(3)(B) (requiring that evidence of an out-of-court statement against the declarant's interests is only admissible if supported by corroborating evidence if the out-of-court statement "is offered in a criminal case as one that tends to expose the declarant to criminal liability").

requirement in this context, concluding that such a requirement should be omitted from any amendment to the California Evidence Code.

I. The Law Today in California Regarding Mediation Confidentiality and Claims of Attorney Malpractice[3]

Since its adoption in 1965, the California Evidence Code embodied a strong policy preference to encourage out-of-court settlements. For instance, section 1152(a) renders offers of settlement inadmissible if they are used to prove the offering party's liability.[4] As explained by the CLRC, this provision was intended to promote "the complete candor between the parties that is most conducive to settlement" in order to further the public policy "favor[ing] of the settlement of disputes without litigation."[5] Despite this protection, the original California Evidence Code did not keep settlement discussions confidential under all circumstances. For instance, a party could introduce evidence of a settlement offer to show its opponent's bias or motive.[6]

These same policy interests form the basis of the California Evidence Code's rules regarding mediation. As mediation gained popularity in the 1980s, the CLRC recommended legislation to keep the information disclosed during mediation conferences confidential to encourage the efficient resolution of disputes outside of court.[7] Based on the CLRC's recommendations, the California Legislature adopted a provision that protected certain mediation communications.[8] After a number of rounds of expanding and altering the evidentiary code's

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[3] The CLRC's staff reports provide a more detailed analysis of the current law regarding mediation confidentiality. I provide only a brief summary of the most relevant developments in the law.
[4] CAL. EVID. CODE § 1152(a) (West 2014); 1965 Cal. Stat. ch. 299.
[5] EVID. § 1152(a).
[6] CAL. LAW REVISION COMM'N, MEMORANDUM 2013-39: RELATIONSHIP BETWEEN MEDIATION CONFIDENTIALITY AND ATTORNEY MALPRACTICE AND OTHER MISCONDUCT 3 (2013), *available at* http://www.clrc.ca.gov/pub/2013/MM13-39.pdf (collecting cases).
[7] *Id.*
[8] *Id.* at 4.

protection of mediation communications, the California Legislature adopted the current statutory scheme in 1997.[9]

The most important provision for the purposes of the CLRC's current study is section 1119. The statute provides that no oral or written communication "made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery."[10] Additionally, the statute mandates that "[a]ll communications, negotiations, or settlement discussions by and between participants in the course of a mediation . . . shall remain confidential."[11] The protection afforded by section 1119 is robust, protecting not only the statements of the parties involved, but also any communication made by any mediation participant in the course of, or for the purpose of, a mediation conference. Indeed, the California Evidence Code only provides a narrow exception that lifts the veil of confidentiality if "[*a*]*ll persons* who conduct or otherwise participate in the mediation expressly agree . . . to disclosure," or if the communication "was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree" to its disclosure.[12] Similarly, a mediator's report may not be considered in court unless "mandated by court rule or other law."[13] Even then, the only admissible element of a mediator's report is "whether an agreement was reached" unless all the mediation participants agree to further disclosure.[14]

[9] *Id.* 5-10. The California Evidence Code now contains a separate chapter covering mediation. CAL. EVID. CODE ch. 2 (West 2014).
[10] *Id.* § 1119(a)-(b).
[11] *Id.* § 1119(c).
[12] *Id.* § 1122(a) (emphasis added).
[13] *Id.* § 1121.
[14] *Id.*

Matching the statutory text's strict imposition of mediation confidentiality, judicial interpretations of the California mediation provisions have been unyielding.[15] The California Supreme Court has consistently explained that the Legislature implemented a strong policy in favor of encouraging alternative means of resolving disputes outside of court.[16] Mediation is of course one of those alternative means of dispute resolution, and the California Supreme Court has reasoned that confidentiality is of paramount importance to promote participation in mediation.[17]

This robust protection afforded to mediation confidentiality in the California Evidence Code as well as in judicial decisions led to the CLRC's current project of studying the relationship between mediation confidentiality and legal malpractice. In *Cassel v. Superior Court*, the California Supreme Court applied its strict interpretation of the mediation confidentiality provisions to bar from admission into evidence the "mediation-related discussions" between a client and his attorney.[18] The petitioner in *Cassel* had brought a malpractice claim against an attorney who represented him in a mediation to settle a business lawsuit.[19] His claim turned on evidence of "private attorney-client discussions" that

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[15] *See, e.g.*, Rojas v. Superior Court, 33 Cal. 4th 407, 423 (2005) (holding that there is no judicially created "good cause" exception to the mediation confidentiality provisions); Foxgate Homeowners Ass'n v. Bramalea Cal., Inc., 26 Cal. 4th 1, 4 (2001) (concluding "there are no exceptions to the confidentiality of mediation communications or to the statutory limits on the content of mediator's reports" outside of express statutory exceptions, and thus, the imposition of sanctions based on a mediator's report must be overturned). *But see* Rinaker v. Superior Court, 62 Cal. App. 4th 155, 160-61 (1998) (holding that California's mediation confidentiality rules "must yield when necessary to ensure [a minor's] constitutional right to effective cross-examination and impeachment of an adverse witness in a juvenile delinquency proceeding").

[16] *See, e.g.*, *Rojas*, 33 Cal. 4th at 415 (citing *Foxgate*, 26 Cal. 4th at 14).

[17] *Id.* ("'[Mediation] confidentiality is essential to effective mediation' because it 'promote[s] a candid and informal exchange regarding events in the past. . . . This frank exchange is achieved only if participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes.'" (alterations in original) (internal quotation marks omitted) (quoting *Foxgate*, 26 Cal. 4th at 14)).

[18] 51 Cal. 4th 113, 123 (2011).

