

Memorandum 2015-35

**Relationship Between Mediation Confidentiality and Attorney Malpractice
and Other Misconduct: Scholarly Commentary**

In this study of the relationship between mediation confidentiality and attorney malpractice and other misconduct, the Legislature specifically directed the Commission¹ to consider certain matters, including “scholarly commentary.”² Throughout this study, the staff has often referred to relevant scholarly commentary.³ Most recently, Memorandum 2015-23 focused on the academic literature on the threshold issue of whether mediation communications warrant special protection.

This memorandum continues the Commission’s review of relevant scholarly commentary, examining views on the type and extent of protection needed, particularly with regard to the intersection of mediation with attorney malpractice and other misconduct. The memorandum supplements the previously presented material, without repeating it.

Given the Commission’s limited resources, the memorandum does not cover all topics potentially relevant to this study, and it does not delve deeply into every topic addressed. For instance, we have not incorporated the literature on mediator immunity⁴ or mediator regulation,⁵ nor have we described the full array of debates over aspects of the Uniform Mediation Act.⁶

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

3. See especially Memorandum 2015-5 (discussing empirical data).

4. See, e.g., Scott Hughes, *Mediator Immunity: The Misguided and Inequitable Shifting of Risk*, 83 Or. L. Rev. 107 (2004); Robyn Carroll, *Mediator Immunity in Australia*, 23 Sydney L. Rev. 185 (2001); see also Michael Moffitt, *Suing Mediators*, 83 B.U. L. Rev. 147 (2003); Michael Moffitt, *Ten Ways to Get Sued: A Guide for Mediators*, 8 Harv. Negot. L. Rev. 81 (2003).

5. See, e.g., Jack Goetz & Jennifer Kalfsbeek, *Serving the Public: The Case for Formally Professionalizing Court-Connected and Litigated-Case Mediation*, <http://www.mediationtools.com/articles/ARTProfessionalizingMediation.pdf>; Paula Young, *Take It or Leave It, Lump It or Grieve It: Designing*

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PREDICTABILITY OF PROTECTION

As discussed in Memorandum 2015-23, most, but not all, scholars with expertise in alternative dispute resolution (“ADR”) agree that mediation communications warrant special protection. The scholars have diverse views, however, regarding precisely how to structure such protection.

In writing on the subject, a number of scholars have emphasized the importance of providing a framework that enables mediation participants to predict whether their mediation communications will remain confidential. For example, Prof. Alan Kirtley (University of Washington School of Law) commented that “[c]ertainty of application is *a critically important characteristic* for mediation privilege provisions.”⁷ Similarly, Prof. Charles Ehrhardt (Florida State University College of Law) stressed the importance of permitting an advance determination of how the law would apply. In his view, the protection of a common law mediation privilege under Federal Rule of Evidence 501 “should not depend on the court’s balancing the need for the disclosure against [the]

Mediator Complaint Systems that Protect Mediators, Unhappy Parties, Attorneys, Courts, the Process, and the Field, 21 Ohio St. J. on Disp. Resol. 721 (2006).

6. See, e.g., Richard Reuben, *The Sound of Dust Settling: A Response to Criticisms of the UMA*, 2003 J. Disp. Resol. 99 (2003).

7. Alan Kirtley, *The Mediation Privilege’s Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, J. Disp. Resol. 1, 52 (1995) (emphasis added).

interest in confidentiality to determine whether the privilege is applicable.”⁸ He warned that “[m]aking confidentiality contingent upon a judge’s subsequent evaluation of the relative importance of the competing interests ‘would eviscerate the effectiveness of the privilege.’”⁹

Uncertainty about the extent of protection can arise not only if a privilege rule or statute fails to provide clear guidance, but also if courts and litigants fail to heed it. Some scholars have pointed out that the latter type of problem appears to exist with regard to mediation communications.

For example, Prof. Sarah Cole (Ohio State University) wrote:

Empirical evidence suggests that misuse of mediation communications is common. Moreover, much of the misuse is intentional. At the same time, courts rarely punish parties who misuse mediation communications. Not only do parties often fail to complain when confronted with misuse, but, even when parties raise the issue, courts typically ignore it. In the few cases where courts acknowledge inappropriate use of mediation communications, little or nothing is done to discourage the parties’ behavior. It is only in a small percentage of mediation communications misuse cases that a court imposes sanctions of any type, and when a sanction is imposed, it is typically a minor monetary penalty or other meager punishment.¹⁰

Prof. Cole relied on evidence gathered by Profs. James Coben and Peter Thompson (Hamline University School of Law), which the staff has previously summarized for the Commission.¹¹

In the same vein, Prof. Ellen Deason (University of Illinois College of Law) expressed concern about an “amazing number of opinions” in which the courts “seemingly do not recognize the problem of maintaining mediation confidentiality.”¹² As she explained, these courts “describe evidentiary hearings that probed mediation sessions and party submissions that revealed mediation details *without even mentioning* the effect on mediation confidentiality.”¹³

8. Charles Ehrhardt, *Confidentiality, Privilege and Rule 408: The Protection of Mediation Proceedings in Federal Court*, 60 La. L. Rev. 91, 121 (1999).

9. *Id.* at 121-22, quoting *Jaffee v. Redmond*, 518 U.S. 1, 17 (1996).

10. Sarah Rudolph Cole, *Secrecy and Transparency in Dispute Resolution, Protecting Confidentiality in Mediation: A Promise Unfulfilled?*, 54 Kan. L. Rev. 1419, 1421 (2006) (footnotes omitted).

11. See Memorandum 2015-5, pp. 11-14; see also *id.* at 14-15.

12. Ellen Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides With Confidentiality*, 35 U.C. Davis L. Rev. 33, 67 (2001) (hereafter, “Deason (2001, re contract law).”)

13. *Id.* (emphasis added); see also *id.* at 98.

In another article, Prof. Deason stressed the need for predictability with regard to mediation confidentiality. She echoed Prof. Ehrhardt's point about the importance of being able to determine *in advance* how the law will apply:

In mediation, as in other settings in which privileges encourage communications, protection for those communications must be predictable if confidentiality is to have its intended effect. To optimize communication among mediation participants and provide a foundation for their perception of the mediator's ... neutrality, the benefits of confidentiality must be effective *ex ante*, during the mediation process, and prior to any dispute over the scope of confidentiality. The positive influence of confidentiality is lost if, during the mediation, the parties and their lawyers do not have confidence in their ability to protect communications from future disclosure and in the system's protection for mediator and judicial neutrality.¹⁴

In her view, "[a]n adequate level of predictability requires, at a minimum, knowledge of the boundaries at which uncertainty begins for confidentiality."¹⁵

Prof. Deason went on to explain that due to jurisdictional variations in the rules for mediation communications, "there are so many variables involved in determining confidentiality protection that a high level of predictability is unrealistic."¹⁶ In her opinion, the "most effective way to foster predictability" would be to create "a system in which, wherever a suit is filed and whatever law is applied, the outcome for mediation confidentiality will be the same"¹⁷ In other words, she maintained that predictability "is best ensured with uniform laws of confidentiality across state lines."¹⁸ She also warned that predictability "must be improved if confidentiality is to create its intended benefits for the mediation process."¹⁹

14. Ellen Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability*, 85 Marquette L. Rev. 79, 84-85 (2001) (hereafter, "Deason (2001, re uniformity)" (footnotes omitted).

15. *Id.* at 85.

16. *Id.*; see also Ellen Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 Ohio St. J. on Disp. Resol. 239, 241 (2002) (hereafter, "Deason 2002") ("Currently, it is not an overstatement to say that no mediator or counsel in the country can, with confidence, predict the extent to which it will be possible to maintain the confidentiality of a mediation.").

17. Deason (2001, re uniformity), *supra* note 14, at 104.

18. Andrea Schneider, *Which Means to an End Under the Uniform Mediation Act?*, 85 Marq. L. Rev. 1, 4 (2001) (describing Prof. Deason's viewpoint).

19. Deason (2002), *supra* note 16, at 242; see also Deason (2001, re uniformity), *supra* note 14, at 102 ("While ... uncertainty about confidentiality has not previously inhibited the growth of mediation, that potential is growing.").

Prof. Deason thus urged states to adopt the Uniform Mediation Act (“UMA”), even though she felt “the UMA is not perfect.”²⁰ As she put it, states “need to avoid chauvinism and adopt the UMA, even if it means compromising specific positions, in order to help foster an overall climate conducive to mediation.”²¹

ABSOLUTE AS OPPOSED TO QUALIFIED PROTECTION

In Memorandum 2015-23, we explained that Prof. Eric Green (Boston University School of Law) and a few other scholars took the “heretical view” that a mediation privilege was neither necessary nor desirable. Among other things, Prof. Green argued that an absolute privilege would result in “tremendous harm” due to “the public perception that a mediation that takes place behind a curtain of confidentiality may produce unfair results.”²² He further argued that it would be extremely difficult and prohibitively dangerous to draft a less-than-absolute mediation privilege.²³

Unlike Prof. Green, most commentators believe that there should be a mediation privilege or some other special protection for mediation communications.²⁴ But they generally agree with Prof. Green that such protection should *not* be absolute.²⁵

According to a New York commentator, for example, Prof. Green was “quite right to argue that an absolute, or ‘blanket’ privilege is inappropriate.”²⁶ The commentator went on to discuss alternatives, including (1) “a flexible privilege

20. Deason (2001, re uniformity), *supra* note 14, at 104.

21. *Id.* at 111.

22. Eric Green, *A Heretical View of the Mediation Privilege*, 2 Ohio St. J. Disp. Resol. 1, 11 (1986).

23. *Id.* at 30.

24. See Memorandum 2015-23, pp. 6-9.

25. See, e.g., Reuben, *supra* note 6, at 114 (“the simple ‘mediation is confidential’ statutes found in some state statutes and court rules ... are seductive in their simplicity, [but] they are deceptive in that they raise more questions than they answer, promise much more than they deliver, and in the end contribute little to the reliability of mediation confidentiality.”); Ehrhardt, *supra* note 8, at 124 (“Just as exceptions are recognized in limited situations to the attorney-client and psychotherapist-patient privileges, exceptions should be recognized to a mediation privilege when social policy outweighs the need for the privilege.”); Kevin Gibson, *Confidentiality in Mediation: A Moral Reassessment*, 1991 J. Disp. Resol. 1, 2 (1992) (“[F]or mediation to be effective some degree of confidentiality may be required, but it is wrong to assume that mediation needs *absolute* confidentiality.”) (emphasis in original); Note, *Protecting Confidentiality in Mediation*, 98 Harv. L. Rev. 441, 452 (1984) (“Recent legislative enactments in several states have provided near-absolute protection for communications made in mediation, whether among the parties or with the mediator. Though this approach creates a straightforward rule suitable to an informal process, it is an overreaction to the shortcomings of evidentiary rules and contractual arrangements.”) (footnotes omitted).

26. Michael Perino, *Drafting Mediation Privileges: Lessons from the Civil Justice Reform Act*, 26 Seton Hall L. Rev. 1, 15 (1995).

that gives courts wide discretion to qualify the privilege on a case-by-case basis,” and (2) “a broad confidentiality rule with specific exceptions.”²⁷ He suggested combining those two approaches:

The better solution is to combine these two approaches. Such a provision will contain a broad rule of confidentiality that creates a presumption of confidentiality for mediation sessions. The rule will provide the court with specific exceptions to that confidential treatment. More importantly, the rule will create an appropriate balancing test that will allow the court sufficient discretion to address individual situations the drafters may not have contemplated without allowing the court too much room to alter the privilege scheme.²⁸

He admitted that the “likely result of such an approach is a complex rule or statute.”²⁹ In contrast to Prof. Green, he did not consider that an intractable problem:

The fact that some (or even most) mediation privileges are drafted poorly ... does not mean that all drafting attempts should cease. Rather, these poorly drafted privileges only demonstrate the need to draft confidentiality provisions more carefully.³⁰

Similarly, two members of the ABA Standing Committee on Dispute Resolution (Lawrence Freedman and Michael Prigoff) noted that mediation “thrives on confidentiality,”³¹ but “[c]onfidentiality in mediation is fundamentally at odds with a system of law favoring consideration of all relevant evidence.”³² They acknowledged that striking an appropriate balance between those factors would be difficult. Nonetheless, they considered it important to try:

A confidentiality provision can be crafted with appropriate exceptions and flexibility to mitigate the disutilities of a blanket privilege. Professor Green, among others, says it is difficult to draft a statute. We agree. However, this difficulty does not override the need for a privilege where mediation is so vital to the effective functioning of our dispute settlement system and confidentiality is so important to mediation.³³

27. *Id.* at 33, 34.

