

## Memorandum 2015-34

**Relationship Between Mediation Confidentiality and Attorney Malpractice  
and Other Misconduct: Scope of Study**

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This memorandum discusses the proper scope of the Commission's ongoing study, which is important to resolve now that the Commission is beginning to prepare a tentative recommendation.<sup>1</sup>

The legislative resolution relating to this study calls upon the Commission to provide:

*Analysis of the relationship under current law between mediation confidentiality and attorney malpractice and other misconduct, and the purposes for, and impact of, those laws on public protection, professional ethics, attorney discipline, client rights, the willingness of parties to participate in voluntary and mandatory mediation, and the effectiveness of mediation, as well as any other issues that the commission deems relevant...*<sup>2</sup>

The phrase "attorney malpractice and other misconduct" is subject to multiple interpretations.

At the outset of this study, the Commission considered, but did not definitively resolve, the proper scope of the study.<sup>3</sup> It decided to begin its work by focusing on *attorney* misconduct, subject to later adjustment:

The Commission will not define the precise scope of its study at this time. Comments on the proper scope of the study would be helpful. The staff should begin by focusing on attorney malpractice and other attorney misconduct, which is clearly within the scope intended by the Legislature in Assembly Concurrent Resolution 98

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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](http://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. 2012 Cal. Stat. res. ch. 108 (ACR 98 (Wagner)) (emphasis added); see also 2014 Cal. Stat. res. ch. 83 (SCR 83 Monning).

3. See Memorandum 2013-39, pp. 33-34 & Exhibit p. 19 (comments of Ron Kelly).

(Wagner & Gorell), 2012 Cal. Stat. res. ch. 108. The Commission may adjust the scope of the study as the study proceeds.<sup>4</sup>

In researching the various matters that the Legislature specifically requested, the staff initially tried to focus narrowly on attorney misconduct, as the Commission instructed. We quickly found, however, that statutory schemes such as the Uniform Mediation Act (“UMA”) “are difficult to understand without taking a broader view, there is comparatively little information on attorney misconduct in mediation, and the available research materials are not organized in a manner facilitating such a focus.”<sup>5</sup> It also became clear that materials involving other types of alleged mediation-related misconduct — such as alleged mediator misconduct or alleged misconduct by other mediation participants, particularly professionals — might be instructive by way of analogy even if the Commission decided to stick with its focus on attorney misconduct.<sup>6</sup>

Thus, the background research for this study was wide-ranging and time-consuming. As the staff pointed out early on, however, “[t]hat research approach *does not imply anything* about the appropriate breadth or narrowness of whatever reform (if any) the Commission should ultimately recommend in this study.”<sup>7</sup>

Because the Commission is now in the process of crafting a tentative recommendation, it is time to resolve that matter. To do so, it may be helpful to consider four key questions:

- In requesting this study, specifically which topic did the Legislature want the Commission to examine and address?
- What means did the Legislature authorize the Commission to use to address that topic?
- What is the Commission authorized to do based on other sources of authority? What is beyond the Commission’s authority?
- What is a wise position in terms of (1) allocating the Commission’s limited resources, and (2) achieving sufficient consensus to be a realistic legislative proposal?

We address each question in order below.

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4. Minutes (Aug. 2013), p. 3.

5. Memorandum 2014-14, p. 6.

6. See Memorandum 2014-35, pp. 2-3.

7. Memorandum 2014-14, p. 6 (emphasis in original).

IN REQUESTING THIS STUDY, SPECIFICALLY WHICH TOPIC DID THE LEGISLATURE  
WANT THE COMMISSION TO EXAMINE AND ADDRESS?

Many different types of bad behavior could theoretically occur during a mediation. In addition, mediation communications might provide evidence of misconduct that occurred earlier than, or separate and apart from, the mediation process. The resolution relating to this study refers to “the relationship between mediation confidentiality and attorney malpractice and *other* misconduct ...”<sup>8</sup> It is important to consider what the Legislature meant when it referred to “other misconduct.”