[19] *Id.* at 118.

took place immediately before the mediation.[20] While the trial court barred this evidence under section 1119, the court of appeals reversed, "reason[ing] that the mediation confidentiality statutes are intended to prevent the damaging use *against a mediation disputant* of tactics employed, positions taken, or confidences exchanged in the mediation, not to protect attorneys from the malpractice claims of their own clients."[21]

The California Supreme Court reversed the court of appeals, explaining that the statutory language simply did not support such a reading.[22] The Court also noted that it "express[ed] no view" on whether the California Evidence Code "ideally balances the competing concerns or represents the soundest public policy," and invited the Legislature to reconsider the statute if it saw fit.[23] Justice Chin concurred in the decision "reluctantly."[24] He expressed concern that the Court's decision "will effectively shield an attorney's actions during mediation" from a malpractice lawsuit, "even if [the attorney's] actions are incompetent or even deceptive."[25] Moreover, he questioned the wisdom of the statute, explaining that "[t]here may be better ways to balance the competing interests [of promoting participation in mediation and ensuring attorney accountability] than simply providing that an attorney's statements during mediation may never be disclosed."[26]

The *Cassel* decision led to the CLRC's current project: determining whether and how the California Evidence Code should be amended to allow for the admission of evidence from a

[20] *Id.*
[21] *Id.*
[22] *Id.* at 136.
[23] *Id.*
[24] *Id.* at 138 (Chin, J., concurring).
[25] *Id.*
[26] *Id.* at 139.

mediation of attorney malpractice.[27] The remainder of this paper is devoted to analyzing the rationale, potential benefits, and possible disadvantages of amending the California Evidence Code to permit the admission of evidence from a mediation of attorney malpractice only if corroborated by other evidence.

II. Corroboration Requirements: Their Rationale and Implementation

Corroboration requirements exist in a variety of forms, and "have perhaps the longest lineage of all evidentiary rules."[28] Indeed, such rules can be traced back to three different places in the Torah.[29] Sometimes they predicate the admissibility of evidence on the existence of other evidence that somehow heightens the original evidence's trustworthiness.[30] In other circumstances, corroboration of testimony or a particular fact is a required element of a conviction.[31] The United States Constitution, for instance, explicitly mandates that a person accused of treason cannot be convicted without "the testimony of two witnesses to the same overt act, or on confession in open court."[32]

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[27] Other states currently allow for the admission of such evidence. *E.g.*, UNIFORM MEDIATION ACT § 6(a)(6). The Uniform Mediation Act has been adopted in eleven states and the District of Columbia. *Legislative Enactment Status: Mediation Act*, UNIFORM L. COMMISSION (Nov. 7, 2014), http://www.uniformlaws.org/LegislativeMap.aspx?title=Mediation%20Act.

[28] Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification*, 41 U.C. DAVIS L. REV. 1487, 1528 (2008).

[29] *Id.*

[30] *See, e.g.*, FED. R. EVID. 804(b)(3)(B) (requiring that in some circumstances hearsay evidence of a statement against interest may be admissible if "supported by corroborating circumstances that clearly indicate [the evidence's] trustworthiness"); *id.* 807(a) (providing a general exception to the rule against hearsay evidence if the preferred hearsay statement has, among other attributes, "equivalent guarantees of trustworthiness").

[31] *See, e.g.*, CAL. PENAL CODE § 1111 (West 2014) ("A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."); *see also* Christine J. Saverda, Note, *Accomplices in Federal Court: A Case for Increased Evidentiary Standards*, 100 YALE L.J. 785, 790-91 & n.40 (1990) (discussing how a number of states predicate the sufficiency of a conviction based of accomplice testimony on the existence of corroborating evidence).

[32] U.S. CONST. art. III, § 2.

The purpose of these requirements is generally to ensure that the truth is ascertained at trial. Some classes of evidence are deemed to be inherently suspect, so the corroboration requirement is meant to ensure the evidence's trustworthiness. For instance, the testimony of an accomplice is thought to "com[e] from a tainted source" because the accomplice "usually testif[ies] in the hope of favor or the expectation of immunity."[33] In other circumstances, corroboration serves to break a tie between conflicting testimony. This was the rationale of the traditional rule that the testimony of a single individual was insufficient to sustain a conviction for perjury.[34] As one court put it, the two-witness rule was necessary to break "metaphysical equipoise, of 'oath against oath.'"[35]

In this Part, I will discuss the parameters, rationale, and judicial interpretation of different types of corroboration requirements, both current and historical. First, I will examine the most prominent corroboration requirement in the Federal Rules of Evidence, Rule 804(b)(3). Second, I will analyze corroboration requirements in the context of being a barrier to conviction. Then, in Part III, I will analyze how a corroboration requirement would be used to balance the policies in favor of mediation confidentiality and attorney accountability, and assess the advantages and disadvantages of implementing such a requirement.

A. Corroboration in Federal Rule of Evidence 804(b)(3)

Rule 804(b)(3) provides the clearest example of an evidentiary corroboration requirement. Indeed, Rule 804(b)(3) explicitly requires the support of "corroborating

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[33] People v. Coffey, 161 Cal. 433, 438 (1911).

[34] George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 607-08 (1997) (explaining the historical rationale for the perjury two-witness rule and stating that even in modern times, "a single oath remains insufficient to support a perjury prosecution"). California used to have such a rule, CAL PENAL CODE § 1103a (West 1988), but it was repealed in 1989, 1989 Cal. Stat. ch. 897, §§ 28-33.

[35] *United States v. Silverman*, 106 F.2d 750, 751-52 (3d Cir. 1939) (quoting John H. Wigmore, *Required Numbers of Witnesses; A Brief History of the Numerical System in England*, 15 HARV. L. REV. 83, 106-108 (1901)). Grounded on the same rationale, another rule existed requiring the corroboration of victim's testimony in cases of rape. Fisher, *supra* note 34, at 699.

circumstances" as a condition to admissibility. The underlying purpose of the rule as well as its judicial interpretation provide insight into the anatomy and usefulness of evidentiary corroboration requirements. While other corroboration requirements exist in the Federal Rules of Evidence—for instance Rule 807, the residual exception to the rule against hearsay, requires a statement to be accompanied by "circumstantial guarantees of trustworthiness"—I will, for the sake of brevity, not focus exclusively on 804(b)(3).

