

Study K-402

August 5, 2015

First Supplement to Memorandum 2015-36

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

The Commission¹ just received the following new communication relating to its study of the relationship between mediation confidentiality and attorney malpractice and other misconduct:

Exhibit p.

- Deborah Blair Porter, Manhattan Beach (8/4/15)1

The staff wishes to remind the Commission that some aspects of the *Porter* litigation described in this communication are still pending.² We will discuss Ms. Porter's 38-page communication further when time permits.

Additionally, the staff received an email message a few days ago from Nancy Neal Yeend. She said:

Read the latest memo regarding the scope of the CLRC's study and found that there was no commitment to actually addressing attorney and/or mediator misconduct or malpractice. I would hope after nearly 3 years that at a minimum the Commission will make a recommendation regarding those [two] topics.

With the statute and court decisions presently protecting both attorney and mediator misconduct and malpractice, I fear for the future of this process as a legitimate ADR process.³

The staff will promptly advise the Commission if any other communications are submitted for its consideration.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

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. For discussion of that litigation, see Memorandum 2015-4, pp. 6-12.

3. Email from Nancy Neal Yeend to Barbara Gaal (8/1/15).

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August 4, 2015

VIA E-MAIL TRANSMISSION

California Law Revision Commission
c/o UC Davis School of Law
400 Mrak Hall Drive
Davis, CA 95616
Attention: Barbara Gaal, Chief Deputy Counsel

Re: Study K-402 – Mediation Confidentiality – Contractual Waivers

Dear Barbara:

As promised, I am providing my input regarding contractual waivers in mediation.

My input supplements the letter I submitted to the Commission in August 2013 and also proposes elements I believe should be a part of any waiver process, including notice provisions to ensure the process is fair and the playing field level as well as proposals for contractual waivers to ensure the rights of parties are protected and the problems which have arisen in cases such as *Cassel*, *Porter* and *Wimsatt* can be eliminated.

As you suggested, I reviewed the May 20, 2015 Memorandum 2015-22 and appreciate the consideration being given to contractual waivers. I hope that the information I provide will assist the Commission in focusing on how mediation confidentiality, as it is presently interpreted, is resulting in the deprivation of the rights of parties and that steps need to be taken to rectify what is a significant problem, not only for disputing parties, but for the legitimacy of the process. When parties are assured that the disputes they come to mediation to resolve can fully, finally and fairly be resolved through an improved mediation system, I believe this will go a long way to ensuring the legitimacy of California's mediation process in the eyes of the public, as well as their continued participation in the process, which will serve the secondary purpose of mediation, i.e., alleviating the stress on an already overburdened judicial system.

Barbara Gaal, Esq.
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If my comments repeat what others have previously stated or address matters the Commission and staff have already discussed in previous memoranda, please excuse such repetition.

Again, thanks to you and the Commission for the opportunity to participate in this process. The open nature of this process and the public's ability for involvement in the resolution of this issue will lead to greater confidence in the outcome of the study and in the process as a whole.

Please let me know if you have any questions regarding the attached or require any further information.

Most sincerely,

Deborah Blair Porter

Deborah Blair Porter

Attachment:

Contractual Waivers in Mediation – August 4, 2015

CONTRACTUAL WAIVERS IN MEDIATION

INPUT TO CALIFORNIA LAW REVISION
COMMISSION

With regard to STUDY K-402
PURSUANT TO AB 2025

SUBMITTED: AUGUST 4, 2015

By: Deborah Blair Porter

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CONTRACTUAL WAIVERS IN MEDIATION

Prefatory Statement

Before going into the substance of my input, a point needs to be made regarding the mediation process that I think cannot be overstated: attorneys and their clients do not come into the mediation process on equal footing.

First, attorneys are knowledgeable about the law. Parties often bring attorneys to mediation to advise them, as they rely on attorneys throughout the litigation process. Given the standard of practice in hiring legal counsel, a client's reasonable expectation is that in a mediation the attorney will "be there" for the client: to offer sound legal advice and sage counsel, knowledge and expertise, impartial input, a sounding board for the ideas and issues that may arise during the mediation, and whatever may be needed to enable the party to come to a fair resolution of the dispute in which they are involved.

I would imagine most California attorneys who attend a mediation have similar expectations, i.e., they are there specifically to assist their client or clients resolve the dispute with the other disputing party by coming to a mutually acceptable agreement, as EC §1115 contemplates. Their client depends on them, not just for knowledge and expertise, but fundamentally to be trustworthy.

I did some research about the role of attorneys in the mediation process and consider the following synopsis a fair account of what attorneys should be doing:

Attorneys should prepare the client for the mediation process itself, what to expect and how the negotiations are intended to lead to a mutually acceptable agreement. They should offer guidance, advice and information about aspects of the mediation process, or the issues in dispute, the client may not know. Attorneys should be knowledgeable regarding the law governing the subject matter of the dispute and provide information and advice with this aspect of the process as well. They are expected to have a certain level of knowledge and competence with regard to the mediation process itself, including the obligations of the parties, participants and attorneys themselves.

Attorneys are also expected to have the knowledge and expertise necessary to properly prepare and/or review any documents presented in connection with the mediation and to effectively negotiate and draft document terms and agreements between the parties, and otherwise document the settlement, including any agreement, in a manner that complies with the law.

http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/role_of_attorney_in_mediation_process.authcheckdam.pdf

In the latter capacity, it is the attorney who determines who should or actually does sign, or not sign, any document in a mediation. I tell parents in the special education arena that in the same manner school administrators control the Individualized Education Program ("IEP") process in special education – bringing all the appropriate paper and pencils to properly complete the IEP – the attorney representing the party brings the tools and implements to document an

agreement, and thus is in control of *what* is documented, *how* and *to what extent*, ultimately responsible for ensuring it is done *properly* and *completely*, including all appropriate signatures.

In all these respects, the client/party typically has none of the knowledge, power or authority their attorney does and unless they are attorneys themselves, is wholly dependent on the knowledge, ability, subject matter and procedural expertise, ethics, and intent of the attorney (including with regard to any fee arrangement or agreement between the attorney and client).

In addition, while Code of Civil Procedure (“CCP”) §1775 acknowledges that litigation is stressful for parties, mediation - where one party is coming into contact with an opposing party regarding the dispute that led to litigation in the first place - can be just as stressful, so that a party can be understandably anxious. Knowing their attorney “has their back” goes a long way toward ensuring the process will come to a more peaceful and positive resolution.

In light of this unequal footing and clear imbalance of power, one would think there would be a higher standard of accountability for attorneys who hold such positions of trust and responsibility. Since *Cassel*, however, any accountability and responsibility for an attorney’s actions during mediation, which may have existed before, has been eliminated.

As a result, mediations can be far more treacherous for parties. Now it is the responsibility of the party/participant to look over their attorney’s shoulder and make sure he or she is doing their job - properly filling out forms, collecting needed signatures, and otherwise making sure all phases of a mediation comply with applicable law, at the same time ensuring the attorney is acting honestly, ethically and with the necessary expertise to bring the mediation to a successful conclusion. If they don’t, and any technical requirement is not met, it is the party’s responsibility, because in California attorneys have no responsibility or accountability for what occurs in mediation. Such a circumstance begs the question: if the client is capable of doing all these things for themselves, why do they need an attorney at the mediation at all?

In light of the risk mediation poses to parties, I am unsure how the Supreme Court could issue a decision such as *Cassel* and not simultaneously take steps to address the imbalance of power between attorneys and the parties they are supposed to represent in mediation, particularly in light of the role it plays in disciplining California’s attorneys. After all, it is the Supreme Court that oversees the attorney profession in California, including the monitoring and discipline of attorney members of the State Bar:

In addition to its power to admit attorneys to the bar, the ***California Supreme Court has long stated that it has the inherent power to discipline attorneys.***

[Fn 36 - 36. See *Stratmore v. State Bar*, 14 Cal. 3d 887, 889, 538 P.2d 229, 230, 123 Cal. Rptr. 101, 102 (1975); *Brydonjack v. State Bar*, 208 Cal. 439, 443, 281 P. 1018, 1020-21 (1929)).

“Attorney Discipline and the California Supreme Court: Transfer of Direct Review to the Courts of Appeal” by Richard Green Wallace, *California Law Review*, Vol. 72, Issue 2, Article 5, March 1984, Vol. 72:252 at 256-257.

<http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2106&context=californialawreview>

The State Bar Act authorizes the state bar to conduct investigations and hearings regarding attorney misconduct, and provides the resources necessary to investigate and judge the merits of the thousands of complaints filed against attorneys in California each year." The disciplinary work of the state bar is performed by the State Bar Court. However, any person subject to discipline by the state bar or any of its committees may have the action reviewed by the supreme court. ***The State Bar Act thus places the supreme court at the apex of the disciplinary system, making it responsible for reviewing all disciplinary actions.*** Vol. 72:252 at 257. [Footnotes omitted]

In addition, the California State Bar's website notes the State Bar is an arm of California's Supreme Court, stating:

"The State Bar's discipline system is designed to protect the public, the courts and the profession from attorneys who violate ethical rules covering their professional conduct." <http://www.calbar.ca.gov/AboutUs/StateBarOverview.aspx> v

Despite such clear authority, I am unaware of any action by the Supreme Court to exercise its "inherent power to discipline attorneys" in light of *Cassel*, despite its being at the "apex of the disciplinary system" and "responsible for reviewing all disciplinary actions." While one would expect it to sternly warn its constituent attorneys about not engaging in such improper conduct, since it was the Supreme Court that issued *Cassel*, essentially finding the conduct there was contemplated by the Legislature, it seems unlikely warnings are forthcoming.

I am also unaware of any efforts "designed to protect the public, the courts and the profession from attorneys who violate ethical rules covering their professional conduct" by ensuring the mediating public has notice of the risks the process entails. It is troubling the Supreme Court would issue a decision that clearly has had such a devastating impact on the rights of mediating parties, based on the belief that was the Legislature's intent, while taking no steps to ensure the public, whom the Legislature clearly intended mediation to benefit, is adequately informed of the state of the law related to the mediation process, so that party/participants can make an informed decision about whether or not to participate at all.

Introduction

Initially, in asking the Commission to consider contractual provisions which seek to waive confidentiality, and specifically those where parties seek to waive confidentiality in the context of disputes involving public agencies where transparency and accountability are at issue, I was focusing on the waiver provision used in our settlement agreement, agreed to by the settling parties as a term of our "mutually acceptable agreement" in resolving our dispute.

However, over the past couple of years since the Commission began focusing on mediation confidentiality in the wake of *Cassel*, our case and others, and in light of the course of our litigation, I have begun focusing on the use of a contractual waiver to inform parties and protect the rights of party/participants, as against attorney/participants, particularly given the circumstances of our case where our former attorneys used their role as attorney/participant to wrest control of mediation confidentiality from the parties in our litigation for their own use, purpose and interest.