To assist the Commission in resolving that issue, we first describe some different types of misconduct that could occur during mediation. Next, we raise a number of questions to highlight ambiguities in the phrase “other misconduct.” We then examine available evidence bearing on the proper scope of this study.

### **Types of Mediation Misconduct**

At one extreme, a mediation participant could commit a violent criminal act while attending a mediation session, such as assaulting another participant. Alternatively, a mediation participant could commit a nonviolent criminal act, such as stealing money or a cell phone from another participant’s unattended briefcase.

At another extreme, a mediation participant might be faulted for failing to comply with a court order requiring mediation. Some types of noncompliance might be objectively determinable without invading mediation communications. For example, if a party fails to attend a court-ordered mediation, the opponent could prove such noncompliance by introducing testimony about whether the party was present, without getting into the substance of the mediation. That might also be possible, at least to some extent, if a party shows up very late, fails to send a representative with authority to settle, or fails to bring an expert along to a mediation as required by the court. At times, however, a court has sanctioned a party for failing to make a “good faith” attempt to settle at a court-ordered mediation, because the party made no settlement offer or otherwise showed a lack of sincere desire to settle.<sup>9</sup> This type of behavior is only culpable if one assumes that the party is under a duty to make a settlement offer or other

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8. 2012 Cal. Stat. res. ch. 108 (ACR 98 (Wagner)) (emphasis added); see also 2014 Cal. Stat. res. ch. 63 (SCR 83 (Monning)).

9. See, e.g., *Avril v. Civilmar*, 605 So.2d 988, 989 (Fla. 4th D.C.A. 1992).

actual attempt to reach a settlement during a court-ordered mediation, not just to attend as ordered by the court.

In between the extremes discussed above, a mediation participant might engage in nonviolent behavior that could be subject to criminal penalties but usually is only pursued civilly. Fraud is an example of this, as well as some types of extortion.

A mediation participant could also engage in noncriminal misconduct at a mediation, such as negligence. Of particular note here, a professional attending a mediation might violate a professional duty or rule, or fail to comply with a professional standard of care. Depending on the applicable professional requirements, this type of misconduct could be committed by any type of professional: The mediator, the attorneys representing clients at the mediation, or a doctor, accountant, insurer, contractor, engineer, or other professional providing advice or otherwise acting in a professional capacity. The conduct may be punishable through a disciplinary proceeding before a professional organization, or, in some instances, through a malpractice suit or other civil proceeding by an injured person.

### **Questions About Which Types of Misconduct the Legislature Wanted the Commission to Consider**

In its resolution directing the Commission to conduct this study, the Legislature asked the Commission to examine “the relationship between mediation confidentiality and attorney malpractice and other misconduct ....” How broadly to construe that directive is debatable.

From the quoted language, it is clear that the Legislature wants the Commission to examine malpractice and other *professional* misconduct that may be committed *by attorneys* in the mediation context. Whether the Legislature wants the Commission to go further than that is not immediately obvious.

Should the Commission also seek to address mediator malpractice and other professional misconduct that a mediator might engage in? What about other types of malpractice and professional misconduct in the mediation setting?

Would it be appropriate to include professional misconduct outside the mediation context, which is evidenced by mediation communications? Or mediation misconduct of a professional, which is not committed in a professional capacity?

Should the Commission limit its study to professional misconduct, or should it also address mediation misconduct that is unrelated to professional requirements? If so, how far should it go? Should the study include all noncriminal mediation misconduct? Nonviolent mediation misconduct that is subject to criminal penalties but typically pursued only civilly? All mediation-related criminal behavior?

To what extent, if any, should the Commission explore issues of noncompliance with a court order requiring mediation? Is this an area it should attempt to address?