An understanding of the rule against hearsay is necessary to understand any exception to the rule like 804(b)(3). The Federal Rules of Evidence generally exclude hearsay evidence—that is, a statement made by a person (known as the "declarant") outside of a trial that is offered "to prove the truth of the matter asserted in the statement [made by the declarant]."[36] An example comparing hearsay to nonhearsay testimony proves helpful in understanding the rule. If Bill testifies in court that he saw John pull the trigger, it is not hearsay.[37] If, however, Bill testifies in court that his friend Alice told him that she saw John pull the trigger, it is hearsay testimony.[38] The key difference between the two turns on hearsay evidence's inherent unreliability. For nonhearsay evidence, the in-court nature of the testimony provides certain safeguards ensuring its reliability—namely, the declarant must swear an oath, the jurors can judge the demeanor of the declarant, and the opposing party can cross-examine the witness.[39] For hearsay testimony, while the person who testifies in court is subject to courtroom safeguards, the declarant is not. In our example, Alice cannot be cross-examined, she does not swear an oath, and the jury cannot examine her demeanor.[40] Consequently, hearsay evidence is generally excluded.

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[36] FED. R. EVID. 801-02.
[37] GEORGE FISHER, EVIDENCE 377-78 (3d ed. 2013). George Fisher, Evidence Text book.
[38] *Id.* at 378-79.
[39] *Id.* at 378.
[40] *Id.* at 378-79.

Rule 804(b)(3) provides an exception to the rule against hearsay. It applies only when the declarant is "unavailable,"[41] and covers "[s]tatement[s] against interest." A statement against interest is defined as one that "a reasonable person in the declarant's position would have made only if the person believed it to be true because . . . it was so contrary to the declarant's . . . interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability."[42] If, however, the statement is offered in a criminal case and "tends to expose the declarant to criminal liability," the party offering the statement must show that the statement "is supported by corroborating circumstances clearly indicating its trustworthiness."[43]

The original draft of Rule 804(b)(3) did not include a corroboration requirement and would not have permitted the government to offer statements against interest incriminating criminal defendants.[44] Congress objected to this draft, demanding that (1) the rule should allow incriminating evidence offered by the government, and (2) the rule should require defendants to corroborate exculpatory evidence due to the evidence's untrustworthy nature (the theory behind this is that testimony on the behalf of a criminal defendant that another person confessed to the crime for which the defendant stands accused is particularly suspect).[45] The Advisory Committee then relented to Congress's demands.[46] In 2010, the rule was amended further to require

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[41] FED. R. EVID. 804(a). The statute specifically defines unavailability. A declarant is "unavailable" when, among other circumstances, a privilege applies exempting the declarant from testifying, the declarant refuses to testify in spite of a court order to the contrary, the declarant testifies to lacking memory, the declarant has died or is too ill to testify. *Id.*

[42] *Id.* 804(b)(3)(A).

[43] *Id.* 804(b)(3)(B). This additional showing of evidence is subject to Federal Rule of Evidence 104(a), which requires a judge to rule based on a preponderance of the evidence standard (meaning more likely than not) whether the corroborating circumstances exist. *Bourjaily v. United States*, 483 U.S. 171, 176 (1987). In making this determination, the judge is not bound by the rules of evidence, other than those regarding privilege. FED. R. EVID. 104(a).

[44] CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 8.108 (4th ed. 2014).

[45] *Id.*

[46] *Id.*

corroboration in criminal cases for statements against penal interest offered *against* the defendant.[47]

The reasoning behind this amendment was to "assure[] both the prosecution and the accused that the Rule will not be abused and that only *reliable* hearsay statements will be admitted under the exception."[48] In the case of evidence offered by a defendant, hearsay statements against penal interest "are suspect because of a long-standing concern . . . that a criminal defendant might get a pal to confess to the crime the defendant was accused of . . . ."[49] In the case of evidence offered against the accused, the concern is that the declarant was "trying to deflect blame or curry favor with authorities by incriminating others."[50] In either case, the fundamental underlying purpose of Rule 804(b)(3)'s corroboration requirement is to provide an extra precaution to ensure that inherently suspect evidence is indeed trustworthy before it is presented to a jury.

The question remains of what exactly constitutes "corroborating circumstances that clearly indicate [a statement's] trustworthiness."[51] Before answering that question, it is useful to determine what courts *should not* consider when applying this provision of Rule 804(b)(3): the credibility of the witness who testifies to the declarant's statement against interest.[52] To do

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[47] FED. R. EVID. 804 (Notes of Advisory Committee on Rules—2010 Amendment). Since *Crawford v. Washington*, 541 U.S. 36 (2004), the Confrontation Clause of the Constitution bars statements offered against the accused under 804(b)(3) if they are "testimonial" in nature.

[48] *Id.* (Notes of Advisory Committee on Rules—2010 Amendment). Various courts had already applied the corroboration requirement in cases of evidence offered against a criminal defendant. Their reasoning is rooted in pre-*Crawford* Confrontation Clause concerns that focused on the reliability of evidence. *See, e.g.*, United States v Alvarez, 584 F.2d 694, 700-01 (5th Cir. 1978).

[49] United States v. Silverstein, 732 F.2d 1338, 1347 (7th Cir. 1984) (citing United States v. Tovar, 687 F.2d 1210, 1213 (8th Cir. 1982) (per curiam); Lyon v. State, 22 Ga. 399, 401 (1857)).

[50] United States v. Shukri, 207 F.3d 412, 417 (7th Cir. 2000) (citing United States v. Garcia, 986 F.2d 1135, 1140 (7th Cir. 1993)).

[51] FED. R. EVID. 804(b)(3)(B).