In addition, over the past decade and a half I have been involved in special education advocacy and have become increasingly aware of problems in mediation and the need for some sort of waiver to protect parent and student educational rights in that context. Since our settlement in particular, I have been contacted by many families in the state who, through their efforts to obtain appropriate special education services for their children, have faced significant challenges and had extremely negative experiences with the mediation process (which under the Individuals with Disabilities Education Act (“IDEA”) is one of the most widely-recommended and strongly encouraged means of alternative dispute resolution for parents of students with disabilities).

In many cases, significant parent and student rights have been detrimentally impacted through relationships families have with their own legal counsel, as well as through interactions with legal counsel representing school districts, which have led to the loss of significant student rights, without oversight, accountability or recourse. At the end of the process, students are often left without services, despite having used the dispute resolution process the state is mandated to ensure is in place to address disputes over services, and their parents are left with agreements which contain terms that are either meaningless or unenforceable and worse, the prospect of continuing litigation without the financial wherewithal to afford new counsel or the means of redressing their grievances against an offending attorney.

This analysis will discuss each of the above three circumstances and the role contractual waivers play in each of these three contexts.

While I worked in the legal field for over 25 years as both a litigation paralegal and an education advocate, and admittedly have been “schooled” by the two separate litigations we’ve been required to bring, by no means do I profess to be educated in or adept at analyzing law or the legislative history of the mediation statutes in general, or mediation confidentiality in particular. However, I believe I do bring the layperson’s perspective, as well as a commonsense approach to fairness and justice, to the issues discussed. My point, in any case, is to ask your indulgence to the extent I misstate or misinterpret any case, principle or theory, and that you please feel free to correct me or clarify points as you see fit, for there is no doubt my schooling is still “in progress.”

I. Contractual Waiver in *Porter* Settlement for Education Agency Accountability

The first contractual waiver I discuss is the waiver agreed to by the settling parties in our Settlement Agreement in *Porter v. Board of Trustees of Manhattan Beach Unified School District*. The specific provision the parties agreed to was Paragraph 19 and was intended to waive confidentiality. This waiver became a term of settlement, in part, because my family wanted accountability for the sorts of litigation tactics education agencies had become known for in special education disputes and in particular for the practice of litigating rather than providing mandated services to children with disabilities.

Porter v. Manhattan Beach Unified School District

Our original dispute involved the Manhattan Beach Unified School District (“MBUSD”), the local education agency, and the state education agency, the California Department of Education (“CDE”) and was over the provision of special education services for my son under the IDEA. We filed for due process in 1999 and prevailed in June 1999, but it soon became apparent MBUSD would not comply with the decision so we were forced to hire legal counsel. After waiting a year for the district to comply - to no avail - we filed suit in federal court to enforce the order. Our litigation lasted six years and went from the federal court to the 9th Circuit, the U.S. Supreme Court and back again to the federal court where it ultimately settled in 2005.

During the years of our dispute, we became very much aware of the various tactics used by local school districts against parents who tried to obtain appropriate services for their children. For example, when parents would seek services, a district would drag its heels and prolong the IEP process. Parents would become so frustrated they felt compelled to file for due process, so that a process that was to take 45 days under the statute at the time could drag on for months, if not years. On the eve of hearing, districts would mediate and settle with the family, sometimes offering the services the family had been seeking all along, but just as often offering significantly less.

In many cases, desperate families would accept any offer just to have something in the way of services for their child. In these mediations and settlements, districts would insist on absolute confidentiality, not only with regard to the mediation itself, but with regard to the terms of any agreement that was reached, including amounts paid in settlement, services received, etc., without regard to the fact that certain settlement information was subject to public accountability statutes.

Districts also would threaten parents with the loss of agreed-to services if a parent so much as breathed a word about what they had been able to achieve for their child in mediation. In settling before hearing in this manner, it became apparent districts were using mediation to avoid the accountability that went with the obligation to report due process proceedings filed against the district that went to decision, as only those cases were reported in the public record at the time.

This tactic enabled education agencies to use the confidentiality of the mediation process to hide a pattern of litigation that is harmful to students with disabilities and their families, that wreaks havoc with school personnel and destroys school/family relationships. It also enables school districts to continue to spend taxpayer dollars on school district attorneys and legal fees to avoid providing mandated services, rather than spending such tax dollars on providing sorely needed services, without any accountability to families, the school community or the taxpaying public.¹

¹ Unfortunately, I believe this problem has continued since our settlement in 2005 and in fact, has grown worse.

In October 2004, after approximately five years of litigation in our case, Judge Gary Allen Feess granted our partial summary judgment motion on the issue of liability against MBUSD and the CDE. In November 2004, Judge Feess appointed a special master who was to oversee our son's education and for the first time, as a junior in high school, he began to receive meaningful services. Judge Feess issued a written Memorandum and Decision in December 2004.

A few months later the issue of mediation first came up. At the time, my husband and I were not inclined to consider mediation with MBUSD or the CDE as we believed the only way we could achieve long-term accountability and stop the litigation games our district had been playing was to go to trial, with the openness and transparency we believed that process would bring.

However, once it appeared a mediation might actually take place, and our attorneys strongly encouraged it, we were clear that we would not settle unless we were assured there would be NO confidentiality behind which the education agencies could hide the bad acts they had engaged in during our litigation. The ONLY confidentiality we would agree to would be that afforded to students and their educational records under state and federal law. This was an issue we believed our attorneys were invested in as well, as they represented other families of students with disabilities.

Our mediation commenced April 26, 2005, with the process continuing over the next several months during which the parties negotiated the definitive settlement documents.²

As part of this negotiation, the settling parties agreed to a waiver of confidentiality as a mutually agreed-to term of settlement as EC §1115 contemplates. Specifically, Paragraph 1 of the Settlement Agreement, which was finalized in early August 2005, identified the April 26, 2005 mediation session and that through our Settlement Agreement we were finalizing what was begun there:

“The purpose of this Agreement is to implement the Stipulation for Settlement, pursuant to Code of Civil Procedure section 664.6, entered into by the Parties on April 26, 2005, and to further document the compromise to fully and finally settle and resolve all claims between and among the Parties, . . . “

Paragraph 19 itself stated:

“Upon the full execution of this Agreement, the Parties, and each of them, waive the terms and provisions of that certain Judicial Arbitration Mediation Service Confidentiality Agreement (California), dated April 26, 2005. The Parties acknowledge and agree that the terms and provisions of this Agreement are not confidential.”

² I discuss what occurred during the mediation session itself later in this input as part of the discussion entitled “How W&T Coopted Rights/Interests of the Party/Participant in 2005 Mediation.” *See*, Section II, below.

In no uncertain terms, the parties (including my husband and I on behalf of our son, as plaintiffs, the two public education agencies and the local and state individual defendants), all agreed to waive the confidentiality specifically identified in the terms and conditions of the JAMS Confidentiality Agreement, dated April 26, 2005.

However, based upon the Settlement Agreement as a whole, the waiver in Paragraph 19 did not just involve confidentiality related to the mediation (although that was specifically identified as waived in the language of the Settlement Agreement). Instead, Paragraph 19 related to *all confidentiality*, with the exception of confidentiality related to my son's education and educational records. (See, Paragraph 11 of the Settlement Agreement which specifically excludes from the waiver the "confidentiality of Student's records," and rules related to transcripts and graduation).

Our attorneys, Wyner & Tiffany ("W&T"), not only participated in the negotiating and drafting of the Settlement Agreement and related documents, they insisted on taking the lead in the settlement process. W&T also subsequently approved the Settlement Agreement as to form (which is mentioned in the Court of Appeal's first decision in 2010, noting Steven Wyner signed the Settlement Agreement on behalf of W&T); advised us to enter into the settlement generally, including the Settlement Agreement itself (see, Paragraph 13); and drafted language indicating it was entered into pursuant to the laws of the State of California and should be interpreted under those laws (which obviously included California's CCP and the Evidence Code ("EC") sections related to mediation generally and mediation confidentiality in particular). (See, Paragraph 16). Thus, W&T provided notice and assurances to us, as well as to the underlying defendants and their representatives, that the agreement passed muster under California law.

Ultimately, all the settling parties and their legal representatives, including W&T, placed their signatures on the Settlement Agreement following language which stated:

"The Undersigned declare that they have read this document consisting of twelve (12) pages (including signature pages) and understand its terms and freely enter into final Agreement." (Emphasis added)

Thus, the settling parties and their representatives confirmed the waiver of confidentiality in Paragraph 19 and their understanding that the terms and provisions of the Settlement Agreement in general, were proper and legally valid.

Because our son was a minor, the settlement had to be approved by the federal court, which was accomplished through an "Application for Minor's Compromise" prepared by W&T and filed with the Court, along with a copy of the Settlement Agreement, including the waiver in Paragraph 19, and other settlement documents as exhibits. Thus, the waiver of confidentiality in Paragraph 19 was also reviewed by Judge Feess in approving the "Application for Minor's Compromise" and the settlement as a whole, on August 10, 2005.

On September 22, 2005, Judge Feess signed the "Stipulation for Dismissal of Lawsuit," retaining jurisdiction to enforce the terms of the Settlement Agreement, the Order Approving Minor's Compromise and the Special Master Order, including overseeing the Special Master appointed with regard to my son's education while he remained in MBUSD. As a consequence,

the waiver of confidentiality also served the parties' interests as it would allow us to address any evidentiary issues regarding the settlement and the Special Master which might arise during the six year period in which Judge Feess would retain jurisdiction over the action. In fact, evidentiary issues did arise in 2006, in 2007 and again in 2010-2011. In each instance, the waiver of confidentiality was never an issue among the parties to the settlement.

At settlement, the parties believed we had agreed to a valid waiver of confidentiality in Paragraph 19 as a term of settlement. In addition, my husband and I believed we had succeeded in documenting a waiver that would allow us to hold the public education agencies accountable, unable to avoid the public scrutiny we believed was necessary to ensure such agencies stopped using the tactics described above, including the mediation process and its shroud of confidentiality, to avoid accountability in the future.

Unfortunately, we soon learned our attorneys were taking certain positions with regard to our settlement that would cause us significant financial harm and put our son's settlement at risk. In addition, approximately a year or so after the settlement, we learned for the first time that they would assert mediation confidentiality in a manner that contradicted the plain language of the Settlement Agreement. W&T's actions since the settlement in 2005 have resulted in their misappropriating the mediation confidentiality the parties had waived through a term of settlement, for their own purposes, thus thwarting the intent of the settling parties to agree to a mutually acceptable term of settlement and control how their evidence could be used in future proceedings.

