Study K-402 July 30, 2015

Memorandum 2015-33

Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct: Compilation of Possible Approaches

The Commission[1] has completed the background research that the Legislature requested in this study of the relationship between mediation confidentiality and attorney malpractice and other misconduct.[2] In the course of that work, the Commission was fortunate to receive comments from many knowledgeable sources, sharing perspectives and sometimes also specific ideas for reform. The Commission also learned of other approaches to mediation confidentiality and attorney accountability through its research.

The next step in the Commission's study process is to prepare a tentative recommendation, which will be widely circulated for comment. To allow ample time for individuals and organizations to review a tentative recommendation and provide input, the comment period usually lasts 2-3 months.

Before the staff can begin drafting a tentative recommendation, **the Commission needs to provide some general guidance on what direction to take in it.** To assist the Commission in deciding how to proceed, the staff prepared a table that compiles the suggestions received and other possible approaches. The table is attached for the Commission and interested persons to review (see pages T-1 to T-33).

Also attached are the following documents, which are mentioned in the attached table:

Exhibit p.

- Civil & Small Claims Advisory Committee of the Judicial Council, proposed From ADR-108: *Information & Agreement for Court-*

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

Program Mediation of Civil Case (4/14/05 draft, attached to Proposal SP05-03) 1
- John Warnlof, Walnut Creek (4/13/15) 3

The remainder of this memorandum discusses various aspects of the attached table and the process of selecting an approach for the tentative recommendation.

Thoroughness of the List of Approaches in the Attached Table

In preparing the attached table, the staff reviewed all of the staff memoranda for this study (including the exhibits), as well as notes from each meeting at which the Commission considered this topic. We tried to include all of the ideas that people have suggested or the Commission has learned of through its research.

It is possible, however, that we accidentally omitted one or more of those ideas. If so, we regret the omission(s) and apologize. **Because the Commission's study process is lengthy, there will still be plenty of time for the Commission to consider additional ideas.**

Further, there are many different variables and decision-points involved in formulating an approach to the topic at hand, which the Commission could combine and resolve in lots of different ways. Consequently, **the attached table does not purport to include all of the possible approaches, or even all of the ideas that have occurred to the staff in the course of this study.** There is much room for creativity in developing additional ideas. **Further suggestions are always welcome and appreciated.**

References to Relevant Materials in the Attached Table

To help provide context for considering the various ideas in the attached table, the staff included a column labeled "Source of Idea," which typically refers to materials in which the idea was suggested or otherwise discussed (e.g., a comment from a particular person, a staff memorandum describing an approach used in another jurisdiction, or a case or statute that takes a particular approach). Those lists are ***only*** intended to point out some relevant materials to the Commissioners and other interested persons. **The lists are not intended to be complete, or to identify the *original* source of an idea (as opposed to a later proponent or critic).**

Consequently, **no one should rely upon those lists to attempt to gauge the amount of support for, or opposition to, any particular idea.**

Further, **we hope that no one will take offense at, or otherwise be concerned about, not being included in such a list.** The staff tried hard not to ascribe a particular idea to a person unless that person specifically mentioned that idea. For example, if a person described a bad mediation-related experience with an attorney, but did not specifically suggest creating an attorney malpractice exception to the mediation confidentiality statutes, we did not list that person in the "Source of Idea" column for creating a new exception. The person's input is still valuable and the Commission will consider it carefully. It just is not incorporated into this particular table.

Organization of the Attached Table

In the attached table, the staff grouped the reform ideas into four main categories:

- **Category A:** Create some type of mediation confidentiality exception addressing "attorney malpractice and other misconduct" or aspects thereof.
- **Category B:** Other ideas about modifying the extent of mediation confidentiality.
- **Category C:** Require disclosures about mediation confidentiality or similar reforms.
- **Category D:** Other ideas.

Within each category, we listed each general approach that we found in reviewing the comments submitted to the Commission and other materials. For some of those approaches, we also listed several more specific options for implementation.

To make it easy to refer to a specific idea, we numbered each one. For example, the first approach listed in Category A is:

> **General Approach A-1.** Allow disclosure of mediation communications for purposes of a legal malpractice action.

Under that general approach, we listed the following options and provided some further information about them:

> **Option A-1-a.** Enact a provision similar to Fla. Stat. § 44.405(4)(a)(4).
>
> **Option A-1-b.** Enact a provision similar to Mich. Ct. R. 2.412(D)(11).

Option A-1-c. Create "a narrow exception to confidentiality that would allow the plaintiff in the legal malpractice case, *and the plaintiff only,* to testify about any advice that the lawyer gave during the mediation. None of the other participants should be drawn into that dispute."

Option A-1-d. Keep any malpractice exception narrow and carefully tailored (details not specified).

In considering the lists of approaches and specific options, the Commission and interested persons should **bear in mind that those lists are not comprehensive and there are other possibilities.** New and different ideas could be added, or ideas on the list could be blended and combined or reshaped in different ways. The possibilities are endless.

In particular, if the Commission is inclined to propose a mediation confidentiality exception to promote attorney accountability, it may be worthwhile to **examine the list of variables previously provided at pages 4-7 of the First Supplement to Memorandum 2014-35.** That list is based on distinctions between existing provisions used in other states.

Choosing a Direction

By now, the Commission is well-familiar with the topic at hand and the competing policy interests at stake. To begin formulating a tentative recommendation, it needs to make some basic assessments about how much weight to attach to those interests. For example, is the interest in keeping mediation communications confidential so strong that it is not worth exploring the possibility of creating an attorney misconduct exception? Is the interest in ensuring attorney accountability so strong that a straightforward exception is appropriate, rather than a more-nuanced approach involving *in camera* hearings or sealed testimony?

Those are questions for which it seems preferable to leave the initial choice to the Commission, rather than providing a staff recommendation on how to balance the competing policy interests in a contentious area. Thus, aside from recommendations regarding the scope of this study (see Memorandum 2015-34), the staff is not providing a recommendation at this time.

However, once the Commission grapples with the initial choice of direction, the staff plans to help as usual in preparing an effective proposal — identifying issues that require resolution, explaining probable effects of different ways of proceeding, presenting alternatives, addressing technical difficulties, suggesting

possible compromises, and so forth. If the Commission would find it useful in selecting the initial direction, the staff could also provide further analysis and discussion of some of the ideas in the attached table, or other ideas that the Commission wishes to pursue or to learn more about.

The initial choice of direction is important and the Commission does not necessarily have to make that choice at the upcoming meeting; it can take longer if needed. Preliminary steps might include ruling out some of the possibilities in the attached table, or identifying certain ideas for further attention.

Package of Proposed Reforms

Some of the ideas in the attached table are mutually exclusive. For example, enacting the Uniform Mediation Act in California (General Approach B-2) would be inconsistent with leaving the existing mediation confidentiality statutes intact (General Approach B-9).

Other ideas are not mutually exclusive and **it might be appropriate to combine some of them into a package of proposed reforms.** For example, the Commission could propose some type of new exception from Category A, together with a disclosure obligation from Category C, and another reform such as an empirical study from Category D.

Further, the Commission has occasionally presented a few mutually exclusive alternatives in a tentative recommendation, so as to obtain input on multiple ideas it is seriously contemplating. That is not its usual approach, but it is not out of the question. **The Commission might want to consider that possibility as well.**

Proposals Regarding the Intersection of Mediation Confidentiality and Marital Disclosure Obligations

As discussed at the June meeting, a proposal is pending before the Conference of California Bar Associations ("CCBA") to adopt a resolution regarding the intersection of mediation confidentiality and marital disclosure obligations (proposed CCBA resolution 09-03-2015). Ron Kelly recently alerted the staff to another proposal on the same topic.

Those proposals are not included in the attached table. For discussion of this matter, see Memorandum 2015-36 (public comment).

Impact of a Tentative Recommendation

For persons unfamiliar with the Commission's study process, it may be helpful to close with a few words about what a tentative recommendation is and what function it serves.

A tentative recommendation is a draft proposal that typically consists of three main parts: (1) draft legislation, (2) a Commission Comment to accompany each code section included in the draft legislation, and (3) a narrative explanation of the proposed reforms (also known as the "preliminary part"). Interested persons can find numerous examples on the Commission's website. See http://www.clrc.ca.gov/Menu3_reports/tentrecs.html#2015.

A tentative recommendation reflects the Commission's *preliminary* conclusions on a topic. After approving a tentative recommendation, the Commission posts it on its website, issues a press release, and widely circulates the tentative recommendation for an extended time period, so that interested individuals and organizations can make their views known to the Commission.