[52] *Id.* (Notes of Advisory Committee on Rules—2010 Amendment).

otherwise "would usurp the jury's role of determining the credibility of testifying witnesses.[53] In spite of the Advisory Committee's reasoning, however, some courts have taken into account the reliability of the in-court witness.[54]

With that issue aside, I turn to the uncertain task at hand of defining what qualifies as a corroborating circumstance for the purposes of 804(b)(3).[55] While the statute and the Advisory Committee Notes shed little light on what the statute means, the Advisory Committee in a 2002 report identified several factors from the relevant case law that it found useful to determining whether corroborating circumstances clearly indicating trustworthiness exist:

> (1) the timing and circumstances under which the statement was made;
> (2) the declarant's motive in making the statement and whether there was a reason for the declarant to lie;
> (3) whether the declarant repeated the statement and did so consistently, even under different circumstances;
> (4) the party or parties to whom the statement was made;
> (5) the relationship between the declarant and the opponent of the evidence; and
> (6) the nature and strength of independent evidence relevant to the conduct in question.[56]

Due to the necessarily fact-specific nature of the inquiry, it is impossible to say with certainty that any one factor could be dispositive under 804(b)(3)(B). That being said, some examples may prove helpful. In *United States v. Smallwood*, for example, the government

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[53] *Id.* (Notes of Advisory Committee on Rules—2010 Amendment). *See also, e.g.*, United States v. Casamento, 887 F.2d 1141, 1170 (2d Cir. 1989) (explaining that consideration of the creditability of the in-court witness should not be considered under 804(b)(3) because witness credibility is a matter for the jury to consider).

[54] *See, e.g.*, United States v. Alvarez, 584 F.2d 694, 701 (5th Cir. 1978).

[55] *See Silverstein*, 732 F.2d at 1346-47 ("[T]he precise meaning of the corroboration requirement in Rule 804(b)(3) is uncertain and is not much clarified by either legislative history or the cases.").

[56] ADVISORY COMM. ON EVIDENCE RULES, REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES 23 (2002), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/EV5-2002.pdf. *See also* United States v Halk, 634 F.3d 482, 490 (8th Cir. 2011) (listing similar factors, but including the spontaneity of the statement and the general character of the declarant); United States v. Guillette, 547 F.2d 743, 754 (2d Cir. 1976) (listing the timing of the declaration, the existence of corroborating evidence, the extent to which the statement was against penal interest, and the availability of the declarant as witness) (citing Chambers v. Mississippi, 410 U.S. 284, 300-01 (1975)).

offered evidence that the victim told his roommate that he was going to see one of the defendants "because they were angry that [the victim] had stolen drugs from [one of the defendants and his associates]." The government also offered evidence that the victim told his roommate that he had stolen cocaine from one of the defendants and planned to rob him and his associates again, but that the defendant had learned of the past robbery as well as the future robbery plans.[57] The court found the "corroborating circumstances" element satisfied because the declarant had "repeated the statement and had no reason to lie."[58]

In *United States v. Halk*, the defendant, who was convicted of being a felon in possession of a firearm, sought to offer testimony under 804(b)(3) of a statement made by a man named George Robbins, Sr. to an investigator for the Federal Defender that the defendant left to go to the bathroom without a gun before the police came and that the gun the police recovered belonged to the declarant's son.[59] The Eighth Circuit affirmed the District Court's ruling that the evidence was inadmissible under 804(b)(3) because (1) it was not a statement against penal interest, and (2) even if it were a statement against penal interest, there were no sufficient corroborating circumstances to clearly indicate its trustworthiness.[60] With regard to the lack of corroboration, the court reasoned that only one person heard the declarant's statements, that he made at least two contradictory statements respecting the ownership of the gun, and the statement at issue was not spontaneous, as it was made a year after the defendant's arrest shortly before his trial.[61]

B. Corroboration as a Predicate to Conviction

[57] 299 F. Supp. 2d 578, 582 (E.D. Va. 2004).
[58] *Id.* at 588.
[59] 634 F.3d 482, 484, 486 (8th Cir. 2011).
[60] *Id.* at 489-90.
[61] *Id.* at 490.

In some cases, corroboration of evidence is a prerequisite to conviction. Perjury, which at common law required the testimony of two witnesses for a conviction to stand, is one such prominent example, although its rationale for corroboration is weak in modern times. Convictions based on accomplice testimony also often require corroboration—a requirement with a much stronger justification. In this Subpart, I will examine the underlying use and implementation of corroboration as a predicate to conviction for perjury or conviction based on the testimony of an accomplice.

The two-witness rule in cases of perjury exists not because "perjury is too serious a crime for conviction to ride on a single witness's word," but rather because it is a relic of the legal system's "old reluctance to pit one oath against another."[62] California did away with its two-witness rule for perjury in 1989,[63] but some jurisdictions still maintain such a rule. Indeed, 18 U.S.C. § 1621 (2013), one of the federal perjury statutes, still is subject to a two-witness rule, though courts have interpreted the rule more broadly and thus accept corroborating evidence other than the testimony of a second witness.[64] The purpose of the two-witness rule comes from the common law. It exists, as mentioned previously, as a sort of tiebreaker to tilt the balance of a case either for or against a defendant when the only evidence presented is the defendant's word against the testimony of a single witness.[65] As Blackstone put it, the rule exists because "one witness is not allowed to convict a man for perjury; because then there is only one oath against

[62] Fisher, *supra* note 34, at 700.
[63] 1989 Cal. Stat. ch. 897, §§ 28-33.
[64] *See, e.g.*, United States v. Stewart, 433 F.3d 273, 315 (2d Cir. 2006); United States v. Chaplin, 25 F.3d 1373, 1377 (7th Cir. 1994). Prosecutions under section 1621 are relatively uncommon. Prosecutors prefer to bring perjury charges under section 1623, which dispenses with the two-witness rule and outlaws a wider range of conduct than section 1621. *See* CHARLES DOYLE, CONG. RESEARCH SERV., PERJURY UNDER FEDERAL LAW: A BRIEF OVERVIEW 7 (2014), *available at* fas.org/sgp/crs/misc/98-808.pdf.
[65] *See supra* note 35.