For these reasons we believe there is a need for contractual waivers to secure the rights of the party/participant as against the attorney/participant.

II. Contractual Waivers to Secure Right of Party/Participant against Attorney/Participant

W&T Assert Mediation Confidentiality in Porter v. W&T

While the parties in *Porter v. Manhattan Beach USD* resolved our dispute through the mediation process, agreeing to mutually acceptable terms documented in our Settlement Agreement and approved by the federal court, one of the terms, i.e., the waiver of confidentiality in Paragraph 19 was subsequently coopted by W&T and retroactively invalidated, first by the actions of W&T and thereafter by the California courts interpreting the result of their actions.

This was accomplished by W&T asserting "mediation confidentiality" for their own use as "attorney/participants" to the mediation, separate and apart from the rights and interests of their clients (the party/participants):

First - by asserting mediation confidentiality during discovery in *Porter v. W&T* as a shroud to block access to evidence regarding events which occurred in the mediation;

Second - after bringing a pre-trial motion *in limine* to preclude all evidence related to the mediation, by representing to the court through their legal counsel on the eve of trial that they were dropping their previous objections to the introduction of evidence protected by mediation confidentiality, specifically based on the waiver in Paragraph 19;

Third - by introducing evidence regarding the mediation at the trial, by introducing documentary evidence, providing oral testimony themselves and by calling witnesses to testify with regard to the mediation;

Fourth - after a jury verdict against them, by abruptly reversing position and reasserting objections based on mediation confidentiality, claiming the introduction of evidence regarding the mediation at the trial, which they had caused by dropping their previous objections at the outset of trial, had caused an error in the proceeding which entitled them to a new trial so as to avoid the consequences of a jury verdict which resulted from an open and fair trial in which they had had every opportunity to defend themselves; and

Fifth – by doing all of the above NOT at the time of the mediation or resulting settlement, but significantly after the fact.

In granting their motion for new trial, the Superior Court validated W&T's efforts to wrest control of mediation confidentiality away from their clients and the parties to the original underlying litigation.

Thereafter, the California Supreme Court, by attaching *Porter* to *Cassel*, and subsequently refusing to hear an appeal related to Paragraph 19 and the question of who controls mediation confidentiality, allowed W&T, and attorneys in general, to coopt mediation confidentiality for their own purposes and to use - and misuse - mediation confidentiality against the very party/participant they claimed to be representing at the mediation.

As a consequence, the right of settling parties to resolve their dispute and negotiate mutually acceptable settlement terms as EC §1115 contemplates, was usurped *two years after the fact* by non-party participant attorneys who hoodwinked everyone, including their own clients, the opposing parties and their representatives, into believing they were acting in good faith in properly documenting the 2005 settlement.

The result is that party/participants in California who choose to mediate have no rights in the process as compared to their attorney/participants, as California courts will allow the interests of attorney/participants to take precedence over the interests of the party/participants for whom the mediation statutes were enacted. In addition, rather than hold attorneys accountable, the courts would rather avoid the issue than take a stand against such unethical conduct by legal counsel. We do not believe this is a recipe for confidence in California's mediation system or in the ability of California's judicial system to oversee and discipline its attorneys.

Procedural History of Porter v. Wyner & Tiffany

In mid-September 2005, after settlement funds, including W&T's legal fees, were paid, W&T filed a "Stipulation for Dismissal" which Judge Feess signed and entered on September 22, 2005, officially ending the case. Judge Feess retained jurisdiction to enforce the settlement, as mentioned above.

Approximately one week later, W&T presented us with a letter dated September 27, 2005 in which for the first time they took positions which contradicted the terms and express language of the Settlement Agreement, the Application for Minor's Compromise, our fee agreements and

my pay agreements. (I was also employed by W&T at the time). However, at this time, W&T did not indicate any disagreement with the waiver of confidentiality in Paragraph 19. Over the next few months, we attempted to resolve the dispute their September 27, 2005 letter created, but when our efforts were unsuccessful, we filed a lawsuit against W&T in February 2006.

At the time of the August 2005 settlement, W&T promoted their role in our litigation by exploiting the non-confidential nature of the settlement and engaged in actions which demonstrated their belief there was no confidentiality. In addition to issuing a personal press release about the settlement and its terms, they also posted the settlement documents on their business website and circulated them to other advocacy websites without our knowledge or consent. <http://www.wrightslaw.com/news/05/porter.settlement.htm>

During the first year of litigation, W&T proceeded as if they acknowledged the waiver of mediation confidentiality under Paragraph 19, citing to and relying on documents from the mediation in pleadings filed with the Superior Court and producing documents related to the mediation:

June 2006 – W&T filed a Motion to Strike which made no mention of mediation confidentiality nor did it assert any objections related to it. In fact, their Points and Authorities filed in support of the Motion relied on facts that occurred during the mediation and referred extensively to the Mediation Agreement, while their September 2006 Reply Brief likewise did not object on the basis of mediation confidentiality and again similarly referenced the mediation and the agreement.

August 2006 - W&T produced documents, including documents related to the mediation, without objection, including their personal notes of the mediation session among other documents.

November 2006 – On November 13, 2006, in response to a Motion to Compel Further Responses to Written Discovery, W&T’s papers specifically relied on evidence they had produced from the mediation.

On November 16, 2006, only days later, W&T filed a Demurrer and Motion to Strike the Second Amended Complaint, asserting EC §1119 made inadmissible and not subject to discovery evidence of admissions or anything else said in connection with the mediation process and that inclusion of such items was an “express violation” of EC §1119.

For the first time, and more than a year after the settlement, W&T took the position they could assert mediation confidentiality for themselves, separate and apart from their clients who were the parties to the mediation, and could do so *retroactively to invalidate a term of agreement the underlying parties had mutually agreed to in settling their dispute*. This, in spite of the fact that as our attorneys, W&T had negotiated and documented the term, represented to us and the other settling parties that it complied with state and federal law, and they had approved it as to form. As well, *no other party or participant disputed its validity*.

W&T maintained this position regarding mediation confidentiality up to the time the trial in our case was about to commence. However, in February 2008, just before the start of trial, W&T filed a motion *in limine*, which sought to preclude “the introduction of any evidence of, or

testimony regarding, communications made during the Mediation.” We opposed the motion arguing, among other things, that the parties in the underlying federal action had expressly waived mediation confidentiality through Paragraph 19 of the Settlement Agreement.

Mediation Confidentiality in 2008 Trial Proceedings

Abruptly, however, at the outset of trial W&T changed their position and withdrew their motion. Specifically, on the morning trial was to begin, W&T’s counsel, with W&T present in the courtroom, responded to a direct inquiry from Judge Ettinger, on the record:

COURT: But did everybody sign a waiver of confidentiality?

MR. KVETON:…Based on the arguments that were made and raised by the plaintiff in their opposition, including the issue of waiver by all participants, and the waiver in the final settlement agreement, we will withdraw the motion. [2RT 50:15-51:3 (RA40).] ³

The Court then confirmed W&T’s position that mediation confidentiality had been waived, stating “you have waived it and [] we all agree on it.” [2RT 54:14-55:3 (RA44-45).] Based on W&T’s last minute withdrawal of their objection to evidence protected by mediation confidentiality and the court confirming it, Judge Ettinger ordered the depositions of W&T reopened to allow questions about the mediation which had been objected to previously. Judge Ettinger also ordered the deposition of Robert J. Feldhake, the federal defendants’ chief negotiator at the mediation. ⁴

Thereafter, throughout the trial, W&T not only themselves testified and introduced documentary evidence regarding the mediation, they also called Mr. Feldhake as one of their central witnesses and through him introduced, elicited, and relied on evidence from the mediation and the period during which the definitive settlement documents were negotiated that otherwise would have been barred by mediation confidentiality. During this process, the appearance of Mr. Feldhake, who as attorney for the primary insurer ASCIP, acted as the chief representative and negotiator on behalf of the defendants, also demonstrated the underlying defendants had waived any objections they could have asserted to the use of the evidence.

On March 7, 2008, after a two-week trial, the jury returned a verdict in our favor, specifically finding that: (1) W&T owed \$211,000 in back wages; (2) owed \$51,000 for breach of the Fee Agreement; and (3) a release agreement, drafted by W&T to absolve them of liability for tax advice and shift certain costs to us should be rescinded. Judgment was entered on the verdict on June 23, 2008. [1AA0179.]

³ I have not attached the referenced pages, but have kept the references in, should you like to see them.

⁴ At no time during the pre-trial, trial or post-trial processes, did any other party or participant to the mediation ever dispute the waiver in Paragraph 19.

Approximately one month later, the Supreme Court issued *Simmons v. Ghaderi*, 44 Cal. 4th 570 (2008) (“Simmons”), which held that a party cannot impliedly waive mediation confidentiality by conduct. Using *Simmons* as the basis, W&T filed a motion for new trial and a motion for judgment notwithstanding the verdict [“JNOV”] and suddenly once again flip-flopped from their pretrial position, now claiming they had not formally waived mediation confidentiality in the manner required by the statute and that the resulting irregularity in the proceedings had prevented them from having a fair trial.

On September 10, 2008, Judge Ettinger granted W&T’s motion for new trial, vacated the June 23, 2008 judgment and deemed W&T’s JNOV motions moot. Our first appeal followed.

Our trial demonstrated that all the parties who had participated in the mediation and the underlying settlement and who had signed the settlement agreement, as well as their representatives, had effectively agreed to waive mediation confidentiality for purposes of the trial and participated in the trial with that clear understanding. For plaintiffs, this was evidenced by the voluntary appearance of myself, my husband, and our representatives at the time of the mediation (Steven Wyner and Marcy Tiffany), as well as our voluntary testimony and submission of documentary evidence. Similarly, for the underlying defendants, this was evidenced by the voluntary appearance, testimony and production of documentary evidence by Robert J. Feldhake, on behalf of all the underlying defendants, their counsel and insurance representatives at the time of the mediation. The resulting trial was an open and fair trial, particularly for W&T, who were given every opportunity to air their claims and assert their defenses, with all the evidence they needed to do so.

At that time, all the parties and participants to the mediation - *with the exception of W&T* - stood by the waiver of mediation confidentiality in Paragraph 19 and continued to do so in proceedings before the federal court, where W&T were no longer involved. While Paragraph 19 continued in effect in the jurisdiction in which it was developed, it was rendered null and void in California courts where we sought accountability under California’s laws, because of the constantly-changing actions of our former attorneys, who purported to represent our interests in the mediation and settlement, but several years after the settlement would eventually admit they were not.

Appellate Proceedings re: Mediation Confidentiality

The Court of Appeal initially found in our favor in its April 8, 2010 decision which was subsequently depublished. However, W&T submitted a petition for review to the California Supreme Court that was granted, attaching our fate to *Cassel* pending before the Supreme Court.