After the comment period ends, the staff prepares a memorandum collecting and analyzing the comments for the Commission. The Commission then considers the comments at one or more meetings.

The Commission will often substantially revise a proposal in response to the comments it receives on the tentative recommendation. Sometimes the Commission decides to abandon a proposed approach altogether and issue a revised tentative recommendation that takes a new approach. On occasion, the Commission terminates a study without making a recommendation, or issues a report that does not propose any legislative reforms.

Thus, **the tentative recommendation is not necessarily the recommendation that the Commission will submit to the Legislature.** Comments on a tentative recommendation are crucial, and it is **just as important to submit positive feedback as to submit negative feedback or request revisions.**

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

ACKNOWLEDGMENTS CONCERNING MEDIATION CONFIDENTIALITY

SUPERIOR COURT: _____
MEDIATOR: _____
PLAINTIFF: _____
DEFENDANT: _____
CASE NUMBER: _____
DATE: _____

The participants acknowledge that Evidence Code §§703.5 and 1115 through 1128 apply to the above-captioned mediation, including, but not limited to, the following :

1. That no mediator shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in connection with a prior mediation, except as to a statement or conduct that could give rise to civil or criminal contempt, constitute a crime, be the subject of investigation by the State Bar or Commission on Judicial Performance, or give rise to disqualification procedures under CCP §170.1(a)(1) or (c) (Evidence Code §703.5).

2. That no evidence of anything said or any admission made for the purpose of, or in the course of, or pursuant to, a mediation or mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other non-criminal proceeding in which, pursuant to law, testimony can be compelled to be given (Evidence Code §1119(a)).

3. That no writing, as defined in Evidence Code §250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any action, administrative adjudication, civil action, or other non-criminal proceeding in which, pursuant to law, testimony can be compelled to be given (Evidence Code §1119(b)).

4. That all communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential (Evidence Code §1119(c)).

5. That evidence otherwise admissible or subject to discovery outside of a mediation or mediation consultation shall not be or become inadmissible or protected from disclosure solely by its introduction or use in a mediation or a mediation consultation (Evidence Code §1120(a)).

6. That anything said, any admission made, or any writing that is inadmissible, protected from disclosure, and confidential under this chapter before a mediation ends, shall remain inadmissible, protected from disclosure, and confidential to the same extent after the mediation ends (Evidence Code §1126).

The foregoing acknowledgments are not intended to be exhaustive of all of the matters concerning confidentiality and admissibility addressed in Evidence Code §§1115 through 1128 including disclosure and admissibility of communications or writings and written settlement agreements pursuant to Sections 1122 and 1123.

[Participant's Name]	[Role in Mediation]	[Signature]
[Participant's Name]	[Role in Mediation]	[Signature]
[Participant's Name]	[Role in Mediation]	[Signature]
[Participant's Name]	[Role in Mediation]	[Signature]
[Participant's Name]	[Role in Mediation]	[Signature]

CATEGORY A: CREATE SOME TYPE OF MEDIATION CONFIDENTIALITY EXCEPTION ADDRESSING "ATTORNEY MALPRACTICE AND OTHER MISCONDUCT" OR ASPECTS THEREOF

One way for the Commission to proceed would be to tentatively recommend some type of exception to the mediation confidentiality statutes (Evid. Code §§ 1115-1128; see also Evid. Code § 703.5) to address "attorney malpractice and other misconduct," or aspects thereof.

For some of the input supporting this general concept, see Memorandum 2013-39, Exhibit p. 42 (comments of Nancy Yeend); Second Supplement to Memorandum 2013-47, Exhibit pp. 8-10 (comments of Jerome Sapiro, Jr.); First Supplement to Memorandum 2014-27, Exhibit pp. 1-2 (comments of Howard Fields); *id.* at Exhibit p. 3 (comments of Jack Goetz & Jennifer Kalfsbeek-Goetz); *id.* at Exhibit p. 24 (comments of Ron Makarem); Memorandum 2014-36, Exhibit pp. 3-4 (comments of Jullie Doyle); Memorandum 2014-36, Exhibit pp. 5-8 (comments of Karen Mak); Memorandum 2014-46, Exhibit p. 3 (further comments of Jack Goetz & Jennifer Kalfsbeek-Goetz); testimony of Bill Chan (6/12/14 CLRC meeting); testimony of Larry Doyle on behalf of CCBA (particularly at 4/9/15 CLRC meeting); testimony of Patrick Evans (6/4/15 CLRC meeting) & written materials submitted by him. See also Memorandum 2015-35 (summarizing scholarly views).

There are many possible ways to draft such an exception. The table below lists various general approaches and, in some instances, a number of different options for implementing them. Because there are numerous variables to consider in drafting this type of exception, which could be combined in different ways, this list is just an attempted compilation of the ideas that people have raised or that have otherwise come to the Commission's attention during its study. It does not purport to include every possible approach.

APPROACH	SOURCE OF IDEA
General Approach A-1. Allow disclosure of mediation communications for purposes of a legal malpractice action. "[I]t may be appropriate to provide that communications during mediation may be used in a malpractice action between an attorney and a client to the extent they are relevant to that action, but they may not be used by anyone for any other purpose. Such a provision might sufficiently protect other participants in the mediation and also make attorneys accountable for their actions." *Cassel v. Superior Court,* 51 Cal. 4th 113, 139 (2011) (Chin, J., concurring).	Justice Chin in *Cassel*; see also Third Supplement to Memorandum 2013-47, Exhibit p. 3 (article by Nancy Yeend & Stephen Gizzi) ("A narrow exception to the mediation confidentiality statute for attorney malpractice should be created, which only applies to the admissibility of relevant evidence during a subsequent civil or administrative malpractice proceeding — and in no other forum.").

CATEGORY A: CREATE SOME TYPE OF MEDIATION CONFIDENTIALITY EXCEPTION ADDRESSING "ATTORNEY MALPRACTICE AND OTHER MISCONDUCT" OR ASPECTS THEREOF

APPROACH	SOURCE OF IDEA
Option A-1-a. Enact a provision similar to Fla. Stat. § 44.405(4)(a)(4). This would be one way to implement General Approach A-1. The Florida statute applies to professional malpractice of any type (not just legal malpractice)**.** It is also limited to mediation malpractice: There is no confidentiality or privilege for any mediation communication "[o]ffered to report, prove, or disprove professional malpractice occurring *during the mediation*, solely for the purpose of the malpractice proceeding …." (Emphasis added.)	For input urging CLRC to consider Florida's approach, see First Supplement to Memorandum 2013-39, Exhibit p. 1 (comments of Nancy Yeend).
Option A-1-b. Enact a provision similar to Mich. Ct. R. 2.412(D)(11). This would be another way to implement General Approach A-1. Under this approach, mediation communications may be disclosed when "[t]he mediation communication occurs in a case out of which a claim of malpractice arises and the disclosure is sought or offered to prove or disprove a claim of malpractice against a mediation participant."	
Option A-1-c. Create "a narrow exception to confidentiality that would allow the plaintiff in the legal malpractice case, *and the plaintiff only,* to testify about any advice that the lawyer gave during the mediation. None of the other participants should be drawn into that dispute." Memorandum 2014-46, Exhibit p. 2 (comments of Michael Carbone) (emphasis in original).	Michael Carbone For discussion of this idea, see Memorandum 2014-46, pp. 1-2.
Option A-1-d. Keep any malpractice exception narrow and carefully tailored (details not specified).	For input along these lines, see First Supplement to Memorandum 2013-47, Exhibit p. 7 (comments of Michael Dickstein); *id.* at Exhibit p. 11 (comments of Bruce Johnsen).