28. *Id.* at 34 (footnote omitted).

29. *Id.* at 35.

30. *Id.* at 16.

31. Lawrence Freedman & Michael Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 J. Disp. Resol. 37, 45 (1986).

32. *Id.* at 39.

33. *Id.* at 43.

Along the same lines, Prof. Deason stated that “mediation confidentiality is not (and should not be) absolute”³⁴ She explained:

[D]espite th[e] evidence that confidentiality in mediation is accepted wisdom, confidentiality is, and should be, controversial. It can hinder accurate decision making by excluding salient information. It can run counter to democratic principles of transparency and participation in public processes. In the context of mediation, confidentiality may conflict with other important values that are served by reporting certain mediation conduct or statements. To cite a few examples, disclosures may be important in preventing or punishing crime, attorney misconduct, or child abuse. *These competing values mean that the appropriate scope of confidentiality is not a matter of absolute protection or absolute disclosure. It is instead a matter of balance between protection and disclosure that requires difficult policy choices.*³⁵

Likewise, Prof. Sarah Cole (Ohio State University) emphasized the need for clearly drafted exceptions to a mediation confidentiality statute, instead of providing absolute protection.³⁶ According to her, “by drafting mediation privilege statutes that contain clear exceptions for certain common public policy concerns that arise in mediation, legislators could make it easier for courts to determine that parties intentionally misused mediation communications.”³⁷ As an example, she pointed to the UMA exception for mediator misconduct.³⁸ In her assessment, “[w]hen the legislature drafts clear guidance to courts regarding what is sanctionable behavior, the courts are better able, and, therefore, more willing, to impose sanctions for intentional misuse of communications.”³⁹

34. Deason (2002), *supra* note 16, at 240.

35. Ellen Deason, *Secrecy and Transparency in Dispute Resolution: The Need for Trust as a Justification for Confidentiality in Mediation: A Cross-Disciplinary Approach*, 54 Kan. L. Rev. 1387, 1388 (2006) (hereafter, “Deason (2006)”) (emphasis added, footnotes omitted); see also Deason (2001, re uniformity), *supra* note 14, at 85 (“Confidentiality not only runs counter to the general value we place on hearing all the evidence in our adversarial system of justice, but it also can impair specific goals important to society. As a result, confidentiality cannot be absolutely protected, and there will inevitably be some level of uncertainty about circumstances that may trigger the need for disclosure.”) (footnotes omitted).

36. Sarah Rudolph Cole, *Secrecy and Transparency in Dispute Resolution: Protecting Confidentiality in Mediation: A Promise Unfulfilled?*, 54 Kan. L. Rev. 1419, 1423, 1432, 1446-47, 1448-49, 1454 (2006).

37. *Id.* at 1423.

38. *Id.*

39. *Id.*

ALLEGED MISCONDUCT

Because this study is directed to “the relationship under current law between mediation confidentiality and attorney malpractice and other misconduct,”⁴⁰ it is important to consider what scholars have said about using mediation communications to prove or disprove alleged misconduct. We have already done so to some extent in other materials prepared for this study, but we discuss the topic more below, addressing the following issues in the order listed:

- Should there be any exception(s) to mediation confidentiality to facilitate resolution of professional misconduct claims? What about claims of misconduct by a party or other layperson?
- Should there be any exception(s) to mediation confidentiality to facilitate resolution of contract defenses (e.g., fraud, duress, mutual mistake, unconscionability) to enforcement of a mediated settlement agreement?
- Should there be an exception to mediation confidentiality to facilitate resolution of a claim that a party failed to participate in good faith in a court-ordered mediation?
- Should a provision protecting mediation communications be subject to any exceptions for communications relating to criminal conduct? To what extent should mediation communications be admissible or subject to disclosure in a criminal case?

Claim of Misconduct

What have scholars said about the intersection of mediation confidentiality and alleged misconduct? More specifically, do they think that mediation communications should be protected even when someone seeks such evidence to prove or disprove a misconduct claim? Or do they think there should be one or more exceptions to mediation confidentiality to address such a situation?

We look first at their views on this matter generally, focusing primarily on professional misconduct. We then examine their thoughts on the approaches taken in the UMA and in California.

General View

In Prof. Kirtley’s words, “[t]he mediation privilege should not provide a safe haven for participant wrongdoing or injustice.”⁴¹ Consistent with that sentiment, the academic community seems to generally agree that a mediation privilege or

40. 2012 Cal. Stat. res. ch. 108 (ACR 98 (Wagner)).

41. Kirtley, *supra* note 7, at 49.

other provision protecting mediation communications should be subject to one or more exceptions or limitations to facilitate resolution of misconduct claims.

In expressing these views, commentators sometimes speak of several different types of misconduct collectively, rather than differentiating between attorney misconduct, mediator misconduct, other types of professional misconduct, and misconduct by parties or other laypersons. It is not always clear whether the comments pertain only to misconduct during mediation, or are also meant to encompass the use of mediation communications to prove or disprove other misconduct.

However, except in a few contexts (such as alleged breach of oral settlement terms that were not reduced to writing, or alleged failure to participate in good faith in a court-ordered mediation), the comments typically point out the need for an exception or limitation relating to alleged misconduct. Scholarly commentary taking a contrary viewpoint (arguing against the need for such constraints on mediation confidentiality) appears to be scarce.⁴²

As early as 1984, for example, a student publication in *Harvard Law Review* spoke of the need for an exception that “guards against abuse of the mediation process.”⁴³ The author said that the provision should “allo[w] confidentiality to be pierced when a party brings suit alleging the breach of a duty owed by another party or the mediator in the course of mediation”⁴⁴ As the author explained, “all parties to mediation, successful and unsuccessful, have an interest in seeing that any legal duties owed them in the course of mediation are honored.”⁴⁵

Shortly thereafter, Messrs. Freedman and Prigoff wrote that “[e]xceptions mandating use of confidential information in actions against the mediator would assure redress against abuses of the process.”⁴⁶ Similarly, Prof. Kirtley later wrote that there should be an exception to facilitate proof of mediator misconduct:

42. For a publication arguing that the need for mediation confidentiality outweighs the policy interest in attorney accountability in resolving a clash between a mediation confidentiality rule and a professional responsibility rule requiring an attorney to report a fellow attorney’s misconduct, see Cletus Hess, Comment, *To Disclose or Not to Disclose: The Relationship Between Confidentiality in Mediation and the Model Rules of Professional Conduct*, 95 Dick. L. Rev. 601, 623-24 (1991).

43. Note, *Protecting Confidentiality in Mediation*, 98 Harv. L. Rev. 441, 452 (1984) (hereafter, “Harvard Note”).

44. *Id.*

45. *Id.*

46. Freedman & Prigoff, *supra* note 31, at 43.

A party claiming mediator misconduct must have access to mediation information and the mediator's testimony. A privilege that bars access to such information results in de facto immunity for malpracticing mediators. For that reason, and because the few claims of malpractice likely to arise will not greatly impact the operation of the privilege, *a clear-cut exception to the privilege for mediator malpractice is appropriate.*⁴⁷

Prof. Kirtley further noted that mediators "also need access to mediation information to defend themselves against claims and charges, and to bring suit against parties, usually to collect agreed upon fees."⁴⁸

At about the same time, Prof. Pamela Kentra (Chicago-Kent College of Law) examined the possibility that a mediation confidentiality rule could conflict with a professional responsibility rule that requires an attorney to report misconduct committed by a fellow attorney.⁴⁹ Such professional responsibility rules are common throughout the country,⁵⁰ but California has a self-reporting system instead.⁵¹ Prof. Kentra considered the conflict of duties "intolerable" and proposed that legislatures address it "by fashioning an exception to the principle of mediation confidentiality."⁵²

Prof. Kentra also praised a Minnesota statute protecting ADR communications, which included exceptions for (1) any statement or conduct that could give rise to a disqualification proceeding under the Rules of Professional Conduct for Attorneys, and (2) any statement or conduct that could constitute professional misconduct.⁵³ She urged other jurisdictions to follow the same approach, and she predicted that it would not significantly chill mediation discussions:

Jurisdictions could follow the lead of the Minnesota statute that contains a specific exception for reporting attorney misconduct. This would provide clear guidance for attorney-mediators and would give "fair warning" to attorney-advocates before entering the mediation session. *There should be no chilling effect for parties who wish to utilize the mediation process in a fair way. The only potential*

47. Kirtley, *supra* note 7 (emphasis added, footnotes omitted).

48. *Id.*

49. Pamela Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 B.Y.U. L. Rev. 715 (1997).

50. See *id.*

51. See Bus. & Prof. Code § 6068(o).

52. Kentra, *supra* note 49, at 717-18. An earlier, student-written publication proposed an amendment of the reporting requirement instead. See Hess, *supra* note 42, at 623-24.

53. *Id.* at 751.

chilling effect would be for attorneys who are attempting to abuse the mediation process. This approach would allow each jurisdiction to think through its policies and arrive at an informed decision that the need for reporting attorney misconduct trumps the need for confidentiality of the mediation sessions.

Although mediation confidentiality is extremely important, the duty to report attorney misconduct should eclipse mediation confidentiality. Attorney misconduct should not take place in the normal course of a mediation session. When it does, there is a good chance an attorney-advocate is using the mediation session to cloak his or her misconduct in confidentiality or to attempt to settle a matter relating to his misconduct in a confidential manner. Attorneys should not be allowed to abuse the system in this way. As such, mediation confidentiality statutes, local rules, and mediation program rules should contain an exception for reporting attorney misconduct.

The real parties in interest to a mediation session are the people involved in the conflict, not the attorneys. It is those people, the clients, for whom mediation was designed to empower through the concept of self-determination. As such, they should be the ones we are concerned about protecting when we design an effective confidentiality standard with appropriate exceptions. *Most mediation parties would not steer away from the mediation process when they learn confidentiality could be breached if the mediator learns of attorney misconduct. Most clients presumably desire misconduct on the part of their attorney to be reported.*⁵⁴

Her comments about chilling of mediation discussions appear to assume that disclosures relating to attorney misconduct will only involve communications between a client and the client's attorney, not communications of other mediation participants.

A couple of years later, Prof. Ehrhardt stressed the need for a mediation confidentiality exception covering both attorney misconduct and mediator misconduct. He noted that "the lawyers representing the parties to mediation as well as the mediators may be liable for certain inappropriate actions which occur during the mediation."⁵⁵ In his view, "[t]he party instituting such an action should not be able to assert the privilege to bar the defendant from testifying; nor should the defendant be able to assert the privilege to bar the plaintiff from proving the misconduct."⁵⁶ He further stated:

[I]f the mediator observes misconduct of the attorneys or the attorneys observe misconduct of the mediator, a strong argument

54. *Id.* at 753-54 (emphasis added).

55. Ehrhardt, *supra* note 8, at 123.

56. *Id.* (footnote omitted).

exists that the privilege should not extend to prohibit testimony concerning misconduct. If an ethics complaint is filed against an attorney or the mediator arising out of the mediation, a mediation privilege should not prohibit the attorney or mediator from testifying to what occurred during the mediation.⁵⁷

The commentary described above all predates the approval of the UMA in 2001. Later commentary is similar in tenor, but tends to focus on the UMA provisions, the California approach, or the laws of other jurisdictions. We have already described some of that commentary in reviewing the UMA and the laws of other jurisdictions.⁵⁸ We discuss additional commentary below, starting with views on the UMA provisions relating to professional misconduct.

Views on the UMA Approach to Allegations of Professional Misconduct

The academic community was extensively involved in drafting the UMA.⁵⁹ In fact, the reporters for the UMA were Prof. Nancy Rogers (Ohio State University, Michael E. Moritz College of Law) and Prof. Richard Reuben (University of Missouri — Columbia School of Law), and the drafting committee included several other law professors, perhaps most notably Prof. Frank Sander (Harvard University Law School).