We subsequently filed an *amicus* brief in *Cassel* and our attorney was invited to participate in the November 2010 oral argument, where he explained the facts of our case, how it was like *Cassel*, but also distinguished, and how an express contractual waiver provision had been negotiated and agreed to in Paragraph 19 by the settling parties, which our attorneys alone among the settling parties and representatives, retroactively claimed to dispute and repudiate.

When the Supreme Court issued its decision in *Cassel*, it included Justice Chin’s concurrence, which actually focused on this issue, stating:

This case [*Cassel*] does not present the question of what happens *if every participant in the mediation except the attorney* waives confidentiality. ***Could the attorney even then prevent disclosure so as to be immune from a malpractice action? I can imagine no valid policy reason for the Legislature to shield attorneys even in that situation. I doubt greatly that one of the Legislature’s purposes in mandating confidentiality was to permit attorneys to commit malpractice without accountability. Interpreting the statute to require confidentiality even when everyone but the attorney has waived it might well result in absurd consequences that the Legislature did not intend. That question will have to await another case.*** But the Legislature might also want to consider this point.

We believe our case answered Justice Chin’s question, i.e., “what happens if every participant in the mediation *except the attorney* waives confidentiality?” However, our case *was different* because at the time of the mediation and subsequent settlement, our attorneys had given the appearance that they agreed with the waiver and had, in fact, waived confidentiality.

In fact, *the only “participants” who have ever challenged the documented waiver in Paragraph 19 are the very attorneys who negotiated and drafted the waiver of confidentiality on our behalf as part of the Settlement Agreement, approved it as to form, and led us, their clients, as well as the other signing parties to believe it was valid.* Further, they urged us to sign the Settlement Agreement, themselves signed it to indicate they approved it as to form and had freely entered into it, only to retroactively repudiate it when it didn’t serve *their interests*.

As the Commission’s analysis 2015-4 at page 11 indicates, the Court of Appeal in applying *Cassel* in *Porter II* disagreed. Rather than concluding *Porter* was distinguished by the contractual waiver, based on its interpretation of the “participants” to the mediation, the Court of Appeal found:

In their supplemental brief, the Porters claim that this case falls within the “absurd result” scenario discussed by Justice Chin in his concurring opinion in *Cassel, supra*, 51 Cal.4th at pages 139-140. There, Justice Chin indicated that if all ***participants*** in a mediation waived confidentiality except the attorney, it might result in absurd consequences if the attorney could prevent disclosure of the communication and thus shield himself from a malpractice action. The analysis is not apt here, however, as many of the ***participants*** aside from the attorneys did not sign the agreement. [*Porter v. Wyner & Tiffany*, July 27, 2011, page 19, Footnote 13]

Thus, the Court of Appeal, applying *Cassel*, narrowly interpreted the language of the statute so that *all the participants who attended the mediation were required to sign the settlement agreement* in order for the waiver of confidentiality agreed to by the parties in settling their dispute to be valid.⁵

The Court's interpretation appeared to ignore the record which demonstrated W&T hadn't even asserted mediation confidentiality *until well over a year after the settlement was concluded* so that at the time of the settlement, none of the parties or participants even had notice of any objections or concerns with regard to the issue of confidentiality at the time, much less timely notice of it, so that such concerns could be addressed.⁶

Further, this interpretation overlooked the fact that it was W&T's obligation, as the attorneys responsible for documenting the agreement at the time of the settlement, to ensure that all appropriate parties and participants, including themselves, signed the settlement agreement so that it was valid and compliant with the law. Lost in all the literal interpretation of the statute was W&T's role in the strategic manipulation of the entire process *after the fact*, and the impact it has had on the rights of the parties they supposedly represented in the mediation.

In essence, not only could an attorney/participant attend a mediation on behalf of a party and act separately from the interests of that party/participant, they could lead the party to believe everything about the agreement was proper, but then *over a year after having purportedly negotiated and drafted a final settlement agreement for that party*, assert their separate interests.

The Court of Appeal applied *Cassel's* principles to the facts of *Porter II*, despite the fact that the cases were distinguished in many respects (e.g., *Porter* involved a mediation which led to a resolution, including a settlement agreement, which included a term that waived confidentiality (agreed to by the parties as part of their mutually acceptable agreement), and attorneys who didn't assert mediation confidentiality until over a year and a half after purporting to validly document that settlement). The Court of Appeal, in applying *Cassel*, came to the same conclusion as *Cassel*, i.e., that the actions of the attorney/participant and their impact on the client/participant did not lead to an "absurd result," and also concluded this is what the Legislature intended in its use of the term "participant."⁷

⁵ We believe a fundamental flaw in *Cassel* is its focus on California's "mediation confidentiality statutes" without considering those statutes within the context of California's "mediation statutes" in general under CCP §1775 et seq., or how the latter demonstrates the legislative purpose and intent of the mediation process is to benefit the parties who seek to use it to resolve their disputes.

⁶ Certainly, to the extent that W&T had objections, they also have an obligation to raise them with their clients, opposing parties and their counsel, and do so in a timely manner, particularly considering the significant rights implicated, including those of their minor client. Certainly, nothing in the statute contemplates or condones attorneys lying in wait by withholding critical objections, only to spring them later in order to secure some procedural advantage in litigation which their actions in withholding such information caused.

⁷ We believe our case did demonstrate the "absurd result" and that the *Cassel* analysis and findings cannot be applied to the facts of our case without a more in depth analysis of the mediation statutes as a whole, particularly insofar as the actions of our former attorneys post-dated the mediation in question, not arising for over a year and resulting in *retroactive repudiation of agreements they had been responsible for ensuring were valid*. In part, this is a function of the fact that, as noted above at Footnote 5, the *Cassel* court limited its analysis to the reach and impact

We appealed to the California Supreme Court. Our issues presented were simple and reflect questions which today remain unanswered:

1. Who controls the decision to waive mediation confidentiality? Specifically, where all parties to a dispute have expressly waived mediation confidentiality, should non-party participants to the mediation be allowed to thwart that decision?

2. Does a documented waiver of mediation confidentiality contained in a fully executed Settlement Agreement require the signatures of all non-party participants to the mediation in order to constitute a valid express waiver of mediation confidentiality?

Unfortunately, despite our belief that our petition was a direct response to Justice Chin's question, the California Supreme Court apparently didn't see the need to address these questions or the issues they raised, including the waiver by the parties or the problematic issue of accountability for how the actions of self-interested attorneys were compromising California's mediation process.

Over the past ten years, our former attorneys have prolonged our litigation asserting numerous, varied and contradictory positions regarding mediation confidentiality – first ignoring it during discovery, then asserting it in discovery and again in pre-trial motions, only to abruptly flip-flop and claim it didn't apply due to Paragraph 19 in the Settlement Agreement. However, when the openness and transparency of a fair and just trial, based on their dropping pre-trial objections to evidence related to the mediation resulted in a jury verdict against them, once again they vociferously asserted its “absolute” nature and that the “irregularity in the proceeding” they had caused entitled them to a new trial.

What is ironic is that while W&T continued to assert the “absolute” nature of mediation confidentiality to the California Supreme Court in *Cassel* and the Court of Appeal in the rehearing after *Cassel*, and then again to the Supreme Court when we petitioned for review, they abruptly switched positions yet again in their reply papers in connection with the 2012 JNOV ordered by the Court of Appeal in *Porter II*, for the first time taking the novel position that the

of “the mediation confidentiality statutes” and did not consider those statutes within the context of California's “mediation statutes” as a whole. However, what is also puzzling is that the *Cassel* court *actually relied on the Uniform Mediation Act* (although it failed to cite to it) for the “statutory purpose” of mediation confidentiality (citing to *Simmons*, which in turn cited to *Foxgate* which stated “The legislative intent underlying the mediation confidentiality provisions of the Evidence Code is clear,” citing to “(Nat. Conf. of Comrs. On U. State Laws, U. Mediation Act (May 2001) § 2, Reporter's working notes, P 1”). At the same time, the *Cassel* court ignored the UMA's provisions related to the role, rights and relationship of a “party” to a “nonparty participant,” including an attorney, which seems to demonstrate it is the “party” for whom the process was convened, but also distinguishes “participants” as separate and distinct from their “counsel” who often accompany them to such a process (Reporter's notes 1.2(2), page 11, Lines 7-8); that such a nonparty participant “attorney” is considered a “support” person for the party (Prefatory Note, 1: Role of Law (Page 2, Line 16)); that “mediation confidentiality” is a privilege (Sec. 5, page 22 et seq.); and that while the nonparticipant could be a holder of the privilege (Sec. 5(b)(4) at page 22), this was a status typically reserved for nonparticipant “experts” (Sec. 5 Rptrs. notes, 4.c, Page 27, Lines 21-28) so that the primary holder of the privilege is the “party” (Sec. 5, Rptrs. Notes 4.a-b, page 26) for whom the mediation is convened, and whose “candor” is what is required to enable a resolution to the dispute. (See, *Cassel*, page 5, “Discussion” related to recommendations of the California Law Revision Commission and citations to *Simmons* and *Foxgate*).

mediation period actually ended ten days after the April 26, 2005 mediation session, based on their interpretation of EC §1125.

Throughout our litigation, W&T have alternately characterized themselves as “parties” to the mediation (to justify negotiating on their own behalf as against the interests of their clients at the mediation), but claimed they were not “parties” to the Settlement Agreement, (and therefore were not bound by its language or provisions, particularly the waiver in Paragraph 19, while continuing to assert the validity of the remaining terms of agreement so long as they benefited them, including those which ensured payment of their legal fees).

They have alternately asserted the rights of, and objections on behalf of, “other parties,” “other participants” who attended the mediation, and even “the mediator,” to justify their efforts to set aside the waiver in Paragraph 19, over the rights of their clients, whom they were ostensibly representing at the mediation. This despite the fact that the settling parties had agreed to the waiver as a term of their mutually acceptable settlement, and that none of the other participants who attended the mediation on behalf of the other parties has actually ever objected to the introduction of the evidence, because their interests were all aligned with the party on whose behalf they attended the mediation.

W&T Coopted Rights/Interests of Party/Participant in 2005 Mediation

It was our understanding that in the mediation and settlement process an attorney is supposed to be representing and aligned with the interests of the client, so that in arranging and attending the mediation on our behalf, our attorneys were there to *represent and be in alignment with our family’s interests*, i.e., the parties they represented. While the chief negotiator for the underlying defendants represented, and was aligned with, the interests of the disputing party defendants at the mediation, as well as the participants who were present on behalf of those defendants (including various representatives of both MBUSD and the CDE), this was not the case with our attorneys.