CATEGORY A: CREATE SOME TYPE OF MEDIATION CONFIDENTIALITY EXCEPTION ADDRESSING "ATTORNEY MALPRACTICE AND OTHER MISCONDUCT" OR ASPECTS THEREOF

APPROACH	SOURCE OF IDEA
General Approach A-2. Allow disclosure of mediation communications for purposes of an attorney disciplinary proceeding (or at least make explicit whether and how the mediation confidentiality provisions apply to such a proceeding).	For input urging CLRC to consider this approach, see First Supplement to Memorandum 2013-39, Exhibit p. 1 (comments of Nancy Yeend). See also Memorandum 2014-6, Exhibit p. 3 (comments of Ron Kelly, which do not state his personal view).
Option A-2-a. Enact a provision similar to Fla. Stat. § 44.405(4)(a)(6). This would be one way to implement General Approach A-2. The Florida statute applies to a professional disciplinary proceeding of any type (not just an attorney discipline proceeding). It is also limited to mediation misconduct: There is no confidentiality or privilege for any mediation communication "[o]ffered to report, prove, or disprove professional misconduct occurring *during the mediation*, solely for the internal use of the body conducting the investigation of the conduct …." (Emphasis added.)	For input urging CLRC to consider Florida's approach, see First Supplement to Memorandum 2013-39, Exhibit p. 1 (comments of Nancy Yeend).
Option A-2-b. Draft a narrow exception for use of a mediation communication in an attorney discipline proceeding, and put that exception in the Business & Professions Code. This would be another way to implement General Approach A-2.	Rachel Ehrlich raised this general idea at the 6/4/15 CLRC meeting.
Additional A-2 options. Other examples of a mediation confidentiality exception allowing disclosure in an attorney discipline proceeding are: • Mich. Ct. R. 2.412(D)(10) (mediation communications may be disclosed when "[t]he disclosure is included in a report of professional misconduct filed against a mediation participant or is sought or offered to prove or disprove misconduct allegations in the attorney discipline process.") • N.C. Gen. Stat. § 7A-38.1(*l*)(3) (exception for "disciplinary proceedings before the State Bar …."); • S.C. Ct.-Annexed ADR R. 8(b)(3) (exception for disclosures "required by … a professional code of ethics").	

CATEGORY A: CREATE SOME TYPE OF MEDIATION CONFIDENTIALITY EXCEPTION ADDRESSING "ATTORNEY MALPRACTICE AND OTHER MISCONDUCT" OR ASPECTS THEREOF

APPROACH	SOURCE OF IDEA
General Approach A-3. Create an exception addressing both malpractice and professional misconduct.	
Option A-3-a. Enact a provision similar to UMA Section 6(a)(6), which provides: (a) There is no privilege … for a mediation communication that is: … (6) except as otherwise provided in subsection (c), sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation…. … (c) A mediator may not be compelled to provide evidence of a mediation communication referred to in subsection (a)(6) or (b)(2). (d) If a mediation communication is not privileged under subsection (a) or (b), only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under subsection (a) or (b) does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose. For other provisions along the same lines, see Maine R. Evid. 514(c)(5); Md. Code, Courts & Judicial Proceedings § 3-1804(b)(3); N.M. Stat. Ann. § 44-7B-5(A)(8); Va. Code Ann. § 8.01-581.22(vii).	Memorandum 2014-27, Exhibit p. 9 (comments of Nancy Yeend); See, e.g., Memorandum 2014-46, Exhibit p. 9 (comments of Eric van Ginkel). For discussion of UMA Section 6(a)(6), see Memorandum 2014-14, pp. 19-20; Memorandum 2014-24, pp. 8-9, 39.
Option A-3-b. Supplement the UMA malpractice exception (shown above) with "checks and balances such as in camera hearings and the possibility of imposing sanctions …." Brian Shannon, *Dancing With the One That "Brung Us" — Why the Texas ADR Community Has Declined to Embrace the UMA,* 2003 J. Disp. Resol. 197, 208 (2003).	

CATEGORY A: CREATE SOME TYPE OF MEDIATION CONFIDENTIALITY EXCEPTION ADDRESSING "ATTORNEY MALPRACTICE AND OTHER MISCONDUCT" OR ASPECTS THEREOF

APPROACH	SOURCE OF IDEA
General Approach A-4. No mediation confidentiality protection for private attorney-client communications.	This idea was known as "Approach #2" in Memorandum 2015-22.
Option A-4-a. Enact a provision implementing the approach described by the court of appeal in *Cassel v. Superior Court,* 101 Cal. Rptr. 3d 501, 509 (2009): The attorney and client would be treated as a single mediation participant, and the mediation confidentiality statute would be inapplicable to a private discussion between an attorney and client, at least if the discussion "contain[s] no information of anything said or done or any admission by a party made in the course of the mediation." *Cassel v. Superior Court,* 101 Cal. Rptr. 3d 501, 509 (2009) (depublished opinion). For discussion of this concept, see Memorandum 2014-43, pp. 12-13 (article by Abraham Gafni); *Benesch v. Green,* 2009 U.S. Dist. LEXIS 117641 (2009); Memorandum 2015-22, pp. 14-15 (staff analysis).	Depublished court of appeal opinion in *Cassel* (authored by Justice Jackson, with Justice Zelon concurring). See also Second Supplement to Memorandum 2013-47, Exhibit p. 9 (comments of Jerome Sapiro, Jr.); Memorandum 2014-27, Exhibit p. 9 (comments of Nancy Yeend); First Supplement to Memorandum 2014-27, Exhibit p. 24 (comments of Ron Makerem).
Option A-4-b. Enact a provision implementing the approach described by the court of appeal in *Porter v. Wyner,* 107 Cal. Rptr. 3d 653, 662 (2010) (formerly also at 183 Cal. App. 4th 949): "The confidentiality aspect which protects and shrouds the mediation process … was not meant to subsume a secondary and ancillary set of communications by and between a client and his own counsel, *irrespective of whether such communications took place in the presence of the mediator or not.*" (Emphasis added.)	Superseded court of appeal opinion in *Porter* (authored by Presiding Justice Bigelow, with Justice Rubin concurring). For discussion of the *Porter* litigation, see Memorandum 2015-4, pp. 6-12.

CATEGORY A: CREATE SOME TYPE OF MEDIATION CONFIDENTIALITY EXCEPTION ADDRESSING "ATTORNEY MALPRACTICE AND OTHER MISCONDUCT" OR ASPECTS THEREOF

APPROACH	SOURCE OF IDEA
Option A-4-c. Enact legislation like AB 2025 (Wagner), as introduced on Feb. 23, 2012. This bill, sponsored by the Conference of California Bar Associations ("CCBA"), proposed to amend Evidence Code Section 1120(b) to say that the chapter on mediation confidentiality does not limit "[t]he admissibility in an action for legal malpractice, an action for breach of fiduciary duty, or both, or in a State Bar disciplinary action, of *communications directly between the client and his or her attorney during mediation* if professional negligence or misconduct forms the basis of the client's allegations against the attorney." (Emphasis added.)	For support and opposition letters relating to this version of AB 2025, see Memorandum 2013-39, Exhibit pp. 15-18, 22-42; see also http://www.clrc.ca.gov/pub/Misc-Report/AM-K402-9:21:12.pdf; Second Supplement to Memorandum 2013-39, Exhibit p. 1 (comments of Kazuko Artus); First Supplement to Memorandum 2013-47, Exhibit pp. 8-9 (comments of Jeffrey Erdman); Second Supplement to Memorandum 2013-47, Exhibit p. 4 (comments of Paul Dubow & James Madison of CDRC).
Option A-4-d. Create a mediation confidentiality exception for private attorney-client communications, but condition it on the right of either party to object that it would be unfair to consider their private communications without also considering the communications of other parties outside the attorney-client relationship. Consider the merits of that objection *in camera*. Allow the judge to bar the introduction of the private attorney-client communications if justice requires it.	Staff brainstorming (not a staff recommendation).
Option A-4-e. Same as Option A-4-d, but permit introduction of mediation communications involving mediation communications other than the attorney and client, if those participants waive confidentiality as to the relevant communications, solely for purposes of the proceeding at hand.	Staff brainstorming (not a staff recommendation).

CATEGORY A: CREATE SOME TYPE OF MEDIATION CONFIDENTIALITY EXCEPTION ADDRESSING "ATTORNEY MALPRACTICE AND OTHER MISCONDUCT" OR ASPECTS THEREOF

APPROACH	SOURCE OF IDEA
General Approach A-5. Enact legislation that expressly lets Evidence Code Section 958 "trump" mediation confidentiality. For example, Evidence Code Section 1119 could be amended as follows: 1119. Except as otherwise provided in this chapter, or when a lawyer-client dispute arises during or after a mediation and Section 958 applies: (a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given. (b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given. (c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.	This idea was known as "Approach #1" in Memorandum 2015-22. For discussion of Section 958, see *id.* at 2-12. For discussion of this particular idea, see *id.* at 13-14.