As one might expect, the academic community did not, and does not, speak with one voice regarding the UMA. For example, Prof. Scott Hughes (University of New Mexico School of Law) was highly critical of the UMA, maintaining that it “demonstrate[s] favoritism for mediators and may result in damage to the integrity of the process.”⁶⁰ Similarly, Prof. Brian Shannon (Texas Tech University School of Law) concluded for various reasons that the Texas ADR Act “is vastly superior to the pending draft of the UMA.”⁶¹ For the most part, however, academic debate has concentrated on details of the UMA, and there appears to be fairly widespread, if a bit grudging, support of the general concept.⁶²

57. *Id.* at 123 n. 145.

58. See, e.g., Memorandum 2014-43, pp. 11-17.

59. See, e.g., Schneider, *supra* note 18, at 1 (“[t]he drafting committees ... benefited from numerous scholars assisting the process”).

60. Scott Hughes, *The Uniform Mediation Act: To the Spoiled Go the Privileges*, 85 Marq. L. Rev. 9, 77 (2001) (hereafter, “Hughes (2001)”).

61. Brian Shannon, *Confidentiality of Texas Mediations: Ruminations on Some Thorny Problems*, 32 Tex. Tech. L. Rev. 77, 109 (2000).

62. See, e.g., Maureen Laflin, *The Mediator as Fugu Chef: Preserving Protections Without Poisoning the Process*, 49 S. Tex. L. Rev. 943, 983 (2008) (“The UMA, the product of five years of research and debate, is a major step forward for the mediation community.”); Eric van Ginkel, *Another Look at Mediation Confidentiality: Does It Serve Its Intended Purpose*, 32 Alternatives to the High Cost of Litig. 119, 121 (2014) (hereafter, “van Ginkel (2014)”) (“The UMA Is Very Good, But Not Perfect”);

With regard to the UMA provisions relating to professional misconduct, the Commission may recall that there are two such provisions, one relating to mediator misconduct and one relating to other types of professional misconduct:

6. (a) There is no privilege under Section 4 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;

(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)

Under these provisions, a court may compel a mediator to testify in connection with a misconduct claim against the mediator, but may not compel a mediator to testify in connection with a professional misconduct claim against another mediation participant. The UMA Comment explains that this approach helps “to protect against frequent attempts to use the mediator as a tie-breaking witness, which would undermine the integrity of the mediation process and the impartiality of the individual mediator.”⁶³

Some scholars have questioned whether the UMA provision on professional misconduct should provide special treatment to mediator testimony, as opposed to compelling the mediator to testify just like any other witness.⁶⁴ There was also debate during the UMA drafting process about whether the mediator misconduct and professional misconduct provisions should be subject to the “gateway test” used for some of the other UMA exceptions⁶⁵ — i.e., the rule that

Phyllis Bernard, *Reply: Only Nixon Could Go to China: Third Thoughts on the Uniform Mediation Act*, 85 Marq. L. Rev. 113, 145 (2001) (“Despite long-standing apprehensions, this author was able to lend tentative support to the UMA, a sign of hope for the future.”); see also Reuben, *supra* note 6, at 100 (UMA has support of “many if not most leading dispute scholars”).

63. UMA § 6(c) Comment.

64. Compare Rebecca Hiers, *Navigating Mediation’s Uncharted Waters*, 57 Rutgers L. Rev. 531 (2005) (noting that UMA includes exception allowing person to report attorney misconduct, but its language “is, unfortunately, somewhat convoluted”; it “apparently would allow parties, attorneys and non-party participants both to report and to testify regarding professional misconduct, but would exempt mediators from being compelled to testify in such a case.”) with van Ginkel (2014), *supra* note 62, at 122 (“I am in favor of retaining the exclusion of mediator testimony in cases alleging malpractice”).

65. See, e.g., Hughes (2001), *supra* note 60, at 43 (describing back and forth that occurred in UMA drafting process).

mediation evidence may be used only if a court finds, after an *in camera* hearing, 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 a specified type of proceeding.”⁶⁶ In the end, the UMA drafters determined that such a “gateway test” was not necessary for mediator and professional misconduct, as well as certain other exceptions, because those exceptions represented “situations in which the justice system’s need for the evidence may be said to categorically outweigh its interest in the confidentiality of mediation communications such that it would be either unnecessary or impractical for the parties, and administratively inefficient for the court system to hold a full evidentiary hearing on the applicability of the exception.”⁶⁷ Put differently, the drafters determined that “in these narrow circumstances, society’s interest in the information clearly outweighs its interest in barring the admissibility of mediation communications evidence, and if applicable, should not require an additional judicial determination before the mediation communication may be received into evidence.”⁶⁸

In addition, there was extensive debate over whether the UMA should include a catchall provision that would give courts flexibility to order disclosure of mediation communications in situations the UMA drafters did not anticipate (e.g., a provision allowing use of mediation communications when necessary to prevent “manifest injustice”).⁶⁹ The mediation community vigorously opposed that concept and eventually prevailed on the point.⁷⁰ But Prof. Maureen Weston (Pepperdine University School of Law) later wrote an article in which she contended that the UMA’s misconduct provisions are not enough; some type of broader exception is necessary to adequately ensure that courts can properly control judicial proceedings.⁷¹

66. See UMA § 6(b).

67. Reuben, *supra* note 6, at 121.

68. *Id.* at 122.

69. See *id.* at 113.

70. *Id.*

71. Maureen Weston, *Confidentiality’s Constitutionality: The Incursion on Judicial Powers to Regulate Party Conduct in Court-Connected Mediation*, 8 Harv. Negotiation L. Rev. 29, 52 (2003) (“The UMA’s approach in establishing a mediation privilege while enumerating certain exceptions reflects a thoughtful a priori weighing of competing policies between confidentiality and the need for disclosure. However, a statute cannot anticipate all circumstances where a court might determine that disclosure is essential to vindicate a court’s powers and the integrity of the judicial system.”) (footnote omitted); see also *id.* at 76-77 (states should amend mediation

Although legal scholars have expressed differences of opinion on details such as the ones described above, they seem to widely agree with the UMA's inclusion of exceptions for mediator misconduct and professional misconduct.⁷² A couple years after the UMA was approved, for example, one of the UMA reporters wrote that "the list of UMA privilege exceptions have been substantially uncontroversial."⁷³

Views on California's Approach to Allegations of Professional Misconduct

Unlike the UMA, California's main statute on mediation confidentiality (Evidence Code Sections 1115-1128) does not have an exception for attorney misconduct, mediator misconduct, or professional misconduct generally. Rather, mediation communications, including private attorney-client communications, are "confidential, and therefore ... neither discoverable nor admissible — even for purposes of proving a claim of legal malpractice — insofar as they [are] 'for the purpose of, in the course of, or pursuant to, a mediation ...'"⁷⁴ The statute is, however, subject to another limitation: Its protection against admissibility or disclosure of a mediation communication applies only in an "arbitration, administrative adjudication, civil action, or other *noncriminal* proceeding."⁷⁵ The statute does not provide such protection if mediation evidence is sought in a criminal case;⁷⁶ it differs from the UMA in this respect.⁷⁷

confidentiality statutes to include not only UMA exceptions but also additional provision to help protect integrity of judicial process).

72. See, e.g., van Ginkel (2014), *supra* note 62, at 122 (approvingly noting that UMA drafters "realized that the need for confidentiality does not apply to situations where either an attorney or the mediator himself is accused of malpractice"); Cole, *supra* note 10, at 1449 (urging jurisdictions to draft "clear statute that provides exceptions to mediation confidentiality for important public policy reasons," and referring to UMA as good example because its exceptions "are particularly helpful to courts charged with disciplining attorneys and parties who misuse mediation communications."); Hiers, *supra* note 64, at 578 (encouraging lawmakers to address misconduct more directly: "Proactive jurisdictions may choose to address specific types of issues, such as ... explicitly permitting disclosure of professional misconduct."); John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 U.C.L.A. L. Rev. 69, 139 (2002) (observing that UMA exception for professional misconduct serves as "[a]nother protection against misrepresentations" in mediation).

73. Reuben, *supra* note 6, at 121.

74. Cassel v. Superior Court, 51 Cal. 4th 113, 138, 244 P.3d 1080, 119 Cal. Rptr. 3d 437 (2011), quoting Evid. Code § 1119.

75. Evid. Code § 1119(a)-(b) (emphasis added).

76. In Cassel, for example, the Court said:

[B]y their plain terms, section 1119, subdivisions (a) and (b), protect mediation-related communications from disclosure and admissibility only in "arbitration[s], administrative adjudication[s], civil action[s] [and] other *noncriminal* proceeding[s]" Thus, we note, these statutes would afford no protection to an attorney who is *criminally prosecuted* for fraud on the basis of mediation-related oral communications.

Consistent with their generally favorable view of the UMA's approach to professional misconduct, scholars have been critical of California's very different approach. For example, Prof. Cole wrote in 2006 that California's mediation confidentiality statute is "virtually absolute"⁷⁸ and "California decisions demonstrate the problem of going too far with a prohibition on use of mediation communications."⁷⁹ She described *Olam v. Congress Mortgage Co.*⁸⁰ and *Abrams v. Dromy*,⁸¹ in which courts admitted evidence of mediation communications to resolve allegations of misconduct despite the strong language in California's statute.⁸² From such cases, she concluded that while California "may have found a method for successfully discouraging misuse of mediation communications, unfortunately they have created a much bigger problem — appellate and federal court mutiny in the face of an evidence code that simply protects too much."⁸³ She suggested that if a state wants stronger protection for mediation communications than the UMA, "adopting an in camera hearing format to determine whether the party introduced the communications in good faith and whether there is a legitimate reason for admitting the evidence (using a version of the UMA's manifest injustice standard) would seem a better solution than following the California approach."⁸⁴ According to her, if a jurisdiction followed that approach, "clarifying what are and are not proper uses of mediation communications could be accomplished on a case by case basis."⁸⁵

The staff has concerns about Prof. Cole's analysis:

- Some of her analysis seems to be based on misconceptions about the history and nature of mediation confidentiality in California.⁸⁶

Cassel, 51 Cal. 4th at 135 n.11, quoting Evid. Code § 1119 (emphasis in *Cassel*).

77. The UMA protects mediation evidence in some criminal cases under specified circumstances See UMA §§ 4, 6(b)(1) & Comments.

78. Cole, *supra* note 10, at 1447.

79. *Id.* at 1456.

80. 68 F. Supp. 2d 1110 (N.D. Cal. 1999).

81. 2004 Cal. Unpu. LEXIS 6461 (2004).

82. Cole, *supra* note 10, at 1446-47, 1455-56.

83. *Id.* at 1455.

84. *Id.* at 1456.

85. *Id.*

86. Prof. Cole wrote:

[F]or some states, creation of an absolute mediation privilege for mediation communications is a preferable policy choice. In 2002, for example, California enacted a very broad mediation privilege statute shortly before the UMA was finalized. Because California was aware of the UMA and nevertheless went forward with its own statute, providing almost no exceptions to mediation confidentiality, it is unlikely that California's legislature will alter its evidence code to conform with the UMA any time soon.

- The prediction of a “court mutiny” in California has not been borne out; that possibility has been largely foreclosed by decisions of the California Supreme Court.⁸⁷
- The case-by-case approach that she proposes could significantly undermine predictability.⁸⁸

But other commentators have reached similar conclusions about California law.

For example, Prof. Nancy Welsh (Penn State University, Dickinson School of Law) discussed *Cassel* in a 2011 article, emphasizing that the claims made in the case “represent only allegations”⁸⁹ but nonetheless finding them “both worrisome and plausible.”⁹⁰ She voiced concern about the “extreme position”⁹¹ that California has taken with regard to mediation confidentiality, cautioning that “there can be wisdom in old sayings, and some of those sayings include: ‘there can be too much of a good thing;’ ‘moderation is the key;’ ‘where there’s smoke, there’s fire;’ and ‘if it’s too good to be true, it probably isn’t.’”⁹²

She thus considers it “indisputable that mediation is sometimes being used inappropriately; to shield lawyers from potential claims of malpractice; to force parties to settle when they would rather go to trial”⁹³ To protect mediation as an institution, she cautioned that “we must embrace the wisdom of checks and balances and help establish effective counterbalances to discourage the use of mediation for harm rather than help.”⁹⁴

Id. at 1454 (footnote omitted). In fact, however, California first enacted a mediation confidentiality statute in 1985, and enacted its current statute (which continues many aspects of prior law) in 1997, before the UMA was drafted. The current statute is not absolute; its restrictions on admissibility and disclosure apply only in a noncriminal case (see *supra* note 76 & accompanying text) and it is also subject to other exceptions and limitations (see Memorandum 2014-14, pp. 8-9, for a list of some of them).