At the outset of our April 26, 2005 mediation session, while there was a brief introduction by the mediator regarding what the process would entail, beyond that my husband and I did not see the mediator or the opposing parties or their counsel, for most of the mediation. Instead, our attorneys caucused with the mediator and the chief negotiator/counsel for the defendants in a separate part of the office.⁸ Because of the process used in our mediation, we

⁸ If it hasn’t already been raised or discussed as an issue, I believe it is important for the Commission to examine how mediations are often actually conducted. In our case, the mediation did not involve face-to-face sessions between the parties to the dispute, but instead from our perspective consisted of meetings between us and our attorneys followed by meetings between the attorneys alone who we understood were caucusing directly with the mediator outside the presence of the clients. Thus, the parties were excluded from the process in a manner that leaves open the possibility for decisions being made without the parties’ knowledge, involvement or consent. In researching the roles of attorneys in mediation, I came across an article on the American Bar Association’s website which notes: “Caucus Sessions: A mediation technique, which a lawyer may encounter if he or she attends the mediation session(s), is the *caucus*. A caucus is a separate session between the mediator and each party to the dispute, outside of the presence of all other parties. A caucus session with a party would include the party’s lawyer, unless the party instructs otherwise. ***Mediators should not engage in caucus with a lawyer outside of the presence of that lawyer’s client.*** Through caucus, the mediator explores privately with the party such matters as impediments to settlement and the consequences of various alternatives. Not all mediators use this technique. A caucus session

did not know what our attorneys were telling the mediator or the opposing side and with only one or two exceptions, heard only what our attorneys wanted us to hear and knew only what they wanted us to know. In a mediation conducted in this manner, all sorts of things can be said and represented without a client's knowledge. In addition, our communications were for the most part wholly separate communications and exchanges that truly were "attorney/client communications," as no one other than our attorneys and staff from their office, my co-workers who ostensibly were also aligned with our interests, participated in our separate discussions.

Unfortunately, as discussed previously, it became apparent through the trial testimony of the chief negotiator that during the mediation W&T were actually asserting their interests over our son's interests and our interests as clients, and over my interests as their employee, and had used separate caucuses with the mediator, in which only the attorneys were apparently present, to accomplish this.⁹

In addition, this was subsequently confirmed through W&T's own admissions in their motion for new trial and during the appeal process, in December 2009 briefs submitted to the Court of Appeal with regard to "new authority" in the Court of Appeal decision in *Cassel*. In their letter brief, W&T stated that the settlement in the underlying action had involved a "fee-shifting statute, so that part of the negotiations included how much money would be allocable to attorneys' fees for which the defendants were separately liable," so that:

"Thus, W&T was a party to the mediation in its own right with respect to the negotiation over attorneys' fees." (See, Respondents' and Cross-Appellants' Letter Brief re: New Legal Authority," 12/17/09 at Page 8).

In addition, W&T similarly asserted they had a separate, employer/employee relationship with me as their employee and that if I had waived my right to recover my lost earnings claim as part of the settlement (which is what they had advised me to do during the mediation when the underlying defendants had sought a reduction in W&T's fees), W&T would incur a substantial obligation:

"Thus, W&T was not, at least with respect to this aspect of the negotiations, acting solely as an agent for the Porters, such that the discussions between Mrs. Porter and Mr. Wyner had no impact on W&T's interests." (See, Respondents' and Cross-Appellants' Letter Brief re: New Legal Authority," 12/17/09 at Page 8).

requires specific disclosures and raises certain confidentiality and trust issues." "Role of Attorneys in the Mediation Process," (Page 7) (emphasis added)
http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/role_of_attorney_in_mediation_process.authcheckdam.pdf. See also, <http://www.mediate.com/articles/israelL13.cfm> which relates to California mediations and does not appear to contemplate caucus where the parties are left in a room while the attorneys go and meet with the mediator and perhaps representatives for the opposing party, which is what happened in our case.

⁹ "Mr. Feldhake testified that the issue was raised "very late in the morning" (3/4/05 Tr. 150:11-14), and that he "raised it with Mr. Wyner and Ms. Tiffany in private caucus when it was just the three lawyers together." (3/4/08 Tr. 152:2-5) W&T relied on this testimony, which they complained caused an irregularity in the proceeding, to support their motion for new trial.

In other words, it was W&T's belief they were at the mediation to negotiate their fees as against our son's interests in recovering a settlement to compensate him for the deprivation of his educational rights, and against me as their employee, to whom they owed unpaid wages. At no time prior to or during the mediation did W&T inform us they were taking such positions in the negotiations, which at least would have allowed us to decide that perhaps mediating was not such a good idea after all. Also, nothing in the mediation process or procedures indicated this was something they might do, a reality that continues in mediations to this day.

It is our belief that at every step of the process, the attorney/participant has been allowed to coopt control of mediation confidentiality for their own purposes, separate and apart from their client. Fundamentally, as a result of *Cassel* and our case interpreted in light of *Cassel*, the party-to-party process and use of confidentiality in mediation has been coopted by a third-party, the attorney for one of the party/disputants, who has taken it out of what was a straightforward bi-lateral relationship and not only made it trilateral, they have sent it somewhere outside of the standard party-to-party relationship altogether in a manner that has enabled attorneys to shroud their actions and use mediation confidentiality as an untouchable refuge for the negligence, malpractice and outright fraud that unfortunately is part of the practice of some attorneys.

In our case this occurred not only during the mediation and negotiation process (where they used the process for their own interests and purposes, through the drafting of the settlement documents and the waiver of confidentiality to which they voiced no objections), but subsequent to the settlement, by retroactively invalidating the very provision they had negotiated, drafted and purported to approve as to form - a mutually agreed to term of settlement negotiated by the disputing parties in resolving their dispute (Paragraph 19) - to coopt the confidentiality the statute provides for disputing parties to shroud their actions from accountability in a manner the mediation statutes clearly do not contemplate.

In this fashion, the attorney/participant has also coopted the statute's benefits, including the parties' right to control how their evidence would be used in future proceedings, for themselves to use against the very party/participant, i.e., their client, the statute was intended to protect. Clearly, such acts do not comport with CCP §§1775 – 1775.15 and EC §§1115-1128 or any of California's statutes related to mediation. To us, this interpretation is an "absurd result."

Just as problematic is the decision of the Supreme Court which has essentially validated such acts, yet failed to address:

- 1) The ethical violations such acts represent;
- 2) The impact of such acts on the rights of parties to come to mutually acceptable terms in settling their dispute and to control confidentiality in the mediation process; and
- 3) That the control of mediation confidentiality has been wrested away from the party/participant for whose benefit the mediation was ostensibly convened, by the attorney/participant supposedly representing them, with the rights of the latter superseding and taking precedence over the former.

We believe that to address this coopting of authority and to warn would-be mediation participants about what attorneys presently can do with impunity under the law as interpreted in *Cassel*, a form of contractual waiver, which includes extensive notice provisions, is required to protect the party/participant in the mediation process.

PROPOSED “Notice and Contractual Waiver”

What began as a waiver for accountability purposes has been altered in light of our case and the present context of mediation, where attorney/participants are now allowed to coopt the rights and interests of the parties in mediation.

Because the purpose of mediation is to allow the disputants to resolve their disputes in the manner that serves their purposes and because attorneys who attend mediations should be there only to serve the interests of their client in an ethical and good faith manner, parties should have the right to agree to a contractual waiver that allows the parties to control the confidentiality of their evidence, and also to seek redress of their grievances related to attorneys or with regard to any other issues that may arise regarding the process, including simple error, mistake, etc.

As an initial matter, even if the Legislature should determine to enact changes to the statute that will open up the mediation process to necessary scrutiny and accountability with regard to attorneys who may use it for purposes other than what the Legislature truly intended, there must be notice in the process so that parties know their rights in mediation, including their rights in relationship to the attorney representing them. Their knowledge of their rights and that relationship could also lead to parties deciding to negotiate a contractual waiver of mediation confidentiality to enable them to protect themselves against acts by an attorney which may occur during the process that could possibly deprive them of their rights.

Specifically, such an initial notice could forthrightly address:

- Definitions of and the differences between the parties and participants;
- The rights of the party/participant (i.e., that they are the ones for whom the mediation statutes were enacted, not only to enable them to resolve their dispute, but to allow them to control confidentiality and the use of their evidence in any future proceedings, and thus they are the primary participants who control mediation confidentiality, including whether it should be waived or maintained);
- The role of the attorney/participant in the process (including that the role of the attorney/participant representative is generally limited to supporting or acting in alignment with the interests of the party/participant on whose behalf they attend the mediation);
- That the interests of the parties take precedence in the mediation process, as they are the ones for whom the mediation was convened, and that the attorney is to represent and align with the interests of the party in any decision-making that occurs in the mediation process;

- The role of other nonparty participants, including the role experts play in the process, and that such nonparty participants may have a confidentiality interest with regard to statements and reports prepared by such persons for the mediation, given that such assurances of confidentiality are necessary to encourage their candid participation. (*See*, U. Mediation Act (May 2001) Section 5, Reporter’s notes, 4.c Nonparticipants as holder, at page 27);
- Information regarding the obligations of attorneys in terms of expected competencies, knowledge and expertise, with regard to the processes of mediation and documentation of a settlement, a waiver, etc., so that all attendees at a mediation, including parties and attorneys, are on the same page as to the ground rules for the process;
- Exemplars of potential problems that could arise, including the issue of caucusing, as discussed above; that an attorney should not be negotiating for themselves or against the client’s interests; what forms duress and/or intimidation might take in the mediation process; fee and payment issues, etc.;
- Steps to take should such problems arise, as well as resources that are available to assist parties to a mediation in such situations.

In addition, it is important that the mediator not be seen as the sole source of information about the “rules of the game” in the mediation process. Such information should also come from each attorney present, in the presence of the mediator, with an acknowledgement of the rules, and their obligations under them, affirmatively communicated to attendees. Such affirmations would provide assurances to the mediator regarding the attorney’s knowledge and expertise in the process and also reassure parties and participants through the acknowledgement of their obligations under the law and the canons of ethics. This would serve to cement these obligations in the attorney’s mind as well.

While what occurred in our case may be the exception to the rule of what typically occurs in mediation, so long as *Cassel* is the law there exists the potential for parties to mediation to be subjected to the acts we experienced. Considering the devastating impact such actions can have on a party’s rights, not to mention the long-term consequences of continuing litigation, parties should be given the option and in fact be encouraged to agree to a prospective waiver, through which the parties would agree that in the event one party determines, during or after a mediation, that their attorney, or another attorney/representative nonparty participant at the mediation, engaged in actions that compromised their rights or the rights of another party in the mediation and settlement process, the parties will cooperate in any action, which can range from complaints to the State Bar to potential legal action by a party to redress grievances for any such claims, in order to assist the party in redressing their claims.