CATEGORY A: CREATE SOME TYPE OF MEDIATION CONFIDENTIALITY EXCEPTION ADDRESSING "ATTORNEY MALPRACTICE AND OTHER MISCONDUCT" OR ASPECTS THEREOF

APPROACH	SOURCE OF IDEA
General Approach A-6. There should be an exception for mediator misconduct.	See, e.g., Memorandum 2013-39, Exhibit p. 42 (comments of Nancy Yeend); First Supplement to Memorandum 2013-39, Exhibit p. 1 (comments of Kazuko Artus); First Supplement to Memorandum 2014-27, Exhibit p. 3 (comments of Jack Goetz & Jennifer Kalfsbeek-Goetz); testimony of Patrick Evans (6/4/15 CLRC meeting) & written materials submitted by him.
Option A-6-a. Enact a provision similar to UMA Section 6(a)(5), which provides: (a) There is no privilege … for a mediation communication that is: … (5) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator ….. … (d) If a mediation communication is not privileged under subsection (a) or (b), only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under subsection (a) or (b) does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.	See, e.g., Memorandum 2014-46, Exhibit p. 9 (comments of Eric van Ginkel). For discussion of UMA Section 6(a)(5), see Memorandum 2014-14, p. 20; Memorandum 2014-24, pp. 9-10, 39. See also Memorandum 2015-35, pp. 19-26.

CATEGORY A: CREATE SOME TYPE OF MEDIATION CONFIDENTIALITY EXCEPTION ADDRESSING "ATTORNEY MALPRACTICE AND OTHER MISCONDUCT" OR ASPECTS THEREOF

APPROACH	SOURCE OF IDEA
Additional A-6 options. For other examples of a mediator misconduct exception, see • Ala. Civ. Ct. Mediation R. 11(b)(3)(iii) • Ariz. Rev. Stat. § 12-2238(A)(2) • Colo. Rev. Stat. § 13-22-307(2)(d) • Del. Super. Ct. Civ. R. 16(b)(4)(d)(ii) • Ga. ADR R. VII(B) • Kan. Stat. Ann. §§ 5-512(b)(1), 69-452a(b)(1) • Maine R. Evid. 514(c)(4) • Md. Code, Courts & Judicial Proceedings § 3-1804(b)(2) • Mont. Code Ann. § 26-1-813(5)(c) • N.M. Stat. Ann.§ 44-7B-5(C) • N.C. Gen. Stat. § 7A-38.1(*l*)(3); N.C. Standards of Prof'l Conduct for Mediators, R. III(F) • N.D. Cent. Code § 31-04-11(2) • Okla. Stat. tit. 12 § 1805(F) • Or. Rev. Stat. § 36.220(5); • Va. Code Ann. § 8.01-581.22(ii), (vi).	The text of these provisions is provided in Memorandum 2014-35, Exhibit pp. 5-42. Some of them focus primarily on allowing a mediator accused of misconduct to use mediation evidence in defense. See, e.g., Okla. Stat. tit. 12 § 1805(F); Or. Rev. Stat. § 36.220(5).

CATEGORY A: CREATE SOME TYPE OF MEDIATION CONFIDENTIALITY EXCEPTION ADDRESSING "ATTORNEY MALPRACTICE AND OTHER MISCONDUCT" OR ASPECTS THEREOF

APPROACH	SOURCE OF IDEA
General Approach A-7. Enact an exception for monitoring of mediators and mediation programs	
Option A-7-a. Enact a provision similar to Colo. Rev. Stat. § 13-22-307(5), which provides: (5) Nothing in this section shall prevent the gathering of information … for the purpose of evaluating or monitoring the performance of a mediator, mediation organization, mediation service, or dispute resolution program, so long as the parties or the specific circumstances of the parties' controversy are not identified or identifiable.	
Additional A-7 options. For other mediator or court ADR monitoring provisions, see: • Ga. ADR R. VII(B) ("Collection of information necessary to monitor the quality of [an ADR] program is not considered a breach of confidentiality.") • Mich. Ct. R. 2.412(D)(7) (mediation communications may be disclosed when "[c]ourt personnel reasonably require disclosure to administer and evaluate the mediation program.") • N.M. Stat. Ann. § 44-7B-5(D)(2) ("Nothing in the Mediation Procedures Act shall prevent … the gathering of information for research or educational purposes or for the purpose of evaluating or monitoring the performance of a mediator; provided that the mediation parties or the specific circumstances of the dispute of the mediation parties are not identified or identifiable …."). • S.C. Ct.-Annexed ADR R. 8(b)(3) (confidentiality rule does not prohibit "[t]he mediator or participants from responding to an appropriate request for information duly made by persons authorized by the court to monitor or evaluate the ADR program"). • See also Miss. Ct. Annexed Mediation R. XV(E) Comment.	

CATEGORY A: CREATE SOME TYPE OF MEDIATION CONFIDENTIALITY EXCEPTION ADDRESSING "ATTORNEY MALPRACTICE AND OTHER MISCONDUCT" OR ASPECTS THEREOF

APPROACH	SOURCE OF IDEA
General Approach A-8. Enact an exception relating to the validity and enforceability of a mediated settlement agreement.	
Option A-8-a. Enact a provision similar to UMA Section 6(b)(2), which provides: (b) There is no privilege … if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in: … (2) except as otherwise provided in subsection (c), a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation. (c) A mediator may not be compelled to provide evidence of a mediation communication referred to in subsection (a)(6) or (b)(2). (d) If a mediation communication is not privileged under subsection … (b), only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under subsection … (b) does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.	For discussion of UMA Section 6(b)(2), see Memorandum 2014-14, pp. 20-22; Memorandum 2014-24, pp. 10-13, 39.
Option A-8-b. Enact a provision similar to UMA Section 6(b)(2), but without the rule prohibiting mediator testimony.	See, e.g., Memorandum 2014-46, Exhibit p. 9 (comments of Eric van Ginkel). For discussion of special considerations re mediator testimony, see, e.g, Memorandum 2014-58, pp. 17-18. See also *In re Anonymous,* 283 F.3d 627 (4th Cir. 2001) (higher standard for mediator testimony).

CATEGORY A: CREATE SOME TYPE OF MEDIATION CONFIDENTIALITY EXCEPTION ADDRESSING "ATTORNEY MALPRACTICE AND OTHER MISCONDUCT" OR ASPECTS THEREOF

APPROACH	SOURCE OF IDEA
Option A-8-c. Enact a provision similar to Fla. Stat. § 44.405(4)(a)(5), which says there is no protection for a mediation communication that is "[o]ffered for the limited purpose of establishing or refuting legally recognized grounds for voiding or reforming a settlement agreement reached during a mediation." Such evidence may be used solely for that purpose (see Fla. Stat. § 44.405(4)(b)).	For discussion of Florida law, see Memorandum 2014-35, pp. 4-25.
Additional A-8 options. For other examples of provisions creating an exception for a challenge to a mediated settlement agreement, see: • La. Rev. Stat. § 9:4112(b)(1)(c) • Maine R. Evid. 408(b) • Md. Code, Courts & Judicial Proceedings § 3-1804(b)(3) • Mich. Ct. R. 2.412(D)(12) • Minn. Stat. §§ 572.36, 595.02(1)(m) • N.C. Gen. Stat. § 7A-38.1(*l*)(2) • N.D. Cent. Code § 31-04-11 • Or. Rev. Stat. § 36.220(4) • Pa. Cons. Stat. § 5949(b)(4) • Va. Code Ann. § 8.01-581.22(viii), 8.01-581.26.	

CATEGORY A: CREATE SOME TYPE OF MEDIATION CONFIDENTIALITY EXCEPTION ADDRESSING "ATTORNEY MALPRACTICE AND OTHER MISCONDUCT" OR ASPECTS THEREOF

APPROACH	SOURCE OF IDEA
General Approach A-9. Use an *in camera* screening approach, in which a judge or other decision-maker reviews proffered mediation evidence in chambers to determine its admissibility pursuant to a statutory standard.	See, e.g., Memorandum 2014-6, Exhibit p. 3 (comments of Ron Kelly, which do not state his personal view). See also Memorandum 2014-24, pp. 21-23 (discussing practicalities of UMA's *in camera* approach for certain exceptions); Memorandum 2014-43, pp. 9-10 (discussing *in camera* issue raised in Pennsylvania case); Memorandum 2015-13, p. 2 & Exhibit pp. 1-2 (paper by Amelia Green). See also Memorandum 2015-35, pp. 34-36 (summarizing scholarly views on use of *in camera* hearings).
Option A-9-a. Enact an attorney misconduct or professional misconduct exception modeled on the *in camera* approach of UMA Section 6(b). To give one possible example: Section 1119 does not apply if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered: (a) To prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation.	