Prof. Cole also said that Florida was the only state that had codified sanctions for misuse of mediation communications. Cole, *supra* note 10, at 1440. California does not have a statute similar to Florida’s, but Evidence Code Section 1128 specifies that “[a]ny reference to a mediation during any subsequent trial is an irregularity in the proceedings of the trial for purposes of Section 657 of the Code of Civil Procedure.”

87. See *Cassel*, 51 Cal. 4th 113; *Simmons v. Ghaderi*, 44 Cal. 4th 570, 187 P.3d 934, 80 Cal. Rptr. 3d 83 (2008); *Fair v. Bakhtiari*, 40 Cal. 4th 189, 147 P.3d 653, 51 Cal. Rptr. 3d 871 (2006); *Rojas v. Superior Court*, 33 Cal. 4th 407, 93 P.3d 260, 15 Cal. Rptr. 3d 643 (2004); *Foxgate Homeowners’ Ass’n, Inc. v. Bramalea California, Inc.*, 26 Cal. 4th 1, 25 P.3d 1117, 128 Cal. Rptr. 2d 642 (2001).

88. See discussion of “Predictability of Protection” *supra*.

89. Nancy Welsh, *Musings on Mediation, Kleenex, and (Smudged) White Hats*, 33 U. La Verne L. Rev. 5, 17 (2011) (hereafter, “Welsh (2011)”).

90. *Id.* at 15.

91. *Id.* at 17.

92. *Id.* at 18.

93. *Id.*

94. *Id.* at 21-22.

In particular, Prof. Welsh urged the mediation community to help promote the passage of corrective legislation, such as the UMA:

[I]t is time to follow the lead of courts like the California Supreme Court and invite the introduction and passage of legislation that realistically narrows the reach of the mediation privilege, mediation confidentiality, or exclusionary rules. We need to make confidentiality's protection of mediation communications less vulnerable to inappropriate and unintended manipulation. The drafters of the Uniform Mediation Act grappled with this issue. Their solutions were not always pretty or succinct, but they were pragmatic.⁹⁵

She also encouraged the mediation community to voluntarily follow an approach like the UMA, without waiting for legislative reforms or other solutions from other sources:

[W]e mediation proponents should stop looking only to others — the courts, legislatures, executives, administrative agencies — for our solutions. ... We can, and should, recognize our own power and use our hard-won personal legitimacy to force appropriate protection of the mediation process. Good mediators do not want or intend to have legal malpractice claims arising out of their mediation sessions. Good mediators do not want or intend to shield lawyers who understand mediation's primary advantages as a protected forum in which to provide inadequate legal counseling or one that effectively discourages clients from seeking lawful access to their courts.

... In his [*Cassel*] dissent, ... Justice Chin proposed that California's relevant statutes should be amended 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" Rather than waiting for legislators in California or other non-UMA states to heed Justice Chin's words, we mediation proponents could use and improve upon this language to incorporate its objectives into our agreements to mediate. We mediation proponents could even lead by example by including in our agreements to mediate that such mediation communications may also be used in actions against mediators.⁹⁶

Other scholars have echoed Prof. Welsh's concern about California's approach to the intersection of mediation confidentiality and professional misconduct. Recently, for example, Prof. van Ginkel said that people "can criticize the drafters of the UMA for not going far enough with the exceptions it

95. *Id.* at 22 (footnotes omitted).

96. *Id.* at 22-23 (footnotes omitted).

provides, but compared to the California statute *we are approaching Nirvana.*⁹⁷ He praised the UMA drafters for “realiz[ing] that the need for confidentiality does not apply to situations where either an attorney or the mediator himself is accused of malpractice”⁹⁸ He also noted that the UMA exception for professional misconduct “would have protected Mr. Cassel’s situation had California adopted the UMA, as he could have used the available evidence in his malpractice suit against his attorneys”⁹⁹

Contract Defense or Other Challenge to a Mediated Settlement Agreement

The issue of whether to create a mediation confidentiality exception to facilitate resolution of a misconduct claim (e.g., a legal malpractice claim or a State Bar disciplinary proceeding) is distinct from, but closely related to, the issue of whether to create a mediation confidentiality exception when a party seeks rescission or reformation of, or asserts a traditional contract defense such as fraud or duress to, a mediated settlement agreement. The first type of exception (discussed in the preceding section of this memorandum) would allow a person to seek redress for misconduct, without undoing any settlement that participants may have reached in mediation. The second type of exception would allow an attack on a mediated settlement agreement; it might disrupt the finality of the mediation result.

There is considerable scholarly support for creating the second type of exception, but it is “more controversial” than the first type.¹⁰⁰ We discuss some of that literature below, starting with relatively early publications and then turning to more recent comments on the UMA and California law.

Early Views on Raising Contract Defenses to a Mediated Settlement Agreement

The previously mentioned 1984 publication in *Harvard Law Review* says that “confidentiality must yield to a demonstrable need for parol evidence when one of the parties to a mediation agreement sues to enforce or rescind that agreement.”¹⁰¹ The author explained:

Recent statutes ... in general grant blanket protection to all communications made in mediation.

....

97. van Ginkel (2014), *supra* note 62, at 121 (emphasis added).

98. *Id.* at 122.

99. *Id.*

100. Hughes (2001), *supra* note 60, at 38-39; see also Reuben, *supra* note 6, at 121-22.

101. Harvard Note, *supra* note 43, at 452.

The failure to provide for the use of parol evidence when necessary to a suit to rescind or enforce an agreement reached in mediation is the greatest defect in the new statutes. *By treating mediated contracts differently from other settlement agreements, the statutes undermine parties' legitimate interests both in realizing the fruits of mediation and in protecting themselves from fraud, duress, and mistake.* As a result, the new statutes may detract from the very climate of truthfulness that confidentiality should foster. Although confidentiality is crucial to preserving the position of parties that have failed to reach an agreement, *parties that have reached agreement should not be forced to purchase free discussion at the cost of waiving traditional contract law protection against unfairness.*¹⁰²

Similarly, a decade later Prof. Kirtley said that most people “would agree that mediation settlements tainted by fraud, obtained through duress or deemed unconscionable *should not be enforceable.*”¹⁰³ He pointed out, however, that “relatively few mediation privilege statutes address these issues.”¹⁰⁴ He speculated that this “deviation from what might be expected” might be due to a “conclusion that fraud, duress, and unconscionability are present in few mediations,” and might also reflect concern that “exceptions dealing with those ills will open the mediation privilege to widespread misuse by parties suffering from ‘bargainer’s remorse.’”¹⁰⁵

He noted, for example, that a fraud exception “could be cited by those unwilling to abide by their mediation agreements, whether justified or not.”¹⁰⁶ He suggested dealing with this situation by requiring a mediation participant to “seek *a priori* approval from the judge to present mediation information.”¹⁰⁷ He envisioned that “[b]y hearing the competing claims *in camera*, the court could preserve confidentiality unless disclosure was held to be necessary and appropriate.”¹⁰⁸ He further advised that because “the parties will be able to present evidence related to fraud, duress or unconscionability, *mediators should not be compelled to testify as the ‘tie-breaking’ witness.*”¹⁰⁹

102. *Id.* at 452-53 (emphasis added, footnotes omitted).

103. Kirtley, *supra* note 7, at 51 (emphasis added, footnote omitted).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 51-52.

109. *Id.* at 52 (emphasis added).

The UMA Approach and Scholarly Views on It

The UMA, finalized in 2001, contains an exception to the mediation privilege for evidence proffered in connection with a challenge to a mediated settlement agreement. Specifically, UMA Section 6 provides in pertinent part:

(b) There is no privilege under Section 4 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 ... (b)(2).

This UMA exception thus has both of the features Prof. Kirtley suggested: (1) an *in camera* screening test for admissibility of mediation communications and (2) a provision protecting mediators from being compelled to testify pursuant to the exception.

In an article published the same year that the Uniform Law Commission approved the UMA, Prof. Hughes sharply criticized those aspects of the UMA Section 6(b) exception. He characterized the screening test as a “nearly insurmountable hurdle[e],” and warned that it sets “an artificially high and totally inappropriate standard which arguably abrogates common law contractual defenses.”¹¹⁰ He concluded that “although a procedural step prior to accessing testimony (such as an *in camera* hearing or sealed proceedings) is appropriate, *no substantive hurdles* should hinder access to normal common law contract remedies or impair self-determination.”¹¹¹

Prof. Hughes also maintained that “when challenges arise to an agreement reached in mediation, the mediator should be treated like all other mediation participants — he or she should be required to testify.”¹¹² Among other arguments in support of that point, he noted that mediator testimony is required under the UMA exception for a mediator misconduct claim (UMA Section 6(a)(5)). He presumed that an astute lawyer challenging a mediated settlement

110. Hughes (2001), *supra* note 60, at 43; see also *id.* at 38-63.

111. *Id.* at 77 (emphasis added).

112. *Id.*

agreement would sue the mediator as well, so as to get around Section 6(b)'s prohibition on mediator testimony.¹¹³ In other words, he predicted that the prohibition designed to protect mediator neutrality could ironically encourage suits that might lead to mediator testimony and thus threaten such neutrality.

In an article published at about the same time, Prof. Deason took a different position than Prof. Hughes. She agreed with him that a mediator should not automatically be excused from testifying when a party raises a contract defense to a mediated settlement agreement.¹¹⁴ She disagreed, however, with his view on screening evidence proffered in that situation. In her view, a “more complex solution than a bright-line rule is needed when a party challenges the validity of a mediated settlement.”¹¹⁵ She said that a “solution is needed that can take into consideration both the seriousness of the contract defense claim and the invasiveness of the threat to mediation confidentiality.”¹¹⁶ She explained:

A blanket rule — either permitting parties to raise contract defenses without restriction or prohibiting them from ever raising them — is an inadequate response to these circumstances. Both types of rules create incentives that are inconsistent with the goals of mediation. In jurisdictions with a rule that mediation confidentiality must always give way when settlement enforcement is at issue, the incentives are similar to those likely to arise in jurisdictions that do not protect confidentiality adequately as an initial matter. Parties will know that any claim of duress, no matter how weak, can throw the mediation open to scrutiny. Once they see this happen a few times, it is likely to undermine parties' confidence in confidentiality and diminish their willingness to be forthcoming in mediation.

There are equally serious problems with the opposite approach favoring absolute confidentiality. A party who actually is a rare victim of duress may have no means to prove this if all testimony concerning the mediation is precluded. Unless the fraud or coercion occurred outside the mediation process, a strict rule of confidentiality would thwart any attempt to challenge the validity of the agreement. In this context, other mediation values compete

113. *Id.* at 66.

114. Deason (2001, re contract law), *supra* note 12, at 91.

115. *Id.* at 89.

With regard to the *existence*, as opposed to the *validity*, of a mediated settlement agreement, Prof. Deason concluded that “mediation confidentiality should be protected with a ‘bright-line requirement for written and signed agreements that would preclude parties from exposing mediation communications to prove a settlement.” *Id.* at 42; see also *id.* at 73-87. The UMA follows that approach. See UMA § 6(a)(1) & Comment. California law is similar, but it permits mediation parties to memorialize an agreement either in writing or through an audio recording that complies with specified requirements. See Evid. Code §§ 1118, 1123, 1124 & Comments.

116. Deason (2001, re contract law), *supra* note 12, at 89.

with confidentiality. Mediation would no longer be a consensual process if a party could be tricked or forced into an agreement and have no recourse. In light of the potential consequences for the mediation process, precluding all exceptions to confidentiality is an untenable, as well as an impractical, solution.¹¹⁷

Prof. Deason further suggested that courts should implement such a balancing approach through “in camera methods, which can protect confidentiality while a court evaluates the need for mediation confidentiality in the world of contract doctrine.”¹¹⁸ She also urged that “the balancing process should be nuanced enough to consider the special problems created by mediator testimony.”¹¹⁹ Except with respect to the treatment of mediator testimony, she considered her recommendations to be “consistent with the approach of the Uniform Mediation Act.”¹²⁰

The California Approach and Scholarly Views on It

In contrast to the UMA, California’s main mediation confidentiality statute does not contain an exception for evidence proffered in connection with a challenge to a mediated settlement agreement.¹²¹ That means that parties cannot use mediation communications to challenge the enforcement of a mediated settlement agreement on the basis of traditional contract defenses such as fraud, duress, or unconscionability. They must rely solely on other evidence, which might in some instances hinder or even prevent them from proving legitimate claims.