A prospective waiver could be as simple or as complex as the parties decide. It would allow the parties to lay out ground rules in advance to ensure that a party's attorney acted in a manner that has the rights and interests of the party at heart. Such a provision would not only ensure the parties have notice of this very problematic aspect of mediation, but would provide assurance of the validity of the process through notice of such rights and that should problems arise, there would be a means of addressing them.

Such a prospective waiver could state it would only be relevant or necessary should a problem arise and would be extinguished with the resolution of the dispute, unless subsequent facts were discovered, making it relevant again. Such an advance waiver could also include specific protections the parties wish to have for evidence they agreed was confidential, including that it would remain so unless all the parties agreed.

More importantly, such a waiver should clearly state that attorneys or representatives of the parties in attendance did not have the option to block such a waiver and that with the exception of an "expert witness," whose right to confidentiality with regard to their specific statements or reports should be protected, attorneys are to be aligned with interests of the party they represent and must agree with that party's decision regarding confidentiality, including any waiver. Should an attorney choose not to agree to such a provision, this would serve as notice to a party that perhaps they should not proceed with the mediation and instead seek new counsel, as their present attorney did not agree with the scrutiny such protections would bring.

As a result, everyone – parties, participants, attorneys, representatives, etc. - would be put on notice of the potential problems that could arise during a mediation and that the parties' power to prospectively waive mediation confidentiality to address such occurrences would ensure accountability for such problems.

Such a waiver could include whatever method the parties choose to agree to in terms of options for addressing such problems, including but not limited to, *in camera* proceedings as CLRC's analysis has discussed or perhaps a process along the lines of Justice Chin's suggestion in his concurrence in *Cassel*:

"For example, it may be appropriate to provide that communications during mediation may be used in a malpractice action between an attorney and a client to the extent they are relevant to that action, but they may not be used by anyone for any other purpose. Such a provision might sufficiently protect other participants in the mediation and also make attorneys accountable for their actions."

Frankly, such a notice and form waiver could become as routine a part of any agreement to mediate or confidentiality agreement as the provision currently used in the current JAMS Confidentiality Agreement to waive the automatic termination provisions under EC §1125(a)(5).¹⁰ Also, such a notice and waiver provided at the outset of the process would do nothing to inhibit the candid and frank discussion necessary to a mediation.

¹⁰ <http://www.jamsadr.com/adr-forms/>

Fundamentally, when everyone has notice of the process, the rules of the game and is on the same page in terms of rights and responsibilities of all the players, the playing field is far closer to level for parties and attorneys alike than it is today. There would be no better boost to confidence in the mediation process as a whole and its continued use and effectiveness as an alternate means of dispute resolution in California could be safeguarded and ensured.

III. Contractual Waiver to Protect Parent and Student Education Rights

Mediation in Special Education Disputes

As my August 2013 letter indicated, mediation is considered perhaps the most efficient and effective form of alternative dispute resolution in the special education context, as it purposely seeks to avoid subjecting families and school personnel to the stresses associated with the litigation process.

However, the mediation process is presently fraught with significant peril for parents and their children, who find themselves confronted with dangers on multiple fronts in a mediation process with its own unique stressors, which sometimes transcend the problems litigation presents.

Based on my involvement with special education in California, not only as a party, but also as an advocate, I have come to believe there is a need for some form of waiver to protect parent and student educational rights in the mediation process. Since our settlement, I have been contacted by many families in the State of California who, in their efforts to obtain appropriate special education services for their children have experienced significant challenges with mediation (which under the IDEA, is the most widely-recommended means of alternative dispute resolution for parents of students with disabilities).

Some of these challenges include:

Attorneys who have used mediation to obtain legal fees, at the same time the student the attorney was representing received little in the way of educational services;

Parents being forced to waive their child's rights under the law in order to get services from a school district the child should have been able to receive under the Individualized Education Program ("IEP") process, at the same time the public education agency responsible for ensuring such rights as a condition of their receipt of both state and federal funds, continues to collect such funds as if they had provided services;

Local education agency legal counsel using mediation, as well as their role as drafters of settlement agreements, to curtail rights through omitted terms, vague terminology and poorly documented service delivery periods, without oversight or accountability and with parents having no recourse for any problems that arise.

As a result, after a mediation designed to resolve disputes over services and ensure the provision of same, students are left without services, while their parents find themselves with agreements which include terms that are often unenforceable or meaningless, and far too frequently facing

the prospect of continuing litigation without the means to afford new legal counsel and without any avenue for pursuing an attorney who may have wronged them in the first place, all because of mediation confidentiality.

While parties who litigate in California today may be inexperienced in litigation, parents are even less so, and typically have little if any experience with legal systems or processes. While California's Office of Administrative Hearings ("OAH") provides a guide "Understanding Special Education Due Process Hearings" that includes general information about mediation as part of the due process procedures and through "mediation only," to my knowledge it includes no warnings about the problems I've described.

<http://www.documents.dgs.ca.gov/oah/SE/SE%20Guide%20to%20understanding%20DPH.pdf>, California's procedural safeguards notice similarly includes only general information about the process.

IDEA's regulations do provide that "The public agency must inform the parent of any free or low-cost legal and other relevant services available in the area" if the parent requests the information or the parent or agency files a due process complaint under the IDEA (34 CFR §300.507(b)) (Authority: 20 USC §1415(b)(6)), and while California's Office of Administrative Hearings publishes such a list, the actual availability of "free or low-cost legal" services is another matter, with such services virtually nonexistent in a state where only a small segment of the attorney population actually provides services in the area of special education.

(<http://www.documents.dgs.ca.gov/oah/SE/SE%20advocacy%20list.pdf>).

Parent Attorneys Can Compromise Services/ Rights of Students and Parents

Where attorneys are involved in the process, unsophisticated parents are completely reliant on them, dependent on their knowledge, expertise and honesty. In addition, none of the parents I have spoken to over the past couple of years since the *Cassel* decision had any idea about that case or what has occurred in *Porter* since our settlement, despite how well-known our case may have been in the special education field at the time of the 2005 settlement. This means that parents who participate in mediation related to special education have no idea or warning that by doing so they may give up significant rights without recourse for attorney malpractice, negligence or conflict of interest on the part of their legal counsel.

Nor are parents aware that because IDEA is a fee-shifting statute, attorneys who rightly have an expectation to be paid, may end up feeling mediation is the place to take a stand with regard to their fees. As our case demonstrated, some special education attorneys apparently believe they are at the mediation *primarily* to negotiate their fees. Thus, mediation can be an inviting option, since an attorney who can obtain fees through mediation does not have to go through the process of justifying fees to a judge. As a result, the potential for a conflict of interest can arise during mediation where the attorney's interests can take precedence over those of the student and parent.

In addition, significant student and parent rights can be impacted in mediation. Attorneys may pressure parents to accept less in the way of services than the student actually needs in order to conclude the mediation so the attorney can achieve their pay day. Attorneys may also try and convince parents to waive rights to speed up the process.

In such a context, mediation can be extremely detrimental to the rights of parents and guardians of students with disabilities, whose rights and interests are dependent on the ethical behavior of attorneys but which can end up sacrificed to, and compromised by, an attorney whose focus becomes their own personal interest in being paid over the educational needs of their client student and parent (even when that may not have been their original intent) and that focus takes precedence over the interests of the student.

School District Attorneys Can Compromise Services/ Rights of Students and Parents

However, the problems don't end there, for it is not just issues related to a family's attorney that can prove problematic in special education mediation. Parents should be able to secure all appropriate services and supports for their child through the IEP, a process that is fully documented and protected by procedural safeguards which, if need be, enables a parent to pursue claims for both procedural and substantive violations. Unfortunately, districts often do not follow this process and parents are forced to file for due process or mediate to obtain needed services.

Many local education agencies regularly hire legal counsel for due process and mediation, which parents attend both represented by counsel and unrepresented. Parents who end up in mediation must also rely on the good faith of attorneys who represent the education agencies with whom a family is in dispute, at the same time such attorneys may seek to protect the interests of the agency over those of the student and parent. Such attorneys have been known to convince parents and guardians of students that they must waive substantive educational rights in mediation in order to get services for their child, when this simply isn't the case.

When parents pursue due process, often on the eve of hearing, school districts schedule a mediation to attempt to settle. The district comes to the table to finally agree to provide services they should have provided all along through the IEP process, but didn't. Many times, districts offer a student the bare minimum in the way of services. Worn out from the process and believing that obtaining even minimal services is better than the nothing their student has received up to this point, families often agree to accept the minimum offered.

However, parents are then presented with a settlement agreement purporting to document the terms of the agreement, only to find that it includes provisions requiring them to waive their child's rights, and their rights under IDEA, in exchange for services. Often the rights they are asked to waive include the right to pursue claims for prior denials of services during the period the district was supposed to be providing a "free appropriate public education" ("FAPE"), clearly didn't do so, and yet sought and received federal funds as if it had. In many cases, waivers relate to services that haven't even been delivered. In essence, district legal counsel can use IDEA's procedural safeguards to discourage families from pursuing rights the law actually guarantees.

In addition, LEA legal counsel have been known to fail to properly document settlement terms or the resulting IEP to reflect services they verbally represented to parents would be provided. Districts sometimes fail to comply with the express terms of the documents drafted ostensibly to settle a dispute, or misinterpret or fail to adhere to stated terms and then require parents to file suit to attempt to enforce them. To top it off, parents are required to enter into confidentiality provisions which are used to hide these improper provisions, as well as the bad acts and deprivation of rights which led to the mediation in the first place.

At the end of the process, the student can be left without needed services and the parent is faced with continuing noncompliance and the prospect of further disputes after having waived their rights in the process. Since documents developed during mediation and communications regarding them are presently precluded from disclosure under *Cassel*, where a parent or guardian may have unwittingly relinquished rights that are critical to their child receiving a “free appropriate public education,” either at a mediation or in the documentation of any agreement which resulted, such parent or guardian has no recourse against the school district, its legal counsel or their own attorney should they be an unwitting party to such activity. Worse, given the confidentiality provisions, many of them are afraid to even speak about what has happened.

Services/Rights Are Relinquished and Agency Obligations Eliminated

In this way, mediation can be used by school districts to eliminate their mandated obligation to ensure students are identified for and receive the services they need under the IEP process, so that the student can make the appropriate educational progress IDEA contemplates, an obligation that is a condition of a school districts’ receipt of federal funds. [An in-depth discussion of the sorts of problems attendant to this process can be found at a website created about a family’s dispute with their LEA and the State of California. (<http://www.educationnotlitigation.org/letters-sent/appendix2.pdf>. See, pages 12-18)

Unfortunately, services are regularly compromised in special education mediation today in this fashion. This is contrary to IDEA’s purpose of meeting a student’s unique needs. It is an unconscionable violation of the LEA’s obligations to ensure FAPE and protections under the procedural safeguards. It is also a violation of public policy.