CATEGORY A: CREATE SOME TYPE OF MEDIATION CONFIDENTIALITY EXCEPTION ADDRESSING "ATTORNEY MALPRACTICE AND OTHER MISCONDUCT" OR ASPECTS THEREOF

APPROACH	SOURCE OF IDEA
Option A-9-b. Enact an exception modeled on the *in camera* approach of Texas Civ. & Rem. Code § 154.073(e): (e) If this section [on mediation confidentiality] conflicts with other legal requirements for disclosure of communications, records, or materials, the issue of confidentiality may be presented to the court having jurisdiction of the proceedings to determine in camera whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or materials are subject to disclosure. Closely similar provisions include Ark. Code Ann. § 16-7-206(c); La. Rev. Stat. § 9:4112(D); Miss. Ct. Annexed Mediation R. VII(D). In *Avary v. Bank of America, N.A.,* 72 S.W.3d 770 (Tex. Ct. App. 2002), the Texas Court of Appeals for the Fifth District construed Section 154.073(e) to permit the introduction of mediation evidence for purposes of proving an "independent tort" during mediation that encompasses a duty to disclose, but only if the trial judge conducts an *in camera* hearing and determines that the "facts, circumstances, and context" warrant disclosure. The "independent tort" at stake involved professional misconduct (breach of a bank's fiduciary duty as executor of an estate). But the Court of Appeals did not frame its holding in terms of professional misconduct; it spoke of tortious conduct generally. For further discussion of *Avary* and related cases, see Memorandum 2014-44, pp. 6-15, 24-25; see also *Wimsatt v. Superior Court,* 152 Cal. App. 4th 137, 163, 61 Cal. Rptr. 3d 200 (2007) (praising "independent tort" approach used in Texas and criticizing more strict approach used in California).	

CATEGORY A: CREATE SOME TYPE OF MEDIATION CONFIDENTIALITY EXCEPTION ADDRESSING "ATTORNEY MALPRACTICE AND OTHER MISCONDUCT" OR ASPECTS THEREOF

APPROACH	SOURCE OF IDEA
Option A-9-c. Codify the *in camera* approach that Magistrate Judge Brazil described in *Olam v. Congress Mortgage Co,* 68 F. Supp. 2d 1110 (N.D. Cal. 1999): "[A California trial judge should] conduct a two-stage balancing analysis. The goal of the first stage balancing is to determine whether to compel the mediator to appear at an *in camera* proceeding to determine precisely what her testimony would be. In this first stage, the judge considers all the circumstances and weighs all the competing rights and interests, including the values that would be threatened not by public disclosure of mediation communications, but by ordering the mediator to appear at an *in camera* proceeding to disclose only to the court and counsel, out of public view, what she would say the parties said during the mediation. At this juncture the goal is to determine whether the harm that would be done to the values that underlie the mediation privileges simply by ordering the mediator to participate in the *in camera* proceedings can be justified — by the prospect that her testimony might well make a singular and substantial contribution to protecting or advancing competing interests of comparable or greater magnitude. The trial judge reaches the second stage of balancing analysis only if the product of the first stage is a decision to order the mediator to detail, *in camera*, what her testimony would be. A court that orders the *in camera* disclosure gains precise and reliable knowledge of what the mediator's testimony would be — and only with that knowledge is the court positioned to launch its second balancing analysis. In this second stage the court is to weigh and comparatively assess (1) the importance of the values and interests that would be harmed if the mediator was compelled to testify (perhaps subject to a sealing or protective order, if appropriate), (2) the magnitude of the harm that compelling the testimony would cause to those values and interests, (3) the importance of the rights or interests that would be jeopardized if the mediator's testimony was not accessible in the specific proceedings in question, and (4) how much the testimony would contribute toward protecting those rights or advancing those interests — an inquiry that includes, among other things, an assessment of whether there are alternative sources of evidence of comparable probative value."	In *Olam,* Magistrate Judge Brazil said this approach was based on *Rinaker v. Superior Court,* 62 Cal. App. 4th 155, 74 Cal. Rptr. 2d 464 (1998). For further discussion of *Olam,* see Memorandum 2014-45. For discussion of *Rinaker,* see Memorandum 2015-4, pp. 32-34.

CATEGORY A: CREATE SOME TYPE OF MEDIATION CONFIDENTIALITY EXCEPTION ADDRESSING "ATTORNEY MALPRACTICE AND OTHER MISCONDUCT" OR ASPECTS THEREOF

APPROACH	SOURCE OF IDEA
Option A-9-d. Enact an *in camera* approach similar to Section 574(a)(4)(C) of the Federal Administrative Dispute Resolution Act of 1996: A mediation communication made inadmissible or protected from disclosure by provisions of this chapter shall not become admissible or subject to disclosure under this section unless a court first determines in an in camera hearing that this is necessary to prevent harm to the public health or safety of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential.	Ron Kelly supports this concept "IF the Commission determines that weakening our current mediation confidentiality protections is absolutely necessary, and recommends an in camera hearing process." Third Supplement to Memorandum 2014-60, Exhibit p. 3.
Additional A-9 options. For other examples of *in camera* approaches, see: • Ala. Civ. Ct. Mediation R. 11(b)(3) & Comment. The rule itself does not say anything about an *in camera* hearing, but the Comment says: "Any review of mediation proceedings as allowed under Rule 11(b)(3) should be conducted in an *in camera* hearing or by an *in camera* inspection." • Mich. Ct. R. 2.412(D)(12), which says that mediation communications may be disclosed when "[t]he disclosure is in a proceeding to enforce, rescind, reform, or avoid liability on a document signed by the mediation parties or acknowledged by the parties on an audio or video recording that arose out of mediation, if the court finds, after an in camera hearing, that the party seeking discovery or the proponent of the evidence has shown (a) that the evidence is not otherwise available, and (b) that the need for the evidence substantially outweighs the interest in protecting confidentiality. *(continued on next page)*	

CATEGORY A: CREATE SOME TYPE OF MEDIATION CONFIDENTIALITY EXCEPTION ADDRESSING "ATTORNEY MALPRACTICE AND OTHER MISCONDUCT" OR ASPECTS THEREOF

APPROACH	SOURCE OF IDEA
Additional A-9 options (*cont'd*): • N.M. Stat. Ann. § 44-7B-5(A)(8), which says: "Mediation communications may be disclosed if a court, after hearing in camera and for good cause shown, orders disclosure of evidence that is sought to be offered and is not otherwise available in an action on an agreement arising out of a mediation evidenced by a record. Nothing in this subsection shall require disclosure by a mediator of any matter related to mediation communications." • Wis. Stat. § 904.085(4)(e): "In an action or proceeding distinct from the dispute whose settlement is attempted through mediation, the court may admit evidence otherwise barred by this section if, after an in camera hearing, it determines that admission is necessary to prevent a manifest injustice of sufficient magnitude to outweigh the importance of protecting the principle of confidentiality in mediation proceedings generally."	
General Approach A-10. Seal court proceedings instead of using an *in camera* screening approach. This concept is similar to General Approach A-10, just a different procedural mechanism to achieve the same effect.	Magistrate Judge Brazil followed this approach in *Olam v. Congress Mortgage Co,* 68 F. Supp. 2d 1110 (N.D. Cal. 1999). For further discussion of *Olam,* see Memorandum 2014-45.
General Approach A-11. Focus on ensuring fairness and using judicial tools to accommodate the competing interests. This concept is similar to General Approach A-9 and General Approach A-10. It would embrace two key principles: (1) the importance of providing a level playing field with regard to use of mediation communications in a lawyer-client dispute (giving both lawyer and client an equal opportunity to present relevant mediation communications), and (2) using judicial tools such as *in camera* hearings or sealing orders to creatively accommodate the competing interests to the greatest extent possible (providing a certain amount of statutory guidance, while affording some degree of flexibility to the trial judge to tailor the approach to the circumstances of a particular case). The approach could be fleshed out in many different ways.	This idea was known as "Approach #4" in Memorandum 2015-22. For staff analysis of the idea, see *id.* at 16-17.

CATEGORY A: CREATE SOME TYPE OF MEDIATION CONFIDENTIALITY EXCEPTION ADDRESSING "ATTORNEY MALPRACTICE AND OTHER MISCONDUCT" OR ASPECTS THEREOF

APPROACH	SOURCE OF IDEA
General Approach A-12. Distinguish between (1) cases where the underlying dispute has settled and (2) cases where the underlying dispute has not settled and disclosure of mediation communications could still seriously affect the outcome.	See Memorandum 2014-6, Exhibit p. 3 (comments of Ron Kelly, which do not state his personal view); Memorandum 2014-46, Exhibit pp. 4-9 (comments of Eric van Ginkel); Sarah Cole, *Secrecy & Transparency in Dispute Resolution, Protecting Confidentiality in Mediation: A Promise Unfulfilled?,* 54 Kan. L. Rev. 1419, 1450-51 (2005). See also Memorandum 2015-13, pp. 6-7 & Exhibit p. 49 (comments of Nancy Yeend) (suggesting somewhat similar distinction).
General Approach A-13. Enact legislation implementing an approach similar to the one recently proposed in Indiana. This concept would be somewhat similar to General Approach A-12. As explained in Memorandum 2014-59, pp. 8-10, the Indiana proposal distinguishes between (1) use of mediation evidence in the mediated dispute, which would generally be prohibited, and (2) use of mediation evidence in a collateral matter, which would be permissible in certain circumstances. An attorney discipline proceeding is a collateral matter for purposes of this approach. The proposal does not clearly specify whether a legal malpractice proceeding is a collateral matter for purposes of the approach.	