The theory underlying the California approach is that mediation participants can protect themselves against fraud by ensuring that a mediated settlement agreement incorporates any representations they are relying upon in agreeing to its terms (e.g., an opponent’s assertion that he is bankrupt). Similarly, if a mediation participant is feeling unduly pressured at a mediation, or considers proposed settlement terms outrageous, the participant can leave the mediation without settling. If there are instances in which a mediation participant is victimized despite such means of protection, the theory goes, that is an unfortunate but acceptable price for obtaining the benefits of mediation confidentiality (including assurance against “buyer’s remorse”).

117. *Id.* at 89-90 (footnotes omitted).

118. *Id.* at 102.

119. *Id.* at 91.

120. *Id.* at 42; see also *id.* at 73, 91.

121. See Evid. Code §§ 1115-1128.

In an article published a couple of years after the UMA was finalized, Prof. Peter Robinson (Pepperdine University School of Law) reached essentially the same conclusion as Prof. Deason: He urged that the UMA exception for challenging a mediated settlement agreement (UMA Section 6(b)) “should be adopted, but should also authorize mediator testimony.”¹²² Much of his article describes and criticizes the alternative California approach.¹²³

In particular, he described an assortment of cases from across the country in which a party challenged a mediated settlement agreement on one ground or another.¹²⁴ He then contrasted how such cases “would be approached in two instances: the first is an unfettered application of contract law; the second is if the contested agreement had been created with the assistance of a mediator in a jurisdiction with strict confidentiality like California.”¹²⁵ In particular, he noted that the California approach could deprive a court of key information in considering a challenge to a mediated settlement agreement:

The discussions and negotiations in formulating the contract are frequently integral to a contract law analysis. The essentialness or materiality of a term could depend on whether that term had been discussed during the negotiations. The determination of duress or coercion requires evidence of the allegedly intimidating statements and behaviors and their impact on the coerced party. Whether a mistake was unilateral (relief generally not provided) or mutual (the agreement is voidable) could be decided by, among other things, whether the alleged mistaken term was discussed in the negotiations. Fraud can only be established by examining the alleged misrepresentation in a negotiation, the state of mind of the person making the representation, and the reasonableness of the reliance. Contracts against public policy, such as waiver of paternal rights without due process, require an examination of the disclosures and states of mind in the negotiations. Upon finding that a contractual term is ambiguous, the meaning is determined by determining the parties’ intentions at the time of contract formation.

For agreements created in mediations, the discussions and negotiations formulating the agreement are likely to bear on the above types of issues and will almost certainly have occurred in the mediation.¹²⁶

122. Peter Robinson, *Centuries of Contract Common Law Can't Be All Wrong: Why the UMA's Exception to Mediation Confidentiality in Enforcement Proceedings Should be Embraced and Broadened*, 2003 J. Disp. Resol. 135, 173 (2003).

123. See *id.* at 137-68.

124. See *id.* at 143-48.

125. *Id.* at 148; see also *id.* at 148-68.

126. *Id.* at 159-60 (footnotes omitted).

He observed that “[w]hen a party is not permitted to disclose what happened in a mediation, he will be hard pressed to prove an alleged defect in the making or implementation of a mediated agreement.”¹²⁷

He thus concluded that “[b]y depriving courts of the information necessary to employ a standard contract law analysis, strict mediation confidentiality has the effect of transforming the mediated agreement into a ‘super contract,’”¹²⁸ which leads to “absurd enforcement results.”¹²⁹ He warned that such “super contracts” have serious ramifications:

Strict mediation confidentiality essentially deprives mediation participants of many of the protections embodied in contract law principles.

Where protections are absent, *abuses could flourish*. While mediation confidentiality protects and empowers participants in their moment of apprehension, it also makes parties vulnerable to the unscrupulous in enforcement proceedings. For example, an individual intending abusive negotiation strategies (like fraud or coercion) could insist on negotiating in a mediation and then cling to his right of confidentiality when enforcing the suspect agreement. Mediation of transactional agreements and estate planning processes could expand as a way to increase the durability of those agreements/legal documents. Again, the unscrupulous heir planning to exert undue influence in the making of a will might request the participation of a “mediator” so the content of the estate planning conversations would be shielded.

Finally, the competent drafting of a mediated agreement must be emphasized. As a super contract, many of the usual remedies for incomplete drafting will not be available. For example, there is no remedy for a scrivener’s \$600,000 error. Thus, mediation participants must employ a heightened degree of scrutiny when drafting and reviewing the mediated agreement in a strict mediation confidentiality jurisdiction.¹³⁰

While warning of such potential abuses, Prof. Robinson also said that “[m]ediation confidentiality’s interference with enforcement proceedings will be relatively rare because parties to a settlement agreement almost always voluntarily satisfy the terms of the settlement agreement.”¹³¹

127. *Id.* at 161.

128. *Id.*

129. *Id.* at 148.

130. *Id.* at 162-63 (emphasis added, footnotes omitted).

131. *Id.* at 142.

In two later articles, Prof. van Ginkel expressed his support for Prof. Robinson's analysis.¹³² In the more recent one, which he submitted to the Commission in connection with this study, he pointed out that UMA Section 6(b) "would have protected Mr. Cassel's situation had California adopted the UMA, as he could have used the available evidence ... and have challenged the settlement agreement."

Failure to Participate in a Court-Ordered Mediation in Good Faith

A special type of misconduct is failure to participate in a court-ordered mediation in "good faith." This concept may vary from jurisdiction to jurisdiction, and could take a variety of forms, some of which could also be classified as professional misconduct if committed by an attorney or other professional. For example, a mediation participant might fail to show up at a court-ordered mediation, show up late, show up without authority to settle despite a court order to do so, fail to bring along an insurance representative or expert as the court directed, dress disrespectfully for the mediation, make disrespectful comments during the mediation, prolong the mediation process solely for purposes of delaying trial or obtaining information for use at trial, or the like.

It is possible to prove some of these types of misconduct without using any mediation communications. For example, if a party failed to comply with a court order to attend a mediation with the party's expert, a court could impose sanctions based on that non-communicative conduct. There would not be any need to introduce the substance of mediation communications.¹³³

In other situations, however, evidence of mediation communications would be essential to prove an alleged failure to participate in good faith. For example, if a party made disrespectful comments during a mediation, that would be impossible to prove solely through non-communicative conduct.

Scholars have extensively debated the extent to which mediation communications should be admissible to prove an alleged failure to participate in a court-ordered mediation in good faith. Prof. Weston is one of the strongest advocates in favor of admissibility. In a 2003 article in *Harvard Negotiation Law Review*, she maintained that the question was of constitutional dimension,

132. See van Ginkel (2014), *supra* note 62, at 122; Eric van Ginkel, *Mediation under National Law: United States of America*, IBA Legal Prac. Div. Mediation Comm. Newsletter 43, 51 (Aug. 2005).

133. See *Foxgate Homeowners' Ass'n, Inc. v. Bramalea California, Inc.*, 26 Cal. 4th 1, 656 n.14, 25 P.3d 1117, 108 Cal. Rptr. 2d 642 (2001).

because “[s]trong statutory protection for mediation confidentiality threatens a court’s traditional power to monitor the litigation process and to sanction parties and attorneys when the offending conduct occurs in a court-connected mediation context.”¹³⁴ She explained that “separation of powers principles implicitly restrict enforcement of broad confidentiality statutes to the extent these provisions materially impair judicial power to sanction participant conduct in court-connected dispute resolution proceedings.”¹³⁵

Prof. Weston thus concluded that “confidentiality legislation is implicitly, *but should be expressly*, ‘qualified’ to accommodate the judicial power to enforce its orders and conduct its judicial duties.”¹³⁶ More specifically, as previously mentioned,¹³⁷ she believes that mediation confidentiality statutes should not only “incorporate the exceptions set forth in the UMA,” but should also include a provision that expressly permits use of mediation communications where necessary to ensure that courts can properly control judicial proceedings.¹³⁸

In contrast, Prof. John Lande (University of Missouri School of Law) argued strongly against weakening mediation confidentiality to permit enforcement of a good faith participation requirement.¹³⁹ In fact, he maintained that courts should not impose an imprecise good faith participation requirement; he suggested adoption of more clear-cut standards (e.g., a “Requirement of Mere Attendance for a Limited and Specified Time”) instead.¹⁴⁰ He summarized his concerns about a good faith requirement as follows:

A good-faith requirement in mediation is very troublesome. Although it may deter some inappropriate conduct, it also may stimulate even more. It risks undermining the interests of all the stakeholder groups of court-connected mediation, especially interests in the integrity of the mediation process and the courts.

... *Actively enforcing a good-faith requirement would subject all participants to uncertainty about the impartiality and confidentiality of the process and could heighten adversarial tensions and inappropriate pressures to settle cases. Although such a requirement could deter and punish truly egregious behavior in*

134. Weston, *supra* note 71, at 35.

135. *Id.* at 37.

136. *Id.*

137. See discussion of “Views on the UMA Approach to Allegations of Professional Misconduct” *supra*.

138. See Weston, *supra* note 71, at 76-77.

For another leading article expressing views similar to Prof. Weston’s, see Kimberlee Kovach, *Good Faith in Mediation — Requested, Recommended, or Required? A New Ethic*, 38 S. Tex. L. Rev. 575 (1997).

139. See Lande, *supra* note 72.

140. See *id.* at 132-35; see generally *id.* at 126-39.

what [a leading proponent] describes as a few cases, *it would do so at the expense of overall confidence in the system of mediation*. Barring evidence of a substantial number of problems of real bad faith (as opposed to loose litigation talk), *the large cost of a bad-faith sanctions regime is not worth the likely small amount of benefit*, especially considering the alternative policy options available.¹⁴¹

Prof. Weston is not alone in her viewpoint, and some commentators have taken intermediate positions.¹⁴² But the clear bulk of scholarly authority is more consistent with Prof. Lande's views; they reject the notion of reducing the protection for mediation communications so as to facilitate proof of bad faith conduct during mediation. As Prof. Cole put it:

Commentators debate the value of a requirement that parties mediate in good faith because proof that a party failed to mediate in good faith requires a court to inquire into the mediation process, arguably compromising the confidentiality of mediation communications. Moreover, such an inquiry may harm the mediator's reputation as a neutral third party if the good-faith requirement mandates that the mediator report whether or not a party has mediated in good faith. While many courts and legislatures continue to mandate good-faith participation in mediation, *most commentators and mediators would rather eliminate the requirement*.¹⁴³

California's approach, explained at length in the California Supreme Court's decision in *Foxgate Homeowners' Ass'n, Inc. v. Bramalea California, Inc.*,¹⁴⁴ is consistent with that majority perspective. For that reason, and because the resolution directing this study does not specifically require the Commission to examine the concept of failing to participate in a court-ordered mediation in "good faith," this memorandum does not further discuss that topic.

The staff could provide additional information on the topic if the Commission so requests. We are planning to discuss the proper scope of the Commission's study in another memorandum for the upcoming meeting (Memorandum 2015-34).

141. *Id.* at 139-40 (emphasis added, footnotes omitted). For another leading article expressing views similar to Prof. Lande's, see Michael Dickey, *ADR Gone Wild: Is It Time for a Federal Mediation Exclusionary Rule?*, 25 Ohio St. J. on Disp. Resol. 713 (2010).

142. See, e.g., Samara Zimmerman, *Judges Gone Wild: Why Breaking the Mediation Confidentiality Privilege for Acting in "Bad Faith" Should be Reevaluated in Court-Ordered Mandatory Mediation*, 11 Cardozo J. Conflict Resol. 353 (2009).

143. Cole, *supra* note 10, at 1444 n.119 (emphasis added, citations omitted).

144. 26 Cal. 4th 1, 656 n.14, 25 P.3d 1117, 108 Cal. Rptr. 2d 642 (2001).