### **Evidence Bearing on the Proper Scope of this Study**

In considering the above questions, the language of the resolution directing this study is critical. It contains several references to attorneys, attorney misconduct, and attorney organizations. It also refers to “professional ethics” and “client rights,” suggesting a focus on conduct in a professional capacity. Those terms are shown in italics below:

Resolved, That the Legislature approves for study by the California Law Revision Commission the new topic listed below:

(a) Analysis of the relationship under current law between mediation confidentiality and *attorney malpractice* and other misconduct, and the purposes for, and impact of, those laws on public protection, *professional ethics*, *attorney discipline*, *client rights*, the willingness of parties to participate in voluntary and mandatory mediation, and the effectiveness of mediation, as well as any other issues that the commission deems relevant. Among other matters, the commission shall consider the following:

(1) Sections 703.5, 958, and 1119 of the Evidence Code and predecessor provisions, as well as California court rulings, including, but not limited to, *Cassel v. Superior Court* (2011) 51 Cal.4th 113, *Porter v. Wyner* (2010) 183 Cal.App.4th 949, and *Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137.

(2) The availability and propriety of contractual waivers.

(3) The law in other jurisdictions, including the Uniform Mediation Act, as it has been adopted in other states, other statutory acts, scholarly commentary, judicial decisions, and any data regarding the impact of differing confidentiality rules on the use of mediation.

(b) In studying this matter, the commission shall request input from experts and interested parties, including, but not limited to, representatives from the California Supreme Court, *the State Bar of California*, *legal malpractice defense counsel*, *other attorney groups and individuals*, mediators, and mediation trade associations. The commission shall make any recommendations that it deems

appropriate for the revision of California law to balance the competing public interests between confidentiality and accountability.<sup>10</sup>

The resolution also refers to Evidence Code Section 958, which relates to “an issue of breach, by the *lawyer* or by the client, of a duty arising out of the *lawyer-client* relationship.”<sup>11</sup>

More tellingly, the resolution singles out three California cases for particular attention (*Cassel*, *Porter*, and *Wimsatt*). Each of those cases involved the intersection of mediation confidentiality and alleged *attorney* wrongdoing in a *professional* capacity:

- In *Cassel*, the plaintiff “sued his attorneys for malpractice, breach of fiduciary duty, fraud, and breach of contract” in representing him in a mediation.<sup>12</sup> He alleged that “by bad advice, deception, and coercion, the attorneys, who had a conflict of interest, induced him to settle for a lower amount than he had told them he would accept, and for less than the case was worth.”<sup>13</sup>
- Similarly, in *Porter*, the plaintiffs sued their law firm for “legal malpractice, breach of fiduciary duty, constructive fraud, negligent misrepresentation, breach of fee agreement, rescission, unjust enrichment and liability for unpaid wages.”<sup>14</sup> The plaintiffs claimed that the firm gave them incorrect tax advice in connection with a mediated settlement agreement, failed to pay them part of the attorney fee portion of the settlement proceeds as promised during the mediation, and failed to compensate one of the plaintiffs for services rendered as a paralegal.<sup>15</sup>
- *Wimsatt* was another attorney-client dispute relating to a mediation. The plaintiff alleged that his law firm breached its fiduciary duty by making a low settlement demand against his wishes on the eve of a mediation, which ultimately compromised the plaintiff’s ability to obtain a satisfactory settlement.<sup>16</sup>

The history of the legislative resolution reinforces the notion that the Commission is supposed to focus on alleged attorney misconduct, particularly such misconduct in the mediation process. The language directing the

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10. 2012 Cal. Stat. res. ch. 108 (ACR 98 (Wagner) (emphasis added); see also 2014 Cal. Stat. res. ch. 63 (SCR 83 (Monning)).

11. Emphasis added.

12. 51 Cal. 4th at 118.

13. *Id.*

14. *Porter v. Wyner*, 107 Cal. Rptr. 3d 653, 658 (2010) (footnote omitted) (formerly published at 183 Cal. App. 4th 949).

15. See *id.* at 655-57.

16. See 152 Cal. App. 4th at 202-04, 206.

Commission to conduct this study was originally placed not in that resolution, which contains the Commission's entire Calendar of Topics for Study, but in Assembly Bill 2025.