CATEGORY A: CREATE SOME TYPE OF MEDIATION CONFIDENTIALITY EXCEPTION ADDRESSING "ATTORNEY MALPRACTICE AND OTHER MISCONDUCT" OR ASPECTS THEREOF

APPROACH	SOURCE OF IDEA
General Approach A-14. There should be a mediation confidentiality exception for mediation evidence that is relevant to collection of an attorney's fee or a mediator's fee (enabling both attorney and client to introduce such evidence). For example, Michigan permits disclosure of mediation communications when "[t]he disclosure is necessary for a court to resolve disputes about the mediator's fee." Mich. Ct. R. 2.412(D)(4). Similarly, a bill introduced in New York in 2002 (SB 3495) included an exception for "evidence necessary to prove or defend against a claim for fees brought by the mediator … for services rendered in the proceeding."	See, e.g., Memorandum 2015-24, pp. 1-2 & Exhibit p. 1 (comments of Perry Smith re impact of mediation confidentiality on particular type of fee agreement).
General Approach A-15. Include some kind of corroboration requirement in an exception addressing attorney accountability.	The staff raised this idea, without making a recommendation. See Memorandum 2015-13, p. 3. For analysis of the idea, see *id.* at Exhibit pp. 21-44 (paper by Jordan Rice).

CATEGORY B: OTHER IDEAS ABOUT MODIFYING THE EXTENT OF MEDIATION CONFIDENTIALITY

Category A (above) consists of proposals to create some type of mediation confidentiality exception that addresses "attorney malpractice and other misconduct." In addition to the ideas in Category A, the Commission has also received, or otherwise learned of, various other ideas about revising the existing mediation confidentiality statutes, which are collected here in Category B.

APPROACH	SOURCE OF IDEA
General Approach B-1. Revise the rules relating to waiver of the mediation confidentiality protections (Evid. Code §§ 1115-1128; see also Evid. Code § 703.5)	
Option B-1-a. Allow disclosure of mediation communications when all mediation participants waive confidentiality except an attorney accused of malpractice or other misconduct. In other words, the mediation confidentiality statute would not apply "if every participant in the mediation *except the attorney* waives confidentiality." *Cassel v. Superior Court,* 51 Cal. 4th 113, 139 (2011) (Chin, J., concurring) (emphasis in original).	Justice Chin in *Cassel.* This idea was known as "Approach #3" in Memorandum 2015-22. For staff analysis of the idea, see *id.* at 15-16; see also *id.* at pp. 2-12 (discussing Evid. Code § 958).
Option B-1-b. Add the following provision to the Evidence Code: **Section 1130. Attendance Sheet and Agreement to Disclosure.** (a) An attorney representing a client for purposes of a mediation shall request that all participants in the mediation complete an attendance sheet stating their names, mailing addresses, and telephone numbers, shall retain the attendance sheet for at least two years, and shall provide it to the client on request. (b) An attorney representing a client for purposes of a mediation shall agree that mediation communications directly between the client and his or her attorney may be disclosed in any action for legal malpractice or in a State Bar disciplinary action, where professional negligence or misconduct forms the basis of the client's allegations against the attorney.	See Memorandum 2014-6, Exhibit pp. 1-2 (comments of Ron Kelly, which do not state his personal view) For staff analysis of the same general idea, see Memorandum 2015-22, pp. 18-24.
Option B-1-c. The Commission should "consider contractual provisions which seek to waive confidentiality, i.e., specifically those waivers which may be used in the context of disputes involving public agencies where transparency and accountability are at issue."	First Supplement to Memorandum 2013-47, Exhibit p. 18 (comments of Deborah Blair Porter).

CATEGORY B: OTHER IDEAS ABOUT MODIFYING THE EXTENT OF MEDIATION CONFIDENTIALITY

APPROACH	SOURCE OF IDEA
General Approach B-2. Enact the Uniform Mediation Act in California.	See, e.g., Memorandum 2014-6, Exhibit pp. 17-29 (article by Richard Zitrin); *id.* at Exhibit p. 16 (urging that reform "be retroactive as to issues between a client and his/her/its own lawyer"); Memorandum 2014-14, Exhibit pp. 96-98 (article by Jeff Kichaven); *id.* at 109-11 (article by J. Daniel Sharp). See also Memorandum 2014-36, Exhibit pp. 5-8 (comments of Karen Mak); Memorandum 2014-46, Exhibit pp. 4-9 (comments of Eric van Ginkel, urging enactment of UMA, with a few revisions). The UMA has been endorsed by the American Arbitration Ass'n, the Judicial Arbitration & Mediation Service ("JAMS"), the CPR Institute for Dispute Resolution, and the Nat'l Arbitration Forum. For discussion of the UMA, see Memorandum 2014-14; Memorandum 2014-24. States where the UMA got serious consideration but was not enacted include Connecticut, Maine, Massachusetts, Minnesota, New Hampshire, New York, Pennsylvania, Texas, and perhaps others. For scholarly views on the UMA, see Memorandum 2015-35.

CATEGORY B: OTHER IDEAS ABOUT MODIFYING THE EXTENT OF MEDIATION CONFIDENTIALITY

APPROACH	SOURCE OF IDEA
General Approach B-3. Create a general exception to mediation confidentiality, like the one that the Second Circuit used in *In re Teligent,* 640 F.3d 53, 58 (2d Cir. 2011): A party seeking disclosure of confidential mediation communications must demonstrate (1) a special need for the confidential material, (2) resulting unfairness from a lack of discovery, and (3) that the need for the evidence outweighs the interest in maintaining confidentiality. All three factors are necessary to warrant disclosure of otherwise non-discoverable documents.	For discussion of this approach, see Memorandum 2014-58, pp. 22-23.
General Approach B-4. Make mediation confidentiality optional for mediation participants, rather than having it imposed on them by statute.	See Second Supplement to Memorandum 2013-39, Exhibit p.2 (comments of Kazuko Artus).
General Approach B-5. Make explicit that mediation participants can modify the extent of mediation confidentiality by agreement. This suggestion could be implemented by adding the following provision to the Evidence Code: 1129. Notwithstanding any other section in this Chapter, nothing prohibits all the participants including the mediator from entering into an express written agreement, signed by all of them, in which they agree to a different set of provisions regarding the confidentiality of mediation communications in a given mediation.	See First Supplement to Memorandum 2013-47, Exhibit p. 29 (comments of Gary Wiener).
General Approach B-6. Clarify the meaning of Evidence Code Section 1119(c), which provides: (c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.	See generally Memorandum 2014-27, Exhibit p. 9 (Comments of Nancy Yeend).

CATEGORY B: OTHER IDEAS ABOUT MODIFYING THE EXTENT OF MEDIATION CONFIDENTIALITY

APPROACH	SOURCE OF IDEA
General Approach B-7. Revise the mediation confidentiality statutes to expressly address the use of mediation communications in a juvenile delinquency case.	Staff brainstorming based on *Rinaker v. Superior Court,* 62 Cal. App. 4th 155, 72 Cal. Rptr. 2d 464 (1998) (just an idea, not a staff recommendation).
General Approach B-8. Revise Evidence Code Section 1120(a)(3), which says that California's mediation confidentiality provisions do not limit "[d]isclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute." This provision might not be framed broadly enough to cover all of the conflict-of-interest information a prospective mediator must disclose.	Staff brainstorming in Memorandum 2014-58 p. 27 (just an idea, not a staff recommendation); see also Memorandum 2015-4, pp. 20-22 (discussing *Furia v. Helm,* 111 Cal. App. 4th 945, 4 Cal. Rptr. 3d 357 (2003). At the 4/915 CLRC meeting, John Warnlof also suggested consideration of the conflict-of-interest disclosure standard used in *CEATS, Inc. v. Continental Airlines, Inc.,* 755 F.3d 1356 (Fed. Cir. 2014), as well as other possible models, including UMA Section 9.