another."[66] Additionally, Blackstone explained that two-witness rules also serve the purpose of protecting the accused from false testimony.[67]

In modern times, the primary justification for the two-witness rule—to break the equipoise between the defendant's oath versus another's oath—is unconvincing. As the Seventh Circuit noted in *United States v. Chaplin*, "th[e] original justification of the two-witness rule provides a very weak rationale for the application of the rule in the contemporary trial setting."[68] For one, the oath-versus-oath justification makes little sense in that a conviction for a far more serious crime may stand on the "uncorroborated testimony of a single witness."[69] Indeed, in modern times the federal government generally prosecutes perjury under 18 U.S.C. § 1623, which contains no two-witness requirement, rather than § 1621.[70]

Nevertheless, the two-witness rule, though quite possibly an historical anachronism, has yet to meet its end. The Supreme Court in *Weiler v. United States*, looked to the rule's secondary original purpose to justify it in modern times: protection of the accused.[71] The Court explained that although "[t]he rule may originally have stemmed from quite different reasoning . . . implicit in its evolution and continued vitality has been the fear that innocent witnesses might be unduly harassed or convicted in perjury prosecutions if a less stringent rule were adopted."[72]

In the accomplice-testimony context, the justification is similar though more persuasive. Accomplice testimony used to convict a criminal defendant should be viewed with a jaundiced

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[66] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 522 (William C. Sprague ed., Callaghan & Co. 1915).
[67] *Id.* at 523 (explaining the two-witness rule in the treason context protects the accused "from being sacrificed to fictitious conspiracies, which have been the engines of profligate and crafty politicians in all ages.")
[68] 25 F.3d 1373, (7th Cir. 1994).
[69] *See* SARA SUN BEALE ET AL., GRAND JURY LAW & PRACTICE § 11.8 (2013).
[70] Doyle, *supra* note 64, at 7.
[71] 323 U.S. 606 (1945).
[72] *Id.* at 609. *See also Chaplin*, 25 F.3d at 1378 (quoting *Weiler*, 323 U.S. at 609).

eye. Generally, there is "prosecutorial inducement"—namely immunity or a lighter sentence—for accomplices to become informers.[73] Thus, an accomplice's testimony is more likely to be inherently suspect. Additionally, accomplice testimony can be unusually damning to a defendant because the accomplice "claims to have participated in the intricacies of the alleged crime."[74] Consequently a jury is susceptible to dangerously affording great weight to suspect testimony.

Courts thus interpret the corroboration requirements in the perjury and accomplice testimony contexts to effectuate the requirements' purpose to act as a safeguard to ensure evidence's trustworthiness. In perjury cases, courts differ on whether "the corroborative evidence must be inconsistent with the innocence of the defendant" or whether it is sufficient that the "corroborative evidence is substantial and that it tends to confirm the truth of the first witness's testimony in material respects."[75] The difference between these two approaches is, however, "more a matter of semantics than a real distinction."[76] The requirement is satisfied when the corroborative evidence and the principal testimony together can establish that the accused made a false statement under oath beyond a reasonable doubt.[77] The evidence must be independent, meaning that it comes from a source other than the principal testimony.[78] Additionally, the corroborating evidence must be sufficiently trustworthy "to convince the jury that what the principal witness said was correct."[79] In short, as the Second Circuit held in synthesizing the relevant case law, corroborative evidence "must be evidence which bears directly on and substantiates the testimony of the principal witness for the prosecution."[80]

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[73] *See* Saverda, note 31, at 786.
[74] *Id.*
[75] SUN BEALE ET AL., *supra* note 69, at § 11.8.
[76] *See id.* (citing United States v. Diggs, 560 F.2d 266, 270 (7th Cir. 1977)).
[77] *Diggs*, 560 F.2d at 270.
[78] *Id.*
[79] *Id.*
[80] *United States v. Weiner*, 479 F.2d 923, 928 (2d Cir. 1973).

To provide an example of this standard in action, in *United States v. Weiner*, the defendant was convicted of perjury on the basis of his grand jury testimony that the extent of his interactions with a man named Phillip Peltz consisted of meeting him once at a mutual friend's house.[81] He testified to never having spoken to Peltz on the phone or having sent him a letter.[82] The government's chief witness was Peltz himself, who testified that he met the defendant five or six times, received letters from him, and spoke to him numerous times on the phone.[83] The Second Circuit ruled that a portion of offered corroborating evidence met the corroboration standard. First, Peltz had testified at another trial about having written the defendant, which was sufficient independent corroborating evidence.[84] Second, a man named Deutsch testified the defendant had told him a friend of his would call for a recommendation for a stockbroker and that two days later, and Peltz called Deutsch for that very advice, corroborating that Peltz and the defendant had been in contact.[85] Third, the telephone company corroborated Peltz's account.[86]

Weiner also has examples of evidence that does *not* meet the corroboration requirement's standards. First, a note in Peltz's diary to call Weiner was not *independent* of his testimony.[87] Second, Peltz had testified that Weiner owned a plaid suitcase and had papers with purple ink.[88] The government was able to show that indeed Weiner owned a plaid suitcase and had papers with purple ink.[89] Moreover, the government showed Peltz had an airline ticket he might have used to go to where Peltz lived.[90] None of these pieces of evidence, however, were sufficient

[81] *Id.* at 924.
[82] *Id.*
[83] *Id.* at 924-25.
[84] *Id.* at 929.
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*

corroboration because "the mere fact that Weiner had a plaid suitcase, papers with purple ink, and an airline ticket is not probative of the fact that he met with Peltz."[91]

Corroboration testimony in the accomplice context is essentially identical. It is generally considered to be evidence independent of the accomplice's testimony that would tend to connect the defendant with the commission of the crime charged.[92] So, for example, if an accomplice testifies that a defendant was guilty of a crime, and the defendant had initially told police that he did not know any of the people involved in the crime but later admits to having been with those people the night of the crime, the defendant's implied consciousness of guilt demonstrated by his attempt to initially conceal his involvement constitutes corroborating evidence.[93] This is the case because it, independent of any accomplice testimony, tends to implicate the defendant in the crime.