As introduced in early 2012, AB 2025 would have amended Evidence Code Section 1120 to make the chapter governing mediation confidentiality inapplicable to certain State Bar disciplinary proceedings and attorney-client disputes:

1120....

(b) This chapter does not limit any of the following:

....

(4) The 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.

That proposal generated opposition, so the bill was amended to call for a Commission study instead.

The language directing the Commission to conduct the study was essentially the same as the language quoted earlier in this memorandum.<sup>17</sup> The staff of the Assembly Committee on Judiciary analyzed the bill in that form.

Notably, that bill analysis says that the "SUBJECT" of the bill is "*ATTORNEY MISCONDUCT: MEDIATION PROCEEDINGS.*"<sup>18</sup> The analysis also identifies the "KEY ISSUE" as: "*SHOULD THE COMPLEX ISSUE OF ATTORNEY RESPONSIBILITY FOR MALPRACTICE AND MISCONDUCT IN MEDIATION PROCEEDINGS BE ANALYZED BY THE CALIFORNIA LAW REVISION COMMISSION WHICH HAS PREVIOUSLY STUDIED AND HAS EXPERTISE ON THE ISSUE OF MEDIATION CONFIDENTIALITY?*"<sup>19</sup>

AB 2025 passed the Assembly as amended to require this study, but it was never referred to a policy committee in the Senate. Instead, Assembly Concurrent Resolution 98 was amended to include the study proposed in AB 2025, essentially verbatim.<sup>20</sup> Subsequent analyses of the legislation shed no further light on the scope of this study; they simply quote the language in the resolution

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17. See AB 2025 (Gorell), as amended on May 10, 2012.

18. Assembly Committee on Judiciary Analysis of AB 2025 (May 8, 2012), p. 1 (emphasis added).

19. *Id.* (emphasis added).

20. See ACR 98 (Wagner), as amended on July 3, 2012.

referring to “the relationship between mediation confidentiality and attorney malpractice and other misconduct.”<sup>21</sup>

Thus, the analysis of AB 2025 prepared for the Assembly Committee on Judiciary remains the best explanation of the intended scope of this study. Together with the other evidence discussed above, it strongly suggests that the Legislature intended for the Commission to study and provide a recommendation on **the relationship between mediation confidentiality and alleged attorney misconduct in a professional capacity in the mediation process, including, but not limited to, legal malpractice.**

WHAT MEANS DID THE LEGISLATURE AUTHORIZE THE COMMISSION  
TO USE TO ADDRESS THAT TOPIC?

In asking the Commission to examine the topic identified above, the Legislature gave the Commission wide rein to choose the best means of addressing that topic. The final sentence of the resolution says simply: “The commission shall make *any recommendations that it deems appropriate* for the revision of California law to balance the competing public interests between confidentiality and accountability.”<sup>22</sup>

Notably, the Legislature did not ask the Commission to go in any particular direction, nor did it identify any particular goal or indicate how much weight to assign to any policy interest. It did not limit the Commission to proposing revisions of the mediation confidentiality statutes.

Presumably then, **the Commission could propose other types of reforms instead of, or in addition to, revisions of the mediation confidentiality statutes.** However, **those reforms must relate to effectively addressing the topic in question.** Otherwise, they would fall outside the scope of authority for this particular Commission study.

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21. See Assembly Appropriations Committee Analysis of AB 2025 (May 25, 2012), p.2; Assembly Floor Analysis of AB 2025 (May 26, 2012), p.1; Senate Floor Analysis of ACR 98 (July 5, 2012), p.2; Assembly Floor Analysis of ACR 98 (Aug. 20, 2012), p.3.

22. 2012 Cal. Stat. res. ch. 108 (ACR 98 (Wagner) (emphasis added)); see also 2014 Cal. Stat. res. ch. 63 (SCR 83 (Monning)).