Mediation Confidentiality and Criminal Conduct

Another distinct category of misconduct is criminal conduct. With regard to the intersection of mediation confidentiality and criminal conduct, it is important to recognize that there are two basic sets of issues:

- (1) Should a provision protecting mediation communications be subject to any exceptions or limitations for communications that relate to criminal conduct?
- (2) To what extent may a party use mediation communications in a criminal case?

Before considering what scholars have said about these points, it may be helpful to review how California law and the UMA address them. We start by describing California law, because it is simpler than the UMA in this regard.

California Law on the Intersection of Mediation Confidentiality and Criminal Conduct

Subdivision (a) of Evidence Code Section 1119 restricts the admissibility and disclosure of “evidence of *anything said or any admission made* for the purpose of, in the course of, or pursuant to, a mediation or mediation consultation.”¹⁴⁵ Subdivision (b) restricts the admissibility and disclosure of any “*writing ... that is prepared* for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation.”¹⁴⁶

The wording of both provisions is broad enough to encompass mediation communications that relate to criminal conduct. The Evidence Code does not include any exception specifically for mediation communications relating to criminal conduct (or a subcategory of such communications). As a general rule, then, mediation communications relating to criminal conduct are not admissible or subject to disclosure in a *noncriminal* proceeding in California.

The same is not true in a *criminal* case. As previously discussed,¹⁴⁷ subdivisions (a) and (b) of Section 1119 only restrict the admissibility and disclosure of mediation evidence in a noncriminal proceeding. They do not

145. Emphasis added.

146. Emphasis added.

147. Section 1119 is also inapplicable to a proceeding in family conciliation court or a mediation of child custody or visitation issues. See Evid. Code § 1117(b)(1). For the treatment of mediation evidence proffered in a juvenile delinquency proceeding, see *Rinaker v. Superior Court*, 62 Cal. App. 4th 155, 74 Cal. Rptr. 2d 464 (1998).

restrict the admissibility or disclosure of mediation evidence in a criminal case, *regardless* of the nature of that evidence.¹⁴⁸

The UMA's Treatment of the Intersection of Mediation Confidentiality and Criminal Conduct

In general, any "mediation communication"¹⁴⁹ is privileged under the UMA.¹⁵⁰ Among other exceptions, however, there is no privilege for a mediation communication that is:

- "[A] threat or statement of a plan to inflict bodily injury or commit a crime of violence."¹⁵¹
- "[I]ntentionally used to plan a crime, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity."¹⁵²

Thus, a party could introduce or obtain disclosure of those types of mediation communications in a *noncriminal* proceeding in a UMA jurisdiction.

Further, UMA Section 6(b)(1) creates another exception, which applies in specified circumstances in certain criminal cases:

(b) There is no privilege under Section 4 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:*

(1) *a court proceeding involving a felony [or misdemeanor]*¹⁵³

148. See discussion of "Views on California's Approach to Allegations of Professional Misconduct" *supra*.

Subdivision (c) of Section 1119 says that "[a]ll communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential." To the best of the staff's knowledge, the California Supreme Court has not explained what that provision means with regard to criminal cases and evidence of criminal conduct. We could explore this point further if the Commission is interested.

149. For the definition of "mediation communication," see UMA § 2(2).

150. UMA § 4.

151. UMA § 6(a)(3).

152. UMA § 6(a)(4).

The UMA also includes another exception that might be pertinent: Subject to specified limitations, there is no privilege for a mediation communication that is "sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party." UMA § 6(a)(4). In all likelihood, such "abuse, neglect, abandonment, or exploitation" would often, if not invariably, constitute criminal conduct.

153. Emphasis added.

The UMA drafters put brackets around the phrase “or misdemeanor” to indicate that enacting jurisdictions could choose whether the provision should apply to “a court proceeding involving a ... misdemeanor,” as well as “a court proceeding involving a felony.”

The accompanying Comment offers the following explanation for this provision:

... [T]he Act affords *more specialized treatment for the use of mediation communications in subsequent felony proceedings, which reflects the unique character, considerations, and concerns that attend the need for evidence in the criminal process.* States may also wish to extend this specialized treatment to misdemeanors, and the Drafters offer appropriate model language for states in that event.

Existing privilege statutes are silent or split as to whether they apply only to civil proceedings, apply also to some juvenile or misdemeanor proceedings, or apply as well to all criminal proceedings. *The split among the States reflects clashing policy interests.* On the one hand, mediation participants operating under the benefit of a privilege might reasonably expect that statements made in mediation would not be available for use in a later felony prosecution. The candor this expectation promotes is precisely that which the mediation privilege seeks to protect. It is also the basis upon which many criminal courts throughout the country have established victim-offender mediation programs, which have enjoyed great success in misdemeanor, and, increasingly, felony cases. Public policy, for example, specifically supports the mediation of gang disputes, and these programs may be less successful if the parties cannot discuss the criminal acts underlying the disputes.

On the other hand, society’s need for evidence to avoid an inaccurate decision is greatest in the criminal context — both for evidence that might convict the guilty and exonerate the innocent — because the stakes of human liberty and public safety are at their zenith. For this reason, even without this exception, the courts can be expected to weigh heavily the need for the evidence in a particular case, and sometimes will rule that the defendant’s constitutional rights require disclosure.

After great consideration and public comment, the Drafting Committees decided to *leave the critical balancing of these competing interests to the sound discretion of the courts to determine under the facts and circumstances of each case.* It is drafted in a manner to ensure that both the prosecution and the defense have the same right with respect to evidence, thus assuring a level playing field. In addition, it puts the parties on notice of this limitation on confidentiality.¹⁵⁴

154. Emphasis added, citations omitted.

Thus, this UMA exception permits introduction or disclosure of mediation evidence only in certain criminal cases under specified circumstances. In contrast, California's mediation confidentiality law does not appear to impose any restriction on the admissibility or disclosure of mediation evidence in a criminal case.

Scholarly Commentary on the Intersection of Mediation Confidentiality and Criminal Conduct

As the above-quoted Comment states, there are diverse views on the intersection of mediation confidentiality and criminal conduct. A few examples may suffice to give the Commission a flavor for the situation.

Well before the UMA was drafted, Prof. Kirtley criticized the concept of protecting mediation communications only in a civil case. He acknowledged that a statute using that approach "may reflect a policy judgment that the criminal justice system's need for access to mediation information outweighs the benefit of preserving mediation confidentiality."¹⁵⁵ But he warned that the approach would produce a chilling effect upon mediation discussions.¹⁵⁶

In a post-UMA article in *Rutgers Law Review*, mediator Rebecca Hiers made the same point about the danger of chilling mediation discussions by making mediation confidentiality inapplicable in a criminal case.¹⁵⁷ She was also critical of the UMA approach, however, arguing that Section 6(b)'s after-the-fact balancing approach would undermine the mediation privilege by making it unpredictable, contrary to the United States Supreme Court's admonition that an "uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."¹⁵⁸ In addition, Ms. Hiers raised many questions about the proper treatment of mediation communications in which a person threatens violence¹⁵⁹ or admits past criminal conduct.¹⁶⁰

Other commentators have also criticized UMA Section 6(b),¹⁶¹ but it has support as well.¹⁶² One commentator (Shawn Davisson, then a federal law clerk)

155. Kirtley, *supra* note 7, at 28.

156. *Id.* at 29.

157. Hiers, *supra* note 64, at 580 (In jurisdictions where mediation privilege is expressly limited to civil proceedings, "open and honest discussions likely would be chilled regarding civil issues where parallel criminal charges could lie.").

158. Hiers, *supra* note 64, at 567-73.

159. *Id.* at 578-86.

160. *Jaffee v. Redmond*, 518 U.S. 1, 18 (1996).

161. See Shannon, *supra* note 61, at 94-96, 99-101; see also Laflin, *supra* note 62, at 968-70, 978, 980, 982, 984.

maintained that the UMA privilege “is *unconstitutional* as applied to criminal proceedings, or at the very least undesirable from a justice perspective.”¹⁶³ He primarily contended that “the burden of proof required to overcome the mediation privilege in a criminal proceeding under the UMA — i.e., ‘substantially outweighs’ — is an unconstitutional and undesirable threshold.”¹⁶⁴ Focusing on a criminal defendant’s rights to compulsory process, confrontation, a fair trial, and due process, he explained:

The UMA standard, which places a strong benefit of the doubt in favor of inadmissibility, violates the Constitution because it forces courts to balance from an uneven starting point. In creating a “substantially outweighs” test, the UMA approach universally places the interests of mediation above the interests of justice and the constitutional rights of the accused.¹⁶⁵

Mr. Davisson further argued that Section 6(b)’s optional distinction between misdemeanors and felonies “is not prudent in the context of evidentiary privileges.”¹⁶⁶

The resolution directing this study asks the Commission to examine the relationship between mediation confidentiality and “attorney malpractice and other misconduct.” That phrase might be broad enough to include criminal conduct, or at least criminal acts committed by attorneys during mediation. However, the resolution does not specifically refer to criminal conduct. Despite the many public comments submitted to the Commission, there is no indication of significant dissatisfaction with California’s rule that mediation communications are not admissible or subject to disclosure in a criminal case.

Consequently, this memorandum does not further explore scholarly writings on the extent to which a party may use mediation communications in a criminal case. For similar, though perhaps less compelling, reasons, the memorandum does not provide additional information about scholarly writings on whether a provision protecting mediation communications should be subject to any exceptions or limitations for communications that relate to criminal conduct.

162. See, e.g., Reuben, *supra* note 6, at 122-23.

163. See Shawn Davisson, *Balancing the Scales of “Confidential” Justice: Civil Mediation Privileges in the Criminal Arena – Indispensable, Impracticable, or Merely Unconstitutional?*, 38 McGeorge L. Rev. 679, 683 (2007) (emphasis added).

164. *Id.*

165. *Id.* at 715 (footnotes omitted).

166. *Id.* at 714; see also *id.* at 720-21.

The staff could provide further information on those matters if the Commission would find it helpful. As previously noted, we plan to discuss the proper scope of the Commission’s study in another memorandum for the upcoming meeting (Memorandum 2015-34).

IN CAMERA PROCEEDINGS

On a number of occasions during the Commission’s study, one or more people (most notably, Stanford law student Amelia Green)¹⁶⁷ have raised the possibility of having a court conduct an *in camera* hearing to determine whether to admit or order disclosure of mediation communications bearing on attorney malpractice or other misconduct. As discussed above, the UMA (enacted in eleven states plus the District of Columbia) calls for an *in camera* hearing in two contexts: (1) when a party seeks or proffers mediation evidence in connection with a challenge to the enforcement of a mediated settlement agreement¹⁶⁸ and (2) when a party seeks or proffers mediation evidence in a felony case (or, in some jurisdictions, a misdemeanor case).¹⁶⁹ A number of other states also have rules or statutes that call for an *in camera* hearing on the admissibility or discoverability of mediation evidence, at least in some circumstances.¹⁷⁰ In addition, a few courts have followed such an approach on their own initiative.¹⁷¹

What has the academic community said about using *in camera* hearings in connection with mediation confidentiality issues? The staff’s research suggests that the concept has considerable support, at least in some contexts.

As previously discussed, for example, Prof. Kirtley, Prof. Hughes, and Prof. Deason all voiced support for having a court conduct an *in camera* hearing when a party seeks or proffers mediation evidence in connection with a challenge to the enforcement of a mediated settlement agreement.¹⁷² Ms. Hiers took the same position in her article in *Rutgers Law Review*.¹⁷³ Similarly, in proposing a

167. See Memorandum 2015-13, p. 2 & Exhibit pp. 1-20.

168. UMA § 6(b)(2).

169. UMA § 6(b)(1).

170. Those states are Alabama, Arkansas, Louisiana, Michigan, Mississippi, New Mexico, Texas and Wisconsin. See Memorandum 2014-35, Attachment pp. 5-42; Memorandum 2014-44.

171. See *Rinaker v. Superior Court*, 62 Cal. App. 4th 155, 74 Cal. Rptr. 2d 464 (1998); see also *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110 (N.D. Cal. 1999) (following similar approach).