Although releases and waivers may be standard in general business litigation, special education disputes do not involve typical business entities, and instead students and parents are pitted against a publicly-funded agency which has assured a grantor of funds (the State of California and/or the U.S. Department of Education) that it is complying with the law and ensuring students receive a “free appropriate public education.” Hoodwinking or forcing a family into waiving rights to get services the agency is obligated to provide is a forced waiver that goes against common sense, the IDEA and Congress’s clear intent. Because this is happening behind the shield of mediation confidentiality, there is no accountability whatsoever for such improper activity or the extent to which it is occurring and so it continues.

While the IDEA promotes mediation as a less stressful alternative to due process litigation, when it is used in this way it is by no means a “viable” alternative or “less stressful” for that matter, for in many cases students and their families are no better off than when they started and frequently end up with fewer services and further disputes, in which they discover they have waived significant rights and thus no longer have claims to assert. In addition, many parents find out long after the mediation that what they thought they had achieved for their child educationally, in fact, was not achieved because of attorney mistake, self-interest, or bad faith on the part of school districts and their legal counsel.

Thus, a process considered a part of IDEA’s procedural safeguards is being used by school districts to engineer an unwitting relinquishment by parents of their child’s and their own, substantive and procedural education rights. Such rights are being extinguished *without any recourse whatsoever* for the negative impact this can have on a student’s educational progress or outcome resulting from mistakes, missteps or intentional misdeeds in mediation. In essence, school districts use parents and the mediation process to eliminate a district’s statutory obligations to their child, and the mediation process is their cover.

In addition, given the “confidential” nature of mediation and how fearful most parents are to even speak about their mediation, there is an overall lack of awareness of this problem, with a resulting lack of accountability on the part of education agencies, not only for the individual student services and rights being denied, but for the societal impact of the failure of California’s public education agencies to appropriately educate our children.

This is occurring, in part, because parents are not adequately informed of the risks mediation poses in relation to attorneys in the process, the potential for waiver of rights or that *Cassel* prevents parents from redressing grievances which develop as a result of the process.

Cassel Has Affected Due Process Rights under Special Education Procedural Safeguards

The IDEA requires state education agencies to ensure that the procedural safeguards under 20 USC §1415 are in place, including the provision of a procedural safeguards notice, whose contents are intended to notify parents of their opportunity to present and resolve complaints, including the availability of mediation to do so. (*See*, 20 USC § §1412(a)(6) and 1415(d)(2)(E)(iii)). Local education agencies are required to provide such a notice to parents upon the initial referral or request by a parent for an evaluation, when a complaint is filed or upon a parent’s request.¹¹

While such notices provide parents with information regarding their opportunity to present complaints and utilize mediation, they do not provide any warning that parents may risk relinquishing rights in mediation or that because of *Cassel*, there is no recourse for the loss of rights that may occur in the mediation process. Thus, California’s procedural safeguards notice fails to meet the most basic “notice” requirements regarding the risks of mediation that would enable parents to act upon such “notice” and exercise their right to avoid such risks.

Also, under IDEA, mediation is not to be used to deny rights afforded under Part B. Specifically, IDEA requires that “The procedures must ensure that the mediation process: . . . [i]s not used to deny or delay a parent's right to a hearing on the parent's due process complaint, *or to deny any other rights afforded under Part B of the Act*; . . . [34 CFR 300.506(b)(1)] [20 U.S.C. 1415(e)(2)(A)].”¹²

¹¹ This document is on CDE’s webpage “Notice of Procedural Safeguards” and includes cites to 20 *USC* §1415(d); 34 *CFR* §300.504; *EC* §56301(d) (2), *EC* §56321, and §56341.1(g) (1)).<http://www.cde.ca.gov/sp/se/qa/pseng.asp> Also, a brief regarding IDEA’s requirements for mediation is here: <http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CTopicalBrief%2C21%2C>.

¹² How a parent would pursue such rights given the absolute nature of mediation confidentiality protections afforded under *Cassel* is unclear.

Unfortunately, this is exactly what is happening in California today, where the mediation process is being used to deny rights under the law and such actions cannot be redressed under *Cassel's* strict interpretation of mediation confidentiality. Given the scenarios described above, the result is educational damage that goes far beyond what typical litigation or mediation might contemplate, as it implicates the deprivation of educational rights in the context of the very system designed to ensure such rights. Not only are parents left without recourse, the education agencies responsible for the student's education, often the cause of the damage, are not accountable in any way in a system that is far more broken than people are even aware.

Nothing in the procedural safeguards notice the State of California and its local education agencies must provide parents, and nothing in the IDEA or in California's education code for that matter, give any notice that when parents participate in alternative dispute resolution under the IDEA the result can be the loss of significant educational rights. Parents believe that by mediating they are obtaining something of benefit for their child, when in California, by pursuing their "right" they may be at risk for losing even more.

Such circumstances are problematic as they are occurring in the context of the unique nature of special education, where significant duties are owed by the LEA and the SEA to students and their parents. Special education involves parties on one side (the student and/or parent) who are dependent on the other party (the LEA) for the agency's knowledge, expertise and good faith compliance with the law. In addition, the LEA has significant duties to the student/parent, including significant educational obligations to ensure student/parent rights, appropriate student services and FAPE as a condition of their receipt of federal funding. Yet, a conflict of interest can arise where the LEA will spend the funds it is appropriated to provide special education services to students, instead for legal fees to fight the provision of such services, particularly where this occurs in a process shrouded by mediation confidentiality.

In this context, this lack of notice is a significant problem. As I stated above, people are generally unaware of these problems with special education mediation. Compounding that is the reality that the general public, including those who might end up in mediation are completely unaware of *Cassel* or its significance. The lack of any information about these issues from the CDE, the state education agency or OAH, the agency that oversees special education due process proceedings, seems to confirm this.

Another equitable consideration is that while *Cassel* has affected due process rights under IDEA's procedural safeguards in California, it isn't the case in every state. Parents can mediate in other states and have accountability for the problems or activities described above regarding mediation, while a student/parent in California is out of luck. Not only is this inequitable, this directly implicates due process rights under both state and federal law, since mediation under the IDEA is considered a function of the due process procedures and the procedural safeguards which the law is designed to ensure.

I am sure that in enacting the IDEA and its provisions designed to encourage mediation as an alternative means of dispute resolution, Congress never contemplated that student rights would be routinely eliminated by the very process established to resolve disputes or that the education agencies obligated to ensure their provision would be the engine behind such a

process. However, I also don't believe Congress could have anticipated a court decision such as *Cassel* which effectively eliminates any redress of the grievances that arise in mediation.

I have many resources I can share regarding mediation in the special education context if the Commission is interested.

PROPOSED “Contractual Waivers to Protect Parent and Student Education Rights”

Our original purpose in negotiating Paragraph 19 was because school districts were hiding the nature and extent of special education litigation, as well as the increasing tax dollars being paid to fight the provision of services, leading to special education settlements hidden from the public, with no accountability. However, it is the activity I have just detailed and the damaging impact it is having on long-term educational outcomes of students, affecting their families, their districts, their communities and the State of California as a whole, which is my greater concern. This concern is the basis for my suggestions regarding contractual waivers to enable parents to open up mediation should problems arise and to stanch the loss of education rights happening in mediation today.

As with the “Proposed Notice and Contractual Waiver to Protect Interests of Party/Participants” discussed above, information about the process, rights and responsibilities involved with mediation should be made available to parents who choose to mediate. In addition, notice of the rights of parents as parties in relation to their own legal counsel, as well as in relationship with their school district and its legal counsel, should be provided and explained so that should problems arise in this context, parents will recognize them and be prepared to take appropriate steps in a timely manner. Also, steps that can be taken to redress other problems that may arise can also be made available.

I also believe that in the context of mediation involving public education agencies, where significant rights are at stake and at risk for being waived, a contractual waiver should be available to address such actions, so that students and parent rights are not extinguished without redress or recourse as is presently the case. Such a contractual waiver would be prospective and agreed to by the parties at the outset of a mediation. Such a waiver would not only act as notice to parents and guardians, but as a deterrent to attorneys who might consider using the mediation process to prefer their interests over the rights of the student and parent they are representing, or to prefer the interests of the education agency over those of the student and parent who actually are supposed to be the beneficiary of the school district's services.

While confidentiality is preferable in mediation, more preferable is a resolution that is meaningful and lasting, and which benefits the parties, including in this instance, the student who is in need of services and the parent who is vested in the student becoming, through the delivery of services, the productive member of society the IDEA contemplates. The mediation process should not be utilized by education agencies who are responsible for ensuring services to deny such services nor should it be used to extract waivers from unwitting parents which negatively impact a student's rights or eliminate an education agency's obligations under the law.

In addition, should questions or disputes arise with regard to a term of the settlement, e.g., the exact length of a service agreed to, or a term or provision of the settlement agreement and its meaning for the student's services, or in the event a mistake has occurred through error or inadvertence, a contractual waiver would allow the mediation process to be reopened and/or the process or issue reexamined for purposes of rectifying such problems. No person or their confidentiality rights is harmed by clarification of terms or by resolution of mistake or error.

Further, should it be discovered that an attorney has acted in a manner which has detrimentally impacted the rights of the student or the parent, such a waiver would again allow the injured party to take appropriate steps to hold the attorney accountable in the various ways attorneys can be held accountable outside of mediation. In addition, in the case of education agency legal counsel such accountability could include complaints to a school board or the CDE for actions which violate Part B, as the procedural safeguards notice contemplates. Complaints brought to school boards based on an act of litigiousness that does not serve students or the community could eventually lead to an attorney or law firm's service contract not being renewed, so that such openness could lead to greater budgetary and professional responsibility and accountability.

If parties to a mediation prospectively agree to such a waiver in case of problems or disputes, so that everyone knows that such problems and disputes can be resolved later outside the mediation, everyone is on notice that such actions will not be tolerated and that there will be scrutiny and accountability they should occur. This would mean that, as with contractual waivers in part II, above, the imbalance of power would shift to a more equitable balance, and the playing field leveled.

Parent attorneys will be accountable to their clients and on notice that there will be accountability should they prefer their interests over their client's. Overzealous attorneys who seek to continue lucrative contractual relationships with public agencies by extracting waivers of rights from the very students the education agency is supposed to be serving, would come under scrutiny and such a practice would hopefully end. School districts will no longer be able to avoid their obligations under the law nor will their legal counsel be able to use mediation as a weapon against students and their families. Such practices, which are clearly against public policy and the long-term benefit of our schools, our communities and our states, could be confronted and hopefully ended.