WHAT IS THE COMMISSION AUTHORIZED TO DO BASED ON OTHER SOURCES OF AUTHORITY? WHAT IS BEYOND THE COMMISSION'S AUTHORITY?

The language authorizing this particular Commission study is Item #23 in the current version of the Commission's Calendar of Topics.<sup>23</sup> It is not the only source of Commission authority of potential relevance here.

In particular, the Commission also has broad authority to study "[w]hether the Evidence Code should be revised" (Item #7 in the Calendar of Topics). That authority is longstanding, and the Commission has prepared many recommendations pursuant to it.

The Commission is also authorized to study "[w]hether the law relating to arbitration, mediation, and other alternative dispute resolution techniques should be revised" (Item #8 in the Calendar of Topics). That broad grant of authority stems from the Commission's previous work on arbitration and mediation, providing a potential basis for making adjustments to legislation that was enacted on its recommendation.

**However, if the Commission wishes to activate work pursuant to either of those sources of authority, it would first need to notify the judiciary committees in the Legislature:**

[B]efore commencing work on any project within the calendar of topics the Legislature has authorized or directed the commission to study, the commission *shall submit a detailed description of the scope of work to the chairs and vice chairs of the Senate Committee on Judiciary and the Assembly Committee on Judiciary, and any other policy committee that has jurisdiction over the subject matter of the study, and if during the course of the project there is a major change to the scope of work, submit a description of the change ....*<sup>24</sup>

That notice requirement serves to alert the judiciary committees to the Commission's contemplated activities, and affords an opportunity for the committees to provide advice, including the possibility of advising the Commission to refrain from such work because the project appears inappropriate for some reason.

In addition to the sources of authority discussed above, the Commission also has another source of authority that might become relevant in drafting a tentative recommendation for the current study. Under Government Code Section 8298, the Commission "may study and recommend revisions to correct

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23. See 2014 Cal. Stat. res. ch. 63 (SCR 83 (Monning)).

24. *Id.* (emphasis added).

*technical or minor substantive defects* in the statutes of the state without a prior concurrent resolution of the Legislature referring the matter to it for study.”<sup>25</sup> The Commission often relies on Section 8298 to fix minor statutory defects it happens to run across in the course of conducting a study pursuant to another source of authority.

WHAT IS A WISE POSITION IN TERMS OF (1) ALLOCATING THE COMMISSION’S LIMITED RESOURCES, AND (2) ACHIEVING SUFFICIENT CONSENSUS TO BE A REALISTIC LEGISLATIVE PROPOSAL?

As explained above, the Commission seems to have authority to study virtually any aspect of alternative dispute resolution or the Evidence Code, but it would need to notify the judiciary committees before undertaking a new project. The current project is supposed to address the relationship between mediation confidentiality and alleged *attorney* misconduct in a *professional capacity in the mediation process*. In addressing that matter, however, the Commission may use any means that it deems appropriate to balance the competing policy interests.

What do those guidelines mean in concrete terms as the Commission examines the reform ideas in the table attached to Memorandum 2015-33 and decides how to frame a tentative recommendation? What is a wise position for the Commission to take in terms of (1) allocating its limited resources, and (2) achieving sufficient consensus to be a realistic legislative proposal (not necessarily successful, but at least realistic enough to warrant the Legislature’s attention and justify the time spent preparing it)?

Obviously, a major set of questions concerns whether the Commission’s proposal should *solely* address attorney misconduct in a professional capacity in the mediation process. For fairness reasons, it might be appropriate to encompass other types of misconduct in proposing certain types of reforms.

Suppose, for instance, that an attorney, a tax accountant, and an insurer gave the same client the same faulty tax advice during a mediation. If the mediation confidentiality statutes were revised such that evidence of that negligence could be introduced against the party’s attorney, but not against the party’s accountant or insurer, would that lead to a fair result? Would it instead culminate in inconsistent verdicts and reduced confidence in the justice system?

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25. Emphasis added.