III. A Corroboration Requirement as a Potential Solution to Resolve the Conflict Between Mediation Confidentiality and Attorney Accountability

Having explained what corroboration requirements are, what purpose they serve, and how courts implement them, it is now necessary to confront the principal question before us: whether they should be included in any change to California's mediation confidentiality provisions that would allow evidence of attorney malpractice to be introduced. While the exact language of a statutory amendment effectuating such a change could differ, it would stipulate that evidence of attorney malpractice arising from or related to a mediation is admissible only if corroborated by some other evidence or circumstances that indicate the proffered evidence's trustworthiness. The benefits and drawbacks of such an amendment are best evaluated by (1)

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[91] *Id.*
[92] *See* Saverda, *supra* note 30, at 791. *See also* People v. Avila, 38 Cal. 4th 491, 562-63 (2006) ("Corroborating evidence is sufficient if it tends to implicate the defendant and relates to some act or fact that is an element of the crime.").
[93] *Avila*, 38 Cal. 4th at 563.

analyzing whether the purpose of a corroboration requirement in the mediation context coincides with the purpose of corroboration in other contexts, and (2) considering whether a corroboration requirement in a mediation confidentiality exception would be feasible or useful to implement in practice. I examine these two issues in turn.

To understand if a corroboration requirement would be a useful addition to California law regarding mediation confidentiality and attorney malpractice, it is first necessary to ask what ultimate end would the Legislature intend such a requirement to serve. From section 1152(a)—the provision rendering offers of settlement inadmissible if offered to prove liability—to the mediation confidentiality provisions, the California Evidence Code's various mandates of confidentiality related to alternative dispute resolution reflect a strong policy in favor of encouraging out-of-court settlements.[94] In *Cassel*, the California Supreme Court reaffirmed that the text of the mediation confidentiality provisions still embodied this unyielding policy preference, even if it meant that an attorney would effectively be shielded from malpractice suits for conduct arising out of a mediation.[95] It follows then that if the Legislature instituted an exception to the strict mediation confidentiality provisions in order to prove or disprove a malpractice claim, it would do so because of a policy preference in favor of attorney accountability as weighed against whatever harm would be done to the incentive to participate in mediation. If a corroboration requirement were added, it would temper this favoring of attorney accountability over the goals of mediation confidentiality. In other words, the strict policy of encouraging participation in mediation through imposing a blanket rule of confidentiality would be abrogated only in cases in which the evidence proving or disproving malpractice is particularly reliable, as shown through satisfying the corroboration requirement.

[94] *See supra* notes 4-14 and accompanying text.
[95] *See supra* notes 18-22 and accompanying text.

While this would result in lifting the veil of confidentiality only if there were at least minimally credible evidence, a corroboration requirement in this context would serve an entirely different purpose than existing corroboration requirements in other areas of the law. The benefit of a corroboration requirement in the mediation confidentiality context would be to limit the amount of evidence from a mediation ultimately admitted at a malpractice trial to evidence that has some verified heightened level of reliability. But since reliability of evidence is not of a special concern in the mediation confidentiality context—rather, the concern is promoting participation in mediation—a corroboration requirement's sole benefit would merely be to increase the chance that mediation communications will be kept confidential by decreasing the chance that an exception to the confidentiality rule will apply. This places the rationale for a corroboration requirement in the mediation confidentiality context at odds with such requirements' accepted rationale. In general, corroboration requirements are undergirded by a policy in favor of either protecting criminal defendants (in the case of perjury and accomplice testimony) and/or a policy in favor of ensuring the reliability of inherently unreliable evidence (in the case of accomplice testimony and statements against interest under Federal Rule of Evidence 804(b)(3)). Importantly, corroboration requirements do not exist merely to limit the amount courts admit a particular type of evidence. In the mediation-attorney malpractice context, there is no special concern to protect parties from meritless claims, and similarly there is no particular concern regarding evidence of malpractice from a mediation being inherently unreliable. Accordingly, the accepted policy rationale for existing corroboration requirements does not correspond to the policy rationale for adding a corroboration requirement to an exception to the mediation confidentiality rule. With this in mind, a corroboration requirement is

likely not the ideal vehicle for promoting the twin policies of encouraging mediation and ensuring attorney accountability.

A further drawback of corroboration requirements in the mediation confidentiality context weighs in favor of omitting such a requirement from an amendment to the California Evidence Code: the disadvantages of implementing it in court outweigh the benefits. As noted above, instituting a corroboration requirement in the mediation confidentiality context has two consequences. First, it would impose a procedural barrier to admissibility, thus limiting the frequency that an exception to the confidentiality rule could be invoked. This, at least theoretically, will result in more participation in mediation. Second, a corroboration requirement would ensure that when the veil of confidentiality is lifted, it is done so only for reliable—or corroborated—evidence. Because reliability of evidence is not of a particular concern in this context, however, this consequence is one that is not necessarily needed. The drawbacks of adding a corroboration requirement, on the other hand, are significant. Evidence of a legitimate malpractice claim stemming from a mediation very well may be some aspect of a conversation between an attorney and client that cannot be corroborated by independent evidence. Thus, the corroboration requirement would be overbroad, resulting in the unnecessary exclusion of evidence and ultimately undermining the policy favoring attorney accountability. Additionally, any corroborating evidence very well may also come from the mediation. Consequently, the addition of a corroboration requirement in some cases will only cause *more* formerly confidential communications to be brought to a court's attention, undermining the policy of imposing confidentiality to encourage participation and candor in mediations.