172. See discussion of “Contract Defense or Other Challenge to a Mediated Settlement Agreement” *supra*.

173. Hiers, *supra* note 64, at 578 (“Establishment of a well-defined process for judicial review of mediated agreements, if challenged for duress, fraud, or other misconduct, ... could be very

mediation confidentiality exception to facilitate proof of failure to mediate in good faith, Prof. Weston maintained that a judge hearing mediation communications could “minimize deleterious effects by adopting appropriate safeguards to shield the information from unnecessary public disclosure, such as an *in camera* sanctions hearing conducted by a judge who will not preside over the merits of the case.”¹⁷⁴ In the same vein, Prof. Cole suggested an “*in camera* hearing format” as a better alternative than California’s strict approach to mediation confidentiality.¹⁷⁵

Prof. Deason pointed out, however, that “[n]ot all commentators view the idea of a preliminary *in camera* examination favorably.”¹⁷⁶ She specifically noted that some scholars had criticized the United States Supreme Court’s position that a trial court may conduct an *in camera* examination of communications that allegedly fall into the crime-fraud exception to the attorney-client privilege. According to her, those scholars argued that “by allowing *in camera* review before an exception is established, the Court undermined clients’ trust that their privileged information will go no further than their attorney.”¹⁷⁷ She contrasted the Court’s approach to the *in camera* approach she was advocating, which would be more demanding:

The Court permits this review ... on a weak standard that requires only that it “may reveal” evidence to substantiate the claim for an exception to the privilege. Following the *Olam* example, the *in camera* review suggested here would occur only after a preliminary

helpful. Such a process could ensure that such a review would be held *in camera* and also would allow the parties to request to have that record sealed, if appropriate.”).

174. Weston, *supra* note 71, at 78; see also Zimmerman, *supra* note 142, at 382 (proposing different *in camera* approach for addressing claims of bad faith conduct in mediation).

Unlike Prof. Weston, Prof. Lande argued that there should not be a good faith requirement in mediation. See discussion of “Failure to Participate in Court-Ordered Mediation in Good Faith” *supra*. In so doing, Prof. Lande criticized Prof. Weston’s proposed *in camera* approach. Specifically, he pointed out that the UMA’s *in camera* approach was more protective than Prof. Weston’s proposed approach (based on *Rinaker* and *Olam*) in two ways:

First, under the UMA *in camera* procedure, evidence may be admitted only if the “need for the evidence substantially outweighs the interest in protecting confidentiality.” *Rinaker* and *Olam* do not include such a requirement. Second, under the UMA, courts may admit evidence of mediation communications only if the evidence is not otherwise available. *Rinaker* and *Olam* permit exceptions to confidentiality even if there is other evidence to establish the facts sought to be established with the mediation communications.

Lande, *supra* note 72, at 105-06 (footnotes omitted).

175. Cole, *supra* note 10, at 1456.

176. Deason (2001, re contract law), *supra* note 12, at 101.

177. *Id.*

balancing has determined the benefit of lifting confidentiality from the evidence.¹⁷⁸

Prof. Deason's comments about the nature of the *in camera* process are a good reminder that such a procedural step could take many different forms. **If the Commission decides to propose that type of approach, it should carefully consider and specify the details of how it would work.**¹⁷⁹

INFORMING PARTICIPANTS ABOUT THE EXTENT OF PROTECTION

In addition to expressing views on the extent to which mediation communications should be kept confidential or otherwise protected, the members of the academic community have commented on a related matter: What a mediator or attorney should tell prospective mediation parties about how much protection their mediation communications will receive. The possibility of mandating certain disclosures about mediation confidentiality has surfaced repeatedly in the Commission's study. It is therefore appropriate to examine what scholars have said on the subject.

On this topic, the scholarly commentary appears to be unanimous. The articles that touch on it all emphasize the importance of being upfront and honest with prospective mediation parties by accurately informing them, before a mediation begins, about the extent of protection that their mediation communications will receive.

A 1991 Comment published in the *Journal of Dispute Resolution* put it this way:

No mediator can tell a client with complete confidence that everything said during the course of the mediation will remain confidential in all circumstances. Topicality requirements or definitional technicalities pose serious threats to absolute confidentiality, even in states with blanket confidentiality statutes. It is very likely that there are mediators practicing today who know that and still induce their clients to disclose embarrassing and potentially damaging information with promises of confidentiality. Such mediators should realize that they incur a duty on such promises and may find themselves defending suits for breach of contract, invasion of privacy, or fraud....

Mediation is communication. It often requires disclosure of embarrassing and potentially damaging information. Such self-

178. *Id.*

179. See generally Amelia Green, *Mediation Confidentiality and Attorney Malpractice: The Potential for the Use of In Camera Proceedings to Balance Confidentiality with Accountability*, at 17-18 (Memorandum 2015-13, Exhibit pp. 17-18).

disclosure is a very threatening process for most people. It requires a willingness to assume the risk of rejection and abuse, but it is absolutely necessary to the proper functioning of the mediation process. Mediation is built on trust. Without trust participants will not disclose their true needs. But before participants can trust each other they must trust the mediator. *If mediators are to be trusted they must be truthful. Frankly informing parties to a mediation of the limitations to confidentiality may in the short run discourage some disclosures and hence reduce effectiveness. In the long run, however, it is the only viable solution.*¹⁸⁰

A later article in *Louisiana Law Review* referred favorably to the above-quoted analysis, but stressed the need for specificity in disclosing the extent of confidentiality.¹⁸¹ The authors recommended that instead of advising participants that confidentiality is only guaranteed “to the greatest extent permitted by law,” a mediator should make “a full and more precise disclosure.”¹⁸²

In another article, Prof. Maureen Laflin (Idaho College of Law) focused primarily on the prospect of mediation communications in which a person admits criminal liability or provides other incriminatory evidence. She likened the mediator to a Japanese fugu chef:

Fugu fish, one of the most celebrated and notorious dishes in Japanese cuisine, is lethal if not prepared correctly. Because the fugu’s poison can lead to death, only licensed cooks are allowed to prepare this delicacy. Despite its inherent dangers, fugu remains a special feast in Japan.

Like the fugu chef, the concerned mediator must know how to carefully dissect the parties’ dispute, allowing them to reap the benefits of mediation without harming themselves in subsequent criminal litigation. Like the consumers of fugu, mediation participants must be warned of potential dangers. *Participants need to know that there are limits on confidentiality and that everything said in mediation is not necessarily privileged.* Without such a caveat, mediation participants may open their mouths and unwarily take a bite of the “poisonous fish,” leaving on the table statements that could be used against them in later criminal proceedings.¹⁸³

180. Kent Brown, *Comment, Confidentiality in Mediation: Status and Implications*, 1991 J. Disp. Resol. 307, 334 (1999) (emphasis added, footnotes omitted).

181. See Stephen Bullock & Linda Gallagher, *Surveying the State of the Mediative Art: A Guide to Institutionalizing Mediation in Louisiana*, 57 La. L. Rev. 885, 964 (1997).

182. *Id.*

183. Laflin, *supra* note 62, at 944 (emphasis added, footnotes omitted).

In emphasizing the need for honest disclosures about limitations on confidentiality, Prof. Laflin explained that such disclosures are critical to party self-determination:

A fundamental tenet of mediation is party self-determination.... In order to make free and informed choices, participants need to know the parameters of confidentiality before they enter into the mediation process.¹⁸⁴

She recognized that providing such disclosures might inhibit candor, but stressed that mediators should nonetheless make them:

The obligation to warn ... must be juxtaposed against the consequences of providing such a warning. Warnings could discourage full, candid, and honest participation. After such a warning, participants could become hesitant to reveal any information that could possibly be used to injure their credibility, incriminate them, or implicate them in some future criminal trial. As such, *warning participants of the limits of confidentiality could inhibit full disclosure.*

*Even with the potential adverse consequences, mediators must stop making broad and misleading assertions concerning confidentiality. Mediators need to explain the interplay between mediation communications and subsequent criminal proceedings and inform participants that there is a chance, although slim, that what they say in mediation may be used against them in subsequent proceedings.*¹⁸⁵

Other scholarly commentary similarly urges mediators to forthrightly acknowledge the existence of *weaknesses* in the protection for mediation communications.¹⁸⁶ The academic literature does not seem to say much about the type of disclosures various people have suggested in the Commission's study: Disclosures alerting prospective mediation participants to the *strength* of the protection for mediation communications, particularly the possibility that mediation communications might be unavailable to show mediation misconduct.

But the logic and principle of being honest with mediation participants would also apply to that type of disclosure. It seems unlikely that the academic

184. *Id.* at 981 (footnotes omitted).

185. *Id.* at 982 (emphasis added, footnotes omitted).

186. See, e.g., Harvard Note, *supra* note 43, at 441 n.4 (Lawrence Freedman of the ABA Standing Committee on Dispute Resolution "has said that 'it wouldn't really be honest to say [that mediation is confidential] to people who are considering participating.'"); see also Weston, *supra* note 71, at 37 (arguing that consitutional limitations on mediation confidentiality should be made explicit).

community would draw a distinction between the two situations. In fact, one recent article says:

Explaining confidentiality to parties in mediation is analogous to the requirement that law enforcement officers inform suspects of their Miranda rights. A primary aspect of the orientation for mediation is informing parties about *what is and is not confidential*.¹⁸⁷

OTHER MEANS OF ADDRESSING MEDIATION MISCONDUCT

An issue “often raised about mediation and considered in the institutionalization of the process is the danger of coercion.”¹⁸⁸ Allegations of coercion during the mediation process — by the mediator, an attorney, or an opponent — are central to many of the mediation confidentiality cases that the Commission has reviewed,¹⁸⁹ including two of the cases that the Legislature specifically asked the Commission to consider: *Cassel*¹⁹⁰ and *Porter v. Wyner*.¹⁹¹

There is sentiment that “policy-makers should invent safeguards to insure that the confidentiality guaranteed to parties in mediation is not used to veil coercive tactics”¹⁹² This memorandum has already described scholarly suggestions about the proper degree of confidentiality and the importance of accurately disclosing the extent of protection.

In addition, some commentators have proposed other means to reduce the danger of coercion during mediation: ones that would not alter mediation confidentiality requirements. Two such suggestions are discussed below: (1)

187. Susan Oberman, *Confidentiality in Mediation: An Application of the Right to Privacy*, 27 Ohio St. J. on Disp. Resol. 539, 618-19 (2012) (emphasis added, footnotes omitted).

188. Bullock & Gallagher, *supra* note 181, at 965-66.

189. See, e.g., *In re Marriage of Woolsey*, 220 Cal. App. 4th 881, 900, 163 Cal. Rptr. 3d 551 (2013) (husband contended that mediated settlement agreement was unenforceable because wife and/or mediator engaged in undue influence during mediation); *Provost v. Regents of the University of California*, 201 Cal. App. 4th 1289, 1302, 135 Cal. Rptr. 3d 591 (2011) (plaintiff claimed that mediated settlement agreement was unenforceable because his counsel, his opponents’ counsel, and mediator coerced him into signing it through threats of criminal prosecution). See also *Chan v. Lund*, 188 Cal. App. 4th 1159, 1164, 116 Cal. Rptr. 3d 122 (2011) (plaintiff contended that court should rescind mediated settlement agreement “because his purported consent was ‘wrongfully coerced’ through tactics of his ... attorney that ‘amounted legally to duress, undue influence, fraud, prohibited financial dealing with a client in violation of the [California] Rules of Professional Conduct, and undisclosed dual agency”).

190. 51 Cal. 4th 113, 118, 244 P.3d 1080, 119 Cal. Rptr. 3d 437 (2011) (plaintiff claimed that at mediation, his attorneys “by bad advice, deception, and coercion ... induced him to settle for a lower amount than he had told them he would accept, and for less than the case was worth.”),

191. 107 Cal. Rptr. 3d 653, 656 n.5 (formerly published at 183 Cal. App. 4th 949) (plaintiffs alleged that they signed agreement releasing their attorney from liability for tax advice “under duress because they were concerned the [mediated] settlement would unravel if they refused.”).

192. Bullock & Gallagher, *supra* note 181, at 966.

explicitly establishing that a party is entitled to bring a support person along to a mediation, and (2) creating a mandatory “cooling-off” period before a mediated settlement agreement becomes binding and enforceable.

Explicit Right to Bring Along a Support Person

Under UMA Section 10, a party is expressly entitled to bring an attorney or other individual along to a mediation:

SECTION 10. PARTICIPATION IN MEDIATION. An attorney or other individual designated by a party may accompany the party to and participate in a mediation. A waiver of participation given before the mediation may be rescinded.