CATEGORY B: OTHER IDEAS ABOUT MODIFYING THE EXTENT OF MEDIATION CONFIDENTIALITY

APPROACH	SOURCE OF IDEA
General Approach B-9. Retain existing California law on mediation confidentiality (Evid. Code §§ 1115-1128; see also Evid. Code § 703.5).	See, e.g., First Supplement to Memorandum 2013-47, Exhibit p. 1 (comments of Joshua Abrams); *id.* at Exhibit pp. 2-3 (comments of Ass'n for Dispute Resolution of Northern California); *id.* at Exhibit p. 10 (comments of Armand Estrada); *id.* at Exhibit p. 11 (comments of Bruce Johnson); *id.* at Exhibit pp. 14-16 (comments of Terry Norbury); *id.* at 26 (comments of Darlene Weide); Second Supplement to Memorandum 2013-47, Exhibit p. 1 (comments of Margaret Anderson); *id.* at Exhibit p. 2 (comments of Contra Costa County Bar Ass'n); Third Supplement to Memorandum 2013-47, Exhibit pp. 1-2 (comments of Paul Glusman); Memorandum 2014-27, Exhibit p. 1 (comments of Bonnie Fong); *id.* at Exhibit p. 3 (comments of Thomas Lambie); *id.* at Exhibit p. 4 (comments of Jim O'Brien; comments of Barbara Peyton); *id.* at Exhibit p. 5 (comments of Jane Stallman); *id.* at Exhibit p. 6 (comments of Patricia Tweedy); First Supplement to Memorandum 2014-27, Exhibit p. 25 (comments of Nancy Milton); Memorandum 2014-36, Exhibit pp. 1-2 (comments of Doug deVries); Second Supplement to Memorandum 2014-60 (comments of Hon. Paul Aiello (ret.)); Memorandum 2015-13, Exhibit pp. 46-47 (comments of Stephen Schrey); *id.* at Exhibit p. 50 (comments of Spencer Young). See generally Second Supplement to Memorandum 2013-47, Exhibit pp. 3-7 (comments of James Madison & Paul Dubow re likely views of CDRC membership).

CATEGORY C: REQUIRE DISCLOSURES REGARDING MEDIATION CONFIDENTIALITY OR SIMILAR REFORMS

Another possibility would be to statutorily require some type of disclosures to mediation participants regarding mediation or mediation confidentiality, particularly the treatment of evidence relating to alleged mediation misconduct. The Commission could propose this type of reform instead of, or in addition to, modifying the extent of mediation confidentiality. Some possible disclosure requirements and similar reforms are listed below (Category C).

If the Commission decides to propose a statute requiring such disclosures, it might be appropriate to revise the confidentiality provisions to enable mediation participants to show whether the required disclosures were made. It might also be advisable to require that certain disclosures be in writing and each mediation participant sign the document containing the disclosures.

For some of the input supporting this general concept, see, e.g., First Supplement to Memorandum 2013-39, Exhibit p. 2 (comments of Nancy Yeend); First Supplement to Memorandum 2013-47, Exhibit pp. 2-3 (comments of Ass'n for Dispute Resolution of Northern California); Third Supplement to Memorandum 2013-47, Exhibit pp. 3-4 (article by Nancy Yeend & Stephen Gizzi); Memorandum 2014-60, Exhibit p.1 (comments of Nancy Yeend); First Supplement to Memorandum 2014-60, Exhibit p. 1 (comments of Edward Mason). See also Memorandum 2014-43, pp. 13-14 (describing points raised in article by Pa. lawyer Abraham Gafni); Memorandum 2015-24, pp. 3-4 & Exhibit p. 3 (comments of Nancy Yeend); Memorandum 2015-35, pp. 36-39 (summarizing scholarly views on informing mediation participants about extent of mediation confidentiality); testimony of Larry Doyle on behalf of CCBA (4/9/15 CLRC meeting); *Wimsatt v. Superior Court,* 152 Cal. App. 4th 137, 163, 61 Cal. Rptr. 3d 200 (2007).

APPROACH	SOURCE OF IDEA
General Approach C-1. "[L]awyers should be obliged to disclose to their clients that, if the client agrees to mediate, then the lawyer is immune regarding anything the lawyer does or says during or related to mediation."	Second Supplement to Memorandum 2013-47, Exhibit p. 9 (comments of Jerome Sapiro, Jr.). Nancy Yeend made a similar suggestion. See Memorandum 2014-6, Exhibit p. 15: "[I]f the confidentiality statute remains unchanged the Commission could always recommend … an explicit requirement mandating disclosure of the fact that malpractice is protected, and … a written statement could be required to be printed in bold face in every confidentiality agreement."

CATEGORY C: REQUIRE DISCLOSURES REGARDING MEDIATION CONFIDENTIALITY OR SIMILAR REFORMS

APPROACH	SOURCE OF IDEA
General Approach C-2. The required disclosure "should include examples of malpractice the average person can understand and recognize if it is occurring in the process."	First Supplement to Memorandum 2014-60, Exhibit p. 1 (comments of Edward Mason).
General Approach C-3. Statutorily require pre-mediation distribution and completion of a disclosure form. Under this approach, attorneys would be required to distribute and explain a disclosure form to their clients *before* the first mediation session, instead of having the mediator present the form at the start of the first mediation session. A possible disclosure form, used by John Warnlof in his mediations, is attached as Exhibit p. 3.	Testimony of John Warnlof (4/9/15 CLRC meeting).
General Approach C-4. Statutorily require a mediator (or possibly an attorney representing a party in a mediation) to make all or some of the disclosures that court rules currently require a mediator in a court-connected mediation to make. Those disclosures are: • The requirement to disclose matters that could raise a question about a mediator's ability to conduct the mediation impartially. • The requirement to provide a general explanation of the mediation confidentiality rules at or before the first mediation session. • The requirement to explain the mediator's practice regarding confidentiality for separate caucuses held during a mediation. • The requirement to inform mediation parties, at or before the first mediation session, that any resolution of the dispute in mediation requires *voluntary* agreement of the parties. • The requirement to provide all mediation participants with a general explanation of the nature of the mediation process, the procedures to be used, and the roles of the mediator, the parties, and the other participants. • The requirement that the mediator inform all participants, at or before the first mediation session, that the mediator will not represent any participant as a lawyer or perform any professional services in any capacity other than as an impartial mediator.	Staff brainstorming (just an idea, not a staff recommendation). A 2005 proposal by the Civil & Small Claims Advisory Committee would have required a mediator to present a form containing such information and other material at the start of each mediation (proposed form ADR-108). For convenient reference, proposed form ADR-108 is attached as Exhibit pp. 1-2. For discussion of the 2005 proposal, see Memorandum 2015-22, pp. 31-34.

CATEGORY C: REQUIRE DISCLOSURES REGARDING MEDIATION CONFIDENTIALITY OR SIMILAR REFORMS

APPROACH	SOURCE OF IDEA
General Approach C-5. Disclosure re confidentiality from 2005 proposal. Add section to Evidence Code: **Section 1129. Required Notice.** An attorney representing a client for purposes of a mediation shall provide the following notice to her or his client prior to the mediation. **INFORMATION AND CAUTION ON MEDIATION CONFIDENTIALITY** **1. Summary of California Mediation Confidentiality Law.** To promote communication in mediation, California Evidence Code sections 703.5 and 1115-1128 establish the confidentiality and limit the disclosure, admissibility, and court's consideration of communications, writings, and conduct in connection with a mediation. In general, they provide: a. All communications, negotiations, or settlement offers in the course of a mediation must remain confidential; b. Statements made and writings prepared in connection with a mediation are not admissible or subject to discovery or compelled disclosure in noncriminal proceedings; c. A mediator's report, opinion, recommendation, or finding about what occurred in a mediation may not be submitted to or considered by a court or another adjudicative body; and d. A mediator cannot testify in any subsequent civil proceeding about any communication or conduct occurring at or in connection with a mediation. **2. CAUTION.** This means you cannot rely on statements made in mediation. They can't be admitted in evidence in any later non-criminal proceeding UNLESS they are part of a written settlement agreement AND your settlement agreement is signed by all necessary parties and states that you want it to be an enforceable agreement (or words to that effect — see California Evidence Code section 1123). **3. Examples.** You cannot rely on statements from the other side such as "You need to accept much less money than you believe is fair because I only have the following assets and would declare bankruptcy if we went to court" UNLESS you include this list of assets in your settlement agreement and make the accuracy of the list a condition of your settlement. You cannot rely on statements from your own lawyer such as "If you accept the proposed settlement, I (your lawyer) will reduce my legal fees by this amount" UNLESS you ensure this is included in your settlement agreement.	Memorandum 2014-6, Exhibit pp. 1-2 (comments of Ron Kelly, without stating personal view); testimony of Ron Kelly at 4/9/15 & 6/4/15 CLRC meetings in support of concept.