To provide a hypothetical example, imagine an attorney mischaracterizes an offer of settlement to his client during a mediation conference, causing the client to proceed with his

claim, lose at trial, and suffer injury. Under present law, the client could not prove his claim because he could not introduce any evidence that the attorney mischaracterized the settlement offer. Imagining that there was an exception for evidence tending to prove or disprove a malpractice claim accompanied by a corroboration requirement, however, the evidence could be admitted if corroborated. If there is no corroborating evidence—for instance, if the conversation were private—then the client's claim would fail no matter how meritorious his claim is or how credible a jury would find his testimony. If there is corroborating evidence—let's say the mediator overheard the lawyer's faulty advice or the lawyer made a note of his mischaracterized advice on his computer—then the client would be forced to further pull back the curtain of mediation confidentiality in order to admit the evidence of the mischaracterization.

Conclusion

Corroboration requirements exist to either protect criminal defendants or to ensure that inherently unreliable evidence is sufficiently trustworthy to be submitted to a jury. Introducing a corroboration requirement in the attorney malpractice-mediation confidentiality context would further neither of these purposes. Instead, a corroboration requirement would serve primarily as a procedural roadblock, limiting the frequency with which evidence from a mediation is admitted to prove or disprove a malpractice claim. Such a requirement would be overbroad, undermining the policy of ensuring attorney accountability and introducing an unnecessary reliability requirement for evidence that is not inherently suspect. Furthermore, a corroboration requirement would paradoxically result in more formerly confidential mediation communications being brought to the court's attention, as it is likely evidence of malpractice during a mediation can only be corroborated by other evidence stemming from that mediation. Consequently, I

recommend against introducing a corroboration requirement to any amendment to the mediation confidentiality provisions of the California Evidence Code.

EMAIL FROM MAGISTRATE JUDGE WAYNE BRAZIL (RET.) TO BARBARA GAAL (2/26/15)

Dear Barbara: I received your most recent paper for the Commission's consideration of mediation confidentiality. Very nicely done.

I recently was alerted by a friend on the faculty at Boalt to the recent revision of an "empirical" study in which you might be interested (or likely already know about). I am trying to forward my friend's email to you, so you can take a look at this piece directly. The article has no bearing, directly, on confidentiality issues, but does lend some support to the broader notion that mediation can be valuable — and is valued by litigants and lawyers in many cases. The universe about which this article speaks is very limited: one mediator, only employment cases, only in southern California, etc. And most of the findings are not surprising, but a few are not fully intuitive and interesting.

I also wanted to mention (again, probably, so please forgive me) the article I wrote about a year ago for the European symposium that explored formality/informaility in ADR, especially in institutionalized settings (courts, administrative agencies, etc.). Again, there is nothing in this piece that bears directly on the confidentiality questions you are exploring, but in a section of my piece I provide quite a bit of information (from the Northern District's large collection of surveys) about users' views about the character, valued features, and overall value of the ADR processes. This essay was finally published this past fall (with the many other papers delivered at the conference): Joachim Zekoll, Moritz Blaz, and Iwo Amelung, eds., Formalisation and Flexibilisation in Dispute Resolution, published by Brill Nijhoff (Leiden/Boston) in 2014. I have tried to attach the chapter I wrote. If I have succeeded in attaching the document, and if you can open it, you will see that the first half is devoted to history — not even remotely pertinent. The second half presents and explores the implications of some of the data from the Northern District's ADR program, data that further support the view that litigants and lawyers value ADR, especially mediation.

Anyway, I sincerely congratulate you on the sustained high quality of the massive amount of work you have done for the Commission. It could not be better served.

Wayne

Hon. Wayne D. Brazil (Ret.)
Mediator/Arbitrator/Discovery Referee/Special Master
JAMS, *The Resolution Experts*
Two Embarcadero Center, Suite 1500
San Francisco, CA 94111
Email: wbrazil@jamsadr.com
415.982.5267 (Telephone)
415.982.5287 (Facsimile)
Case Manager: Joyce Florence Email: jflorence@jamsadr.com
415.774.2668 (Direct Dial)
415.982.5287 (Facsimile)

EMAIL FROM STEPHEN SCHREY (3/13/15)

Re: Study K-402 — Mediation Confidentiality

Ms. Gaal:

I am a full-time ADR neutral in a mediation and arbitration practice in San Francisco and Northern California. The views I will be expressing in this email are my own while I know they are shared by many if not most in the ADR community, both neutrals and consumers of ADR services.

Before commencing my current practice in 2013, I had been a partner in large law firms, trying and litigating a variety of civil cases for most of my 38+ years in practice in California and other jurisdictions. As I developed my ADR practice while still practicing law, I also represented clients in dozens of mediations as an advocate. I am thus a recent consumer of mediation services. Uniformly, as a consumer along with my clients I regarded mediation confidentiality as a fundamental aspect of the mediation process. Without the long-standing protection of confidentiality for mediations in California, it is safe to say that many if not all of my clients would have balked even at the prospect of entering into a mediation where any of the discussions—depending on the alleged issue—could later be sought in discovery. The concept of a mediated resolution of disputes is largely founded on the finality of any settlement reached in the confidential mediation process. If a seemingly final resolution of a dispute would still leave a risk that in a potential malpractice claim between the opposing lawyer and his client, my clients and/or myself could be forced to testify as to communications between them, the incentive to use mediation would drastically diminish. This is particularly so for institutional parties such as banks and insurance companies.

I therefore respectfully wish to register my strenuous disagreement with the notion that California's existing mediation confidentiality rules should be changed. I urge the Commission to recommend no changes to this existing scheme in the Evidence Code---it has worked well and there is no sound reason to change it. My disagreement is not just aimed at keeping the status quo. I realize that some feel the Supreme Court's decision in Cassel v. Superior Court, 51 Cal. 4th 113 (2011), somehow has uncovered a serious problem in the mediation regime we enjoy in California. I was therefore interested to read the February 20, 2015 Memorandum 2015-5 by the Commission's staff. As you know, the staff thoroughly—if not exhaustively—reported on its search for empirical data on how mediation confidentiality rules function in practice. On the subject of alleged legal malpractice occurring during the mediation process, not surprisingly little, if any, data exists.