The accompanying Comment explains that the provision was designed to help remedy imbalances of power and ensure that any settlement reached in the mediation is truly voluntary:

The fairness of mediation is premised upon the informed consent of the parties to any agreement reached. Some statutes permit the mediator to exclude lawyers from mediation, resting fairness guarantees on the lawyer's later review of the draft settlement agreement....

Some parties may prefer not to bring counsel. However, *because of the capacity of attorneys to help mitigate power imbalances, and in the absence of other procedural protections for less powerful parties, the Drafting Committees elected to let the parties, not the mediator, decide.*¹⁹³

The Comment further explains that the provision “is consistent with good practices that permit the *pro se* party to bring someone for support who is not a lawyer if the party cannot afford a lawyer.”

To some people, Section 10 “will seem a small and almost non-noteworthy addition to the UMA.”¹⁹⁴ In contrast, Prof. Phyllis Bernard (Oklahoma City University School of Law) considers it “a critical mechanism for re-balancing power in mediations and thereby addressing one of the chief areas of criticism.”¹⁹⁵

In a 2001 article, she noted that the Critical Legal Studies (“CLS”) movement had expressed concern that mediation is “an inappropriate method to resolve disputes involving minorities in American society,” because it lacks “safeguards for the minority victim.”¹⁹⁶ She maintained that UMA Section 10 “offers

193. Emphasis added, citations omitted.

194. Bernard, *supra* note 62, at 140.

195. *Id.*

196. *Id.*

protection against this concern.”¹⁹⁷ She also said that the section “provides needed safeguards against the ‘strong arm’ methods of some mediators, which result, on occasion, in agreements that are challenged for coercion, duress, or fraud in the inducement.”¹⁹⁸

Prof. Bernard thus argued that “allowing individuals to bring someone with them will guard against coercion and power politics in the course of the mediation.”¹⁹⁹ She further argued that “if coercive mediations are eliminated through the use of section [10] of the UMA, ... *then there will be less need to pierce mediation confidentiality* in order to reassess the fairness of agreements.”²⁰⁰

The staff does not know whether UMA Section 10 has had the kind of impact that Prof. Bernard predicted. That would be difficult to assess and we are unaware of any attempts to do so.

California does not have a statutory provision like UMA Section 10. As best we know, it appears to be widely assumed that a party may bring an attorney and others to a California mediation if the party so desires. **Input on this point would be helpful.**

A provision like UMA Section 10 probably would be relatively uncontroversial. It might not be a panacea against coercive mediation, or even close. It seems unlikely to do any harm, however, and it might do some good, perhaps as part of a larger package of reforms.

Cooling-Off Period

In a 2001 article in *Harvard Negotiation Law Review*, Prof. Welsh expressed concern about coercive mediation tactics that could defeat the goal of party self-determination:

There is growing evidence ... that at least some court-connected mediators are engaging in very aggressive evaluations of parties’ cases and settlement options (i.e., “muscle mediation”) with the goal of winning a settlement, rather than supporting parties in their exercise of self-determination. As mediation has become increasingly institutionalized in the courts, a small but growing number of disputants have approached courts and ethical boards,

197. *Id.*

198. *Id.* at 140-41.

199. Schneider, *supra* note 18, at 6 (summarizing Prof. Bernard’s article).

200. *Id.* (emphasis added); See Bernard, *supra* note 62, at 119 (contrasting her views with those of Prof. Hughes, who “seeks to assure party self-determination by allowing mediators and parties to testify about mediation communications”).

claiming that mediators' aggressive evaluation or advocacy for particular settlements actually coerced them into a settlement.²⁰¹

She suggested a number of possible means to protect parties' self-determination in mediation, most particularly "the adoption of a three-day, non-waivable cooling-off period before mediated settlement agreements may become enforceable."²⁰²

In proposing that approach, she noted that various jurisdictions use cooling-off periods in other contexts, especially situations involving high pressure sales tactics.²⁰³ She further noted that cooling-off periods "have even been applied to particular types of mediation."²⁰⁴ As an example, she referred to a Minnesota statute, which provides that "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."²⁰⁵ She also cited a California provision pertaining to earthquake insurance disputes²⁰⁶ and a Florida statute pertaining to family mediations,²⁰⁷ which has since been revised to eliminate the cooling-off period.²⁰⁸

201. Nancy Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 Harv. Negotiation L. Rev. 1, 5 (2001) (hereafter, "Welsh (2001)") (footnotes omitted).

202. *Id.* at 6-7; see also Welsh (2011), *supra* note 89, at 23-24 ("We could require, or at least urge, the inclusion of a cooling off period in the settlement agreements that emerge from our mediations.").

203. Welsh (2001), *supra* note 201, at 87-89.

204. *Id.* at 88-89.

205. Minn. Stat. § 572.35. See Welsh (2001), *supra* note 201, at 89.

206. Insurance Code Section 10089.82(c) provides:

If the parties agree to a settlement agreement, the insured will have three business days to rescind the agreement. Notwithstanding Chapter 2 (commencing with Section 1115) of Division 9 of the Evidence Code, if the insured rescinds the agreement, it may not be admitted in evidence or disclosed unless the insured and all other parties to the agreement expressly agree to its disclosure. If the agreement is not rescinded by the insured, it is binding on the insured and the insurer, and acts as a release of all specific claims for damages known at the time of the mediation presented and agreed upon in the mediation conference. If counsel for the insured is present at the mediation conference and a settlement is agreed upon that is signed by the insured's counsel, the agreement is immediately binding on the insured and may not be rescinded.

207. Florida Family Law Rule of Procedure 12.740(f)(1) used to provide:

(f) Report on Mediation

(1) ... If counsel for any party is not present when the agreement is reached, the mediator shall cause to be mailed a copy of the agreement to counsel within 5 days. Counsel shall have 10 days from service of a copy of the agreement to serve a written objection on the mediator, unrepresented parties, and counsel. Absent a timely written objection, the agreement is presumed to be approved by counsel and shall be filed with the court by the mediator.

See *In re Amendments to the Fla. Family Law Rules of Procedure*, 905 So. 2d 865 (Fla. S.Ct. 2005).

Prof. Welsh explained the cooling-off concept as follows:

Cooling-off periods have been introduced when it is known that high pressure tactics are being used with some frequency, when there are concerns that the people subjected to such behavior are not truly exercising free choice in entering into agreements, and when it is not possible to regulate effectively the use of high pressure tactics. Under these circumstances, the introduction of a cooling-off period serves as an effective antidote to high pressure tactics, both because the cooling-off period protect those who have already been subjected to high pressure tactics and because the threat of easy rescission makes it less likely that rational actors will choose to use high pressure tactics *In the mediation context, both of these likely effects suggest that the introduction of a cooling-off period represents an effective means to protect the important principle of party self-determination.*²⁰⁹

She anticipated and sought to rebut several possible objections to the idea:

- **Objection #1:** Some people might object to drawing an analogy between a mediator and a high-pressure salesman.

Response #1: The distinction between a mediator “selling” a settlement proposal and a “pitchman” might be “difficult to draw.” Moreover, “we must remember that many litigants do not voluntarily travel to the courthouse or an office building for their mediation; they are ordered to participate in the process.”²¹⁰

- **Objection #2:** The proposal may be impractical, such as when a mediation occurs on the eve of trial or when a mediation involves sophisticated participants who wish to be bound immediately.

Response #2: “[I]t may be possible to craft reasonable exceptions to a cooling-off provision for court-connected mediation for the[se] types of parties and circumstances”²¹¹

- **Objection #3:** A cooling-off period “would permit parties to back out of agreements much more easily, possibly based only on buyers’ or sellers’ remorse.”²¹²

Response #3: “This concern squarely raises the challenge of ‘walking the talk’ of self-determination. If self-determination — not settlement — is the fundamental principle underlying mediation, the benefits provided by this cooling-off proposal clearly outweigh the possible risks.”²¹³ In particular, *a cooling-off*

208. See Fla. Fam. Law R. Proc. 12.740(f)(1).

209. Welsh (2001), *supra* note 201, at 89 (emphasis added, footnotes omitted).

210. *Id.* at 91.

211. *Id.*

212. *Id.*

213. *Id.*

*period is “relatively straightforward, easily-administrable, and unlikely to invite litigation and/or intrusions upon the confidentiality of mediation.”*²¹⁴ Importantly, the approach would also “reward mediators who view their role as primarily facilitative and penalize mediators who use techniques designed to force an agreement.”²¹⁵

Shortly after Prof. Welsh suggested a mandatory cooling-off period, Prof. Lande seconded the idea, but expanded on her reasoning. As he put it,

Welsh proposes using a three-day cooling-off period before mediated settlement agreements become binding as a protective measure against high-pressure tactics in mediation. Although she did not intend this proposal to address problems of misrepresentation, it could be useful for that purpose as well.²¹⁶

He explained that “a brief cooling-off period before mediated agreements become binding” would “permit investigations about any material facts on which the parties relied.”²¹⁷

Prof. Lande acknowledged that cooling-off periods “are potentially problematic because they could be abused.”²¹⁸ For instance, “a party might make an agreement in mediation intending to renege during the cooling-off period as a way to wear down the other side.”²¹⁹ He nonetheless believed that the approach was worth testing.²²⁰

Other scholars have also indicated that a cooling-off period may serve as a tool to protect vulnerable participants from coercion or misrepresentations during the mediation process.²²¹ The staff does not know how well mediation cooling-off periods have functioned in the jurisdictions that have tried them. **Information on this point would be useful.** The staff will further investigate this matter if the Commission so instructs.

214. *Id.* (emphasis added).

215. *Id.*

216. Lande, *supra* note 72, at 137 (footnote omitted).

217. *Id.*

218. *Id.* at 137 n.350.

219. *Id.*

220. *Id.*

221. See, e.g., Stephan Landsman, *Nothing for Something? Denying Legal Assistance to Those Compelled to Participate in ADR Proceedings*, 37 Fordham Urb. L.J. 273, 292 (2010); Hiers, *supra* note 64, at 577-78; Peter Thompson, *Enforcing Rights Generated in Court-Connected Mediation — Tension Between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice*, 19 Ohio St. J. on Disp. Resol. 509, 539 (2004).

SUMMARY

Scholars have written extensively on matters relevant to the Commission's study. They have diverse opinions, but the commentary can be summarized as follows:

- Some scholars have stressed the importance of providing predictable protection for mediation communications — i.e., statutes or rules that allow mediation participants to determine in advance whether their mediation communications will be protected from admissibility and disclosure.
- Most scholars believe that mediation communications deserve special protection, but such protection should not be absolute.
- The academic community seems to generally agree that a provision protecting mediation communications should be subject to one or more exceptions or limitations to facilitate resolution of misconduct claims.
- The academic community was extensively involved in drafting the UMA and appears to be generally supportive of it, including its exceptions for mediator misconduct and professional misconduct (although there are differences of opinion as to various details). The academic community has been critical of California's alternative approach to the protection of mediation communications, which does not include such exceptions but is inapplicable to mediation evidence proffered or sought in a criminal case.
- In addition to exceptions for mediator misconduct and professional misconduct, the UMA includes an exception for evidence relevant to a traditional contract defense to a mediated settlement agreement (e.g., fraud or duress), or to a claim for rescission or reformation of such an agreement. There is considerable scholarly support for that type of exception, but the concept appears to be more controversial than the exceptions for mediator misconduct and professional misconduct. California does not have such an exception and some scholars have criticized its approach to this matter.
- Most scholars advise against creating a mediation confidentiality exception for evidence that a person failed to participate in a court-ordered mediation in "good-faith."
- Legal commentary reflects diverse views on the intersection of mediation confidentiality and criminal conduct.
- There is considerable scholarly support for the concept of conducting *in camera* hearings to assess the admissibility and discoverability of mediation evidence, at least in certain contexts.

- The academic community has emphasized the need to accurately inform mediation participants about the extent to which their mediation communications will be protected.
- In addition to creating exceptions to the protection for mediation communications, some scholars have suggested other means of addressing concerns about coercion and other mediation misconduct. These include:
 - (1) Enact a provision expressly stating that a party is entitled to bring an attorney or other support person along to a mediation.
 - (2) Establish a mandatory, non-waivable cooling-off period before a mediated settlement agreement becomes enforceable.

We will further explore the scholarly commentary as needed as the Commission continues its work and evaluates different options. **Suggestions regarding potentially important sources, or areas warranting attention, are always welcome.**

Respectfully submitted,

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