The above hypothetical tends to suggest that if the Commission proposes a new exception to the mediation confidentiality statutes, that exception should extend to all professionals, not just attorneys. But different types of professionals are subject to different types of disciplinary systems and other unique considerations.

For example, mediators are entitled to quasi-judicial immunity, a matter that the Commission has already decided, for good reasons, not to attempt to address in this study.<sup>26</sup> Thus, if a mediator gave the same faulty tax advice to the same client in the hypothetical situation just discussed, the mediator would not be subject to liability, regardless of whether the mediation confidentiality statutes would permit introduction of the evidence.

Given that consideration, would it make sense to encompass mediators in any new exception to the mediation confidentiality statutes? Would it be preferable to stick more closely to the focus of this study and avoid the potential complications (such as enhanced likelihood of opposition from mediators) inherent in drafting a broader reform?

Similar considerations might apply to other types of professionals. For example, the Ninth Circuit is currently considering a case involving the intersection of mediation confidentiality, an insurer's duty to act in good faith in handling an insurance claim, and the federal requirements of due process.<sup>27</sup> If the Commission decided to encompass insurers in a proposed reform, it would have to be mindful of this pending litigation. Should it nonetheless follow that approach?

**The staff regards this as a difficult set of questions.** We are not inclined to offer specific advice on it at this time.

Nor will we attempt to specify whether each of the possible reforms listed in the table attached to Memorandum 2015-33 would fall within, or be beyond, the proper scope of the Commission's study. There are quite a number of scope issues to consider. To name only a few,

- General Approach B-6 would attempt to clarify the meaning of Evidence Code Section 1119(c), which provides: "All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation

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26. See Memorandum 2015-22, pp. 34-42; Draft Minutes (June 2015), p. 5.

27. See *Milhouse v. Travelers Commercial Ins. Co.*, No. 13-56959 (9th Cir.). For the lower court decision being appealed, see 982 F. Supp. 2d 1088 (C.D. Cal. 2013).

consultation shall remain confidential.” Would that approach fall within the proper scope of this study?

- General Approach B-7 would attempt to revise the mediation confidentiality statutes to expressly address the use of mediation communications in a juvenile delinquency case. Would that approach fall within the proper scope of this study?
- General Approach D-6 would attempt to develop a mediator regulation system for California. Would that approach fall within the proper scope of this study?

It would be time-consuming to analyze each of the scope issues that might arise.

**Instead of providing such analysis now, we offer the follow general advice for the Commission to consider:**

- The Legislature assigned this study to the Commission in late 2012, in response to concerns presented in a pending bill. It is reasonable to expect that the Legislature would like the Commission to treat the study as a priority matter. In contrast, the Commission’s authority to study the Evidence Code (Item #7 in its Calendar of Topics) and its general authority to study alternative dispute resolution (Item #8 in its Calendar of Topics) are longstanding bases of authority, and the Legislature is not expecting any specific action pursuant to them at this time.
- As the Commission well knows, protection of mediation communications is a controversial topic. In general, the broader a legislative proposal, the more likely it is to generate opposition from some sector, and the less likely it is to be enacted and achieve any of the goals of the legislation.
- Oftentimes, in seeking to achieve a legislative objective, it is more effective to proceed incrementally than to try to take a single big leap.
- The Commission’s recommendation in the current study should be cohesive, fair, and sufficiently comprehensive to effectively address the topic assigned by the Legislature.
- In deciding whether to go afield from the topic the Legislature asked the Commission to address, some factors to consider are:
  - (1) How far afield is the idea in question?
  - (2) Is the idea in question potentially controversial? If so, to what extent?
  - (3) Is there a reason to go afield from the assigned topic? If so, how compelling is it?
  - (4) Would it make sense to deal with the idea in a separate study? In a separate phase within this study? In a separate tentative recommendation during the ongoing phase of this study?

The staff will provide more specific advice on the proper scope of this study as requested or otherwise needed as the study progresses.

Respectfully submitted,

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