I suspect there are several reasons for this paucity of data other than a plague of lawyer malfeasance being unfairly shielded by the Evidence Code. First, lawyer skills vary in mediation advocacy just as in trial. Such differences in skills or talents alone do not support a cognizable legal malpractice claim, however. Second, a party's unhappiness with the outcome of a mediation after it has concluded is far from unusual—hence the

cliché that if both sides are a little unhappy with a settlement it must have been a good one-- but not one infected with lawyer negligence. Third, it is more likely than not that the few reported cases of alleged lawyer malpractice were in reality cases of serious buyer's remorse as much as lawyer incompetence.

When this lack of any substantial evidence of lawyer malpractice in mediation is weighed against the probability that current users of mediation in California will cease doing so, it seems clear this would be a consequence our judicial system cannot afford. Even if parties continue to mediate, moreover, if they cannot be candid in a process where candor is critical for fear of later discovery, the damage to our entire mediation scheme would be enormous, reducing mediation to an exchange of pre-existing talking points that would typically preclude any resolution. I believe that on balance it is clear that no change is warranted. The notion of changing our mediation protections is a misguided solution in search of a problem that simply doesn't exist.

Thank you for your consideration.

Stephen G. Schrey
Mediator and Arbitrator
One Embarcadero Center
18th Floor
San Francisco, California 94111
415.984.8228 (P)
415.412.0417(C)
steve@schreyadr.com **PLEASE NOTE NEW EMAIL AND WEB ADDRESSES***
www.schreyadr.com

Mail: P.O. Box 2671
San Francisco, California 94126

EMAIL FROM ERIC VAN GINKEL, STRAUS INSTITUTE FOR DISPUTE RESOLUTION, PEPPERDINE UNIVERSITY SCHOOL OF LAW (2/24/15)

Dear Barbara,

I just want to compliment you and your staff for this excellent memorandum! It continues the now well-established reputation of the CLRC staff for its thorough work in the area of mediation confidentiality.

I just want to add one short remark: each Commissioner should decide for him/herself whether the quantitative analysis of dissatisfaction should be a guideline to what laws to adopt regarding mediation in general and mediation confidentiality in particular.

One complaint I have heard frequently is that many mediators apparently have the habit of continuing the mediation session deep into the night when there comes a time that the parties are numb and sign just about anything that is put in front of them. I seem to recall that the Coben/Thompson study discusses some of these cases where one of the parties alleges that the settlement agreement was achieved by duress. But I have heard this complaint here in Los Angeles as well. I for one stop each session at a reasonable time and reschedule a follow-up session as soon as practicable. An example of a situation many people just accept and which is hard to challenge in California given the extent to which our confidentiality laws bar disclosure about this course of action.

Best regards,

Eric

Eric van Ginkel
Arbitrator & Mediator
LL.M. in Dispute Resolution

Fellow, College of Commercial Arbitrators (CCA)
Member, International Council for Commercial Arbitration (ICCA)

Adjunct Professor of Law, Straus Institute for Dispute Resolution
Pepperdine University School of Law

Of Counsel, Schonewille & Schonewille

11693 San Vicente Blvd. #908
Los Angeles, CA 90049
Tel: (310) 836-1919
Mobile: (310) 569-9505
Fax: (310) 815-0255
E-Mail: eric@ericvanginkel.com
Website: www.BusinessADR.com
Agency for Dispute Resolution:
www. agencydr.com

Schonewille & Schonewille
Vijzelstraat 68-78
1017 HL Amsterdam
The Netherlands
eric@schonewille-schonewill.com
tel: 020-2067715

SILICON VALLEY MEDIATION GROUP

February 25, 2015

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Relationship Between Mediation Confidentiality and Attorney Malpractice (Study K-402)

Dear Commissioners:

In a recent discussion with other mediators, some interesting scenarios arose, and it would be helpful to know how the CLRC envisions addressing them during your analysis of mediation confidentiality. With the very broad interpretation of confidentiality and with the very limited number of exceptions, it appears that other important issues may be hidden from the light of day.

What if the mediation was scheduled to be held at the offices of one of the attorneys, or perhaps the mediator's office, and there was an ADA violation? It could be a barrier blocking access, no accommodation for someone who had sight or hearing issues, or perhaps even a service animal was not permitted into the mediation. Would the present confidentiality statute preclude the individual, who was not accommodated, from being able to fully participate and would the ADA violations be hidden by confidentiality?

What if a person slipped and fell during the mediation? How would the private insurance claim investigation be handled? Would the information regarding the accident be precluded from disclosure by the present mediation confidentiality statute?

How does concealing attorney malpractice help the State Bar with monitoring its members? I read MM5-05 and noted that the Bar has no data on attorney malpractice during mediations, but then how could it with the present law? How can the California State Bar effectively protect the public, when attorney malpractice is protected?

It is one thing to protect the conversations and negotiations that occur between the parties as they attempt to find a settlement, but it appears to be a very different situation to protect other instances that might occur that have no relationship to finding a resolution. Could California's exceedingly broad confidentiality statutes violate other laws or deny other rights to the participants?

Sincerely,

Nancy

Nancy Neal Yeend

101 First Street, Suite 676 • Los Altos, CA 94022
Telephone (650) 857-9197 • nancy@svmediators.com

EMAIL FROM SPENCER C. YOUNG, LAW OFFICES OF SPENCER C. YOUNG (2/16/15)

Re: Please Protect Mediation Confidentiality

Dear Ms. Gaal,

This law office supports confidentiality in mediations. It is in the public interest for people to be able to speak frankly during settlement discussions and know that they words will not become evidence. This is particularly important given the strain on the courts today and the need to resolve cases efficiently and fairly. Please uphold the current protections for the benefit of the citizens of California.

Thank you for your time and consideration.

Sincerely,

Spencer C. Young
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www.spenceryounglaw.com

Law Offices of Spencer C. Young
1300 Clay Street, Suite 600
Oakland, CA 94612-1427
Phone: 510-645-1585
Fax: 510-645-1586