CATEGORY C: REQUIRE DISCLOSURES REGARDING MEDIATION CONFIDENTIALITY OR SIMILAR REFORMS

APPROACH	SOURCE OF IDEA
General Approach C-6. Require use of a simple form that states something like: (1) Party A is relying on the following representations made by Party B during this mediation, and (2) Party B agrees to waive confidentiality with respect to those representations.	Commissioner Taras Kihiczak raised this idea at the 4/9/15 CLRC meeting.
General Approach C-7. Enact legislation that would require the Judicial Council to prepare an informational video on mediation confidentiality, which mediation participants would be required to view before the start of a mediation. The legislation could further require each participant and the attorney for each participant (if any) to sign a document attesting that the participant viewed the informational video and, if represented by an attorney, had an opportunity to discuss it with the attorney before the mediation.	Staff brainstorming based on a suggestion made by Commissioner Crystal Miller-O'Brien at the 4/9/15 CLRC meeting (just an idea, not a staff recommendation).
General Approach C-8. Enact legislation requiring that certain disclosures about mediation confidentiality be included in the ADR informational packet that a court distributes to litigants when referring a case to ADR. Before participating in a mediation, litigants could be required to initial the disclosures and indicate whether they had an opportunity to discuss those matters with counsel.	John Warnlof raised this general idea at the 6/4/15 CLRC meeting.

CATEGORY C: REQUIRE DISCLOSURES REGARDING MEDIATION CONFIDENTIALITY OR SIMILAR REFORMS

APPROACH	SOURCE OF IDEA
General Approach C-9. Disclosures with regard to adjusting fees in a mediation. Sometimes a client alleges that an attorney, mediator, or other professional orally promised to reduce his or her fee to help achieve a settlement, but the promise was not reduced to writing and the professional reneged.	Several sources have raised specific concerns about adjustment of fees during a mediation. See, e.g., First Supplement to Memorandum 2013-47, Exhibit pp. 18-20 (comments of Deborah Blair Porter); Second Supplement to Memorandum 2013-47, Exhibit pp. 8-9 (comments of Jerome Sapiro, Jr.). See also *Porter v. Wyner,* 107 Cal. Rptr. 3d 653 (2010) (alleged fee adjustment in mediation); *Chan v. Lund,* 188 Cal. App. 4th 1159, 116 Cal. Rptr. 3d 122 (2011) (same); Memorandum 2014-58, pp. 23-24 (discussing 7th Circuit case involving possible conflict of interest between attorney and client over receipt of attorney's fees from proposed settlement).
General Approach C-10. CLRC could "recommend that every retainer agreement and every mediation confidentiality agreement contain language that any promise made by the attorney to reduce the attorney's fee during mediation is unenforceable, and that such language be in a type size larger than the adjoining type and be initialed by the client."	Memorandum 2013-47, Exhibit p. 4 (comments of Sidney Tinberg).
General Approach C-11. The Legislature could require the mediator and/or counsel to warn mediation participants at the beginning of a mediation that they must memorialize any fee adjustment in their settlement agreement if they want to be able to enforce it. Evidence re compliance with this disclosure requirement would be admissible and subject to disclosure.	Staff brainstorming in Memorandum 2013-47, p. 13 (just an idea, not a staff recommendation).

CATEGORY C: REQUIRE DISCLOSURES REGARDING MEDIATION CONFIDENTIALITY OR SIMILAR REFORMS

APPROACH	SOURCE OF IDEA
General Approach C-12. The Legislature could require every mediated settlement agreement to specify whether any of the mediation participants agreed to a fee adjustment during the mediation. The terms of any fee adjustment would have to be memorialized in the mediated settlement agreement or in a separate document. That document would be admissible in court and subject to disclosure if necessary for enforcement purposes; the document would not be protected by the mediation confidentiality statute.	Staff brainstorming based on point made by Rachel Ehrlich at the 6/4/15 CLRC meeting (just an idea, not a staff recommendation).

CATEGORY D: OTHER IDEAS

In addition to ideas about modifying the mediation confidentiality statutes (Categories A and B) and ideas about creating disclosure requirements (Category C), various other ideas have come up during the Commission's study. Such ideas are listed below (Category D).

APPROACH	SOURCE OF IDEA
General Approach D-1. Empirical study. The Legislature could require an empirical study of specified aspects of mediation confidentiality.	See, e.g., Second Supplement to Memorandum 2013-39, Exhibit p. 1 (comments of Kazuko Artus); staff brainstorming in Memorandum 2015-5, pp. 49-50 (just an idea, not a staff recommendation). For discussion of difficulties inherent in empirical studies of mediation confidentiality, see Memorandum 2015-5, pp. 4-8. For discussion of existing data on the topic, see *id.* at 8-21.
General Approach D-2. Daily time limit. To help prevent coercion, the Legislature could place a time limit on each day's mediation session (e.g., no more than 8 hours of mediation per day). Evidence re compliance with the time limit would be admissible and subject to disclosure. There could be an exception to the time limit for exigent circumstances.	Staff brainstorming (just an idea, not a staff recommendation), in response to concern voiced by Eric van Ginkel re overly long mediation sessions. See Memorandum 2015-13, p. 6 & Exhibit p. 49.
General Approach D-3. Modify the standards for attorney malpractice claims involving mediation communications. For example, a statute could require a showing of willful misconduct, instead of negligent misconduct. (Presumably this approach would have to be coupled with some modification of the mediation confidentiality statutes to have any impact.)	This idea was raised by Ron Kelly without stating his personal view. See Memorandum 2014-6, Exhibit p. 3.
General Approach D-4. Enact a provision explicitly stating that a mediation party is entitled to bring a support person along to the mediation.	See UMA Section 10. For discussion of this idea, see Memorandum 2015-35, pp. 40-41.

CATEGORY D: OTHER IDEAS

APPROACH	SOURCE OF IDEA
General Approach D-5. Cooling-off period. The Legislature could enact a statute that establishes a mandatory "cooling-off period" after a mediation, during which the parties to a mediated settlement agreement could think over the terms, or get more information, and then rescind the agreement if they change their minds about it. For examples of mediation cooling-off periods, see Cal. Ins. Code § 10089.82(c) (3-day cooling-off period for mediation of earthquake insurance dispute); Ga. Model Ct. Mediation R. XII(d)(2) (party who had no attorney at court-ordered mediation has 3 days after signing of settlement agreement to make objection); Minn. Stat. § 572.35 ("a mediated settlement agreement between a debtor and creditor is not binding until 72 hours after it is signed by the debtor and creditor, during which time either party may withdraw consent to the binding character of the agreement."). See also former Fla. Fam. Law R. Proc. 12.740(f)(1).	This idea was raised by Ron Kelly without stating his personal view. See Memorandum 2014-6, Exhibit p. 3. Ron Kelly and John Warnlof also raised the idea as a possible solution at the 4/9/15 CLRC meeting. See also Memorandum 2015-35, pp. 41-44 (summarizing scholarly views on mediation cooling-off periods).
General Approach D-6. Develop a mediator regulation system for California.	See First Supplement to Memorandum 2014-27, Exhibit pp. 4-23 (article by Jack Goetz & Jennifer Kalfsbeek Goetz); Memorandum 2014-46, Exhibit p. 3 (further comments of Jack Goetz & Jennifer Kalfsbeek Goetz). For descriptions of mediator regulatory systems in Florida, Georgia, Maine, Minnesota, North Carolina, and Virginia, see P. Young, *Take It or Leave it, Lump It or Grieve It: Designing Mediator Complaint Systems that Protect Mediators, Unhappy Parties, Attorneys, Courts, the Process, and the Field,* 21 Ohio St. J. Disp. Resol. 721 (2006). See also Tenn. S.Ct. R. 31 § 11(b)(14)-(18) (proceedings for discipline of Rule 31 Mediators).

CATEGORY D: OTHER IDEAS

APPROACH	SOURCE OF IDEA
General Approach D-7. Require mediation to take place within 30 days of when a lawsuit is filed, so that attorneys do not run up fees.	Testimony of Paul Rieker (4/9/15 CLRC meeting).
General Approach D-8. Enact a statute stating that a person cannot serve as both a mediator and a referee in the same case.	Testimony of Ron Kelly (6/4/15 CLRC meeting).