Also, where parties wish to do so, they should be able to do as the parties in our case did, i.e., negotiate a waiver that protects student confidentiality and enables parties to maintain control of how their evidence will be used in any future dispute that arises, while also ensuring the information is available to the public, so there is accountability for what public agencies do and how they spend taxpayer dollars. In this way, education agencies could openly demonstrate how effective they are in educating students and that they are acting in a good faith manner.

As a result, parents will be able to negotiate for necessary services in an environment that is far closer to what the IDEA contemplates and quite possibly, school districts will stop using mediation in the manner they have and instead will start using the IEP process again in the manner Congress intended.

As with my initial proposed contractual waiver, in those instances where parties agree to prospectively waive confidentiality for the resolution of such matters, their attorney would also be required to agree to such a provision or be seen as acting in a manner that is counter to the process and thwarting the purpose of mediation, i.e., resolving the dispute. The refusal to agree to a provision would also serve as notice to a party that perhaps they should seek new counsel for most fair and ethical attorneys do not fear the scrutiny such openness would bring.

Again, while the IDEA promotes mediation as a means of alternate dispute resolution, and contemplates confidentiality as part of the process, nothing in the law contemplates the draconian results mediation is having on families who use it to obtain the appropriate services their child is entitled to under the law, while others are using it as a shroud for all sorts of improper activities and conduct. Hopefully, a prospective waiver in the mediation process will be seen as a tool for the parties on both sides to fulfill their obligations to the student, to ensure that the student receives the services and the free appropriate public education the IDEA was enacted to ensure.

CONCLUSION

As you suggested, I have read the Memorandum 2015-22 (pages 18-25) regarding contractual provisions and I very much appreciate the discussion there. I believe some of my suggestions are very much in keeping with the approach discussed and in fact I think my thoughts are very much in line with the discussion regarding the attorney/client relationship under EC 958 (and not just because I heartily approve the Court of Appeal's commonsense interpretation in its first read on *Porter*). Although I have made suggestions for contractual waivers, and I believe they should be a part of the discussion of the revision of the mediation statutes, including those which pertain to mediation confidentiality, I also believe it is also necessary that a statutory exception be enacted by the Legislature as:

It will be a message from the Legislature that the actions by attorneys represented in *Cassel*, *Porter*, and *Wimsatt* will not be tolerated and that the interpretations by the *Cassel* court was not the Legislature's intent;

It will be the law that the acts involved in such cases will see the light of day, that there will be scrutiny, and accountability for any and all activities mediation confidentiality has been used to shroud, so that such activities will hopefully cease;

It will be clear that the provisions of the code are no longer to be subject to tortured interpretation or manipulation of the process or strategic "pushing the envelope" by aggressive attorneys who have been able to coopt and misuse mediation confidentiality intended to benefit the litigants for themselves;

It will telegraph an expectation that everyone is proceeding from the same presumption – that parties and participants are to be informed, that everyone should be on their best behavior and if not there will be accountability.

In keeping with my proposals in anticipation of waivers, I believe the Commission should recommend to the Legislature that there be strong notice requirements in advance of mediation (and here I am not just talking about a *Wimsatt* warning, for I do not believe that an agreement to mediate should contemplate such a waiver of rights). Instead, as indicated above in the proposals for contractual waivers, there should be notice that informs attendees of the obligations of parties and participants, including that they are all expected to proceed in good faith.

I also believe that any legislation should include language that guarantees parties the right to agree to a provision to waive mediation confidentiality in any agreement, if they so choose, so that a party confronted with problems with attorneys as I've described, can take steps to redress any grievances which may arise. Frankly, this would put all mediation participants on notice that while mediation has the potential for conflicts of interest, there will be accountability for improper conduct of any kind, so that everyone knows their interests are protected.

I would also strongly encourage any change in the law to take into consideration how prevalent mediation is within the special education community and require far greater scrutiny and oversight with regard to that process for the reasons stated above, not only for the protection of parent and student rights, but also to examine and investigate potential abuses of the process which implicate significant student rights and agency obligations which are being improperly eliminated through the mediation process, which at the present time are all going unaddressed.

Frankly, in the same way a pilot project was established to encourage mediation, it would be beneficial if a similar pilot project were established to educate parents and guardians of students with disabilities who use the mediation process, particularly given the prevalence of mediation as an alternative to litigation in special education. Such a project could go beyond the current services offered by OAH and provide meaningful resources to enable parents and guardians to understand their rights without being required to incur significant legal costs (which supports the law's assurances of free and low cost legal services in the pursuit of a student's right to a "free appropriate public education," which cannot be "free" so long as parents must incur costs to be protect their child's rights). It would not only significantly benefit parents, it would benefit the education community and the State of California as a whole, given its obligation to ensure access to mediation, and an effective alternative dispute resolution, as part of its annual assurances under the IDEA.

I also hope that to the extent California does not consider adopting the Uniform Mediation Act, it does at least incorporate the Act's well-drafted provisions and explanatory notes, which I found very helpful. Also, since the *Cassel* court itself relied on the Act for its statement of legislative intent (through *Foxgate*), and for the "statutory purpose" of mediation confidentiality, including the "frank and candid" exchange it is supposed to be encouraging, I think the use of such a resource only makes sense.

As to the CLRC study, while I have read with interest the many comments the Commission has received from attorneys insisting that mediation confidentiality needs to be "absolute," and that anything other than such absolute confidentiality will somehow cause the entire system to fall apart, I believe the facts of our case prove unequivocally this is not the case.

In our original trial, after our former attorneys represented to the court through their legal counsel that they were dropping their objections to evidence from the mediation so that it could come in, they themselves proceeded to introduce all the evidence they wanted from the mediation. Nothing as calamitous as what so many attorneys anticipate occurred when the evidence saw the light of day. W&T also called the chief negotiator for the underlying defendants, Robert J. Feldhake, to testify evidencing that mediation confidentiality was clearly waived for both sides of the dispute. In fact, all relevant evidence was admitted and all relevant parties and participants were heard and their rights were represented without objection from any other participant so that a full airing of all the relevant issues W&T chose to present occurred.

While W&T eventually lost the trial and did reverse course to claim “an irregularity in the proceeding” had occurred, this so-called “irregularity” did not prevent them from putting on any and all evidence they wanted to defend their interests and claims. Had they won, I am sure we would not even be here today.

Judges routinely review and weigh evidence and make findings regarding what has occurred in cases, including related to mediation, where they are required to look at such evidence in advance of trial to determine admissibility. (In fact, the CLRC Memorandum 2015-22 points out how the Supreme Court in *General Dynamics Corp. v. Superior Court*, (7 Cal. 4th 1164, 876 P.2d 487, 32 Cal. Rptr. 2d 1 (1994)) (a case involving the attorney/client privilege in the context of a wrongful termination claim) “encouraged the trial courts to be creative in using equitable tools to address such cases,” and in fact laid out an array of such measures and at the same time “recognized the complexity of the situation and sought to accommodate both the lawyer’s interest in pursuing a retaliatory discharge claim and the corporate client’s interest in maintaining the confidentiality of lawyer client communications.”(<http://www.clrc.ca.gov/pub/2015/MM15-22.pdf> at page 8).¹³

Judicial involvement in reviewing evidence has also taken place at the appellate level (e.g., see, *Travelers v. Superior Court*, 126 Cal. App. 4th 1131; 24 Cal. Rptr. 3d 751 (2005), where the Court of Appeal was required to address issues and questions regarding the same valuation order on three separate occasions). What prevents evidence related to mediation from being similarly reviewed, along with testimony taken, to determine claims of mistake, negligence, malpractice or simple error? Why can’t witnesses be called, just as Mr. Feldhake came and testified in our 2008 trial? And where parties are concerned about the confidential nature of the evidence and how it has come up again in a proceeding they may not have anticipated, *in camera* proceedings can be held, just as they are today, that would protect such evidence and the parties, separate and apart from the claims presently being asserted.

¹³ Why the Supreme Court wouldn’t suggest a similar approach in *Cassel* is puzzling. It is also interesting to compare the *Cassel* court’s *laissez-faire* approach when it comes to determining statutory construction and legislative intent regarding mediation confidentiality in the context of attorney misconduct, with the more involved approach the Court took in *Los Angeles Unified School District v. Garcia* (2013) 9th Cir. No. 10-55879 (decided by the Supreme Court at the request of the 9th Circuit), which does not involve attorney accountability, but instead deals with education agency responsibility. The Court’s approach in *Garcia*, like that in *General Dynamics*, seems far more solution-oriented than the hands-off approach of *Cassel*. Perhaps the court is inclined to problem-solving when it benefits attorneys (*General Dynamics*) but not when it doesn’t (*Cassel*).

Admittedly I have a perspective few do, but our trial did not lead to walls crumbling or the world ending, and the jury heard the evidence as fully as our former attorneys wanted, and rendered their verdict. Now, after ten years of litigation, seven years beyond our first trial, I think a simple review of what had occurred with regard to the mediation, with a fair weighing of all the evidence, was far preferable to our current prospect of facing a whole new trial, particularly when I think the evidence shows a fair trial is exactly what W&T got the first time around.

Fundamentally, mediation confidentiality has only recently gone awry when attorneys have begun using it for their own interests and purpose, separate from the rights of the clients they were supposedly representing, asserting it as a strategic tool, not to protect evidence of what occurred in the past, but to avoid accountability for what occurred during the mediation process.

Why California's courts have weighed in so consistently on this issue on the side of attorneys, as against the rights and interests of the party/consumer, is a question that calls out for discussion and begs scrutiny, particularly since the vast majority of sitting judges in California's court system are themselves attorneys and the California Supreme Court itself is the judicial body responsible for ensuring proper conduct by the attorneys of our state.

What no court has seemed inclined to mention, much less discuss, is how decisions such as *Cassel* can be issued with almost no mention or discussion of the ethical violations such egregious actions constitute or the need for accountability for same (of course excepting Justice Chin's comments and the court in *Wimsatt*), particularly in light of the greater ethical obligations supposedly placed on attorneys in their conduct vis-à-vis clients and in processes such as mediation. This leads to a crisis in confidence in the ability of California's courts to deliver fair and impartial justice, particularly in connection with so shrouded a process as mediation.

What is also troubling is that even with the draconian results in *Cassel*, *Porter* and *Wimsatt*, to my knowledge there has been little official discussion of how to ensure meaningful notice to California's consumers about the perils of the mediation process. At the same time the majority of attorneys who have provided input to the Commission, and who are also responsible for ensuring their clients have notice of the impact of *Cassel*, have raised such a hue and cry one would think shining a light on the bad acts of some attorneys within mediation will prove harmful to the mediation process itself, when I believe it will only affect those who act badly within its boundaries. Perhaps there is more public discussion than I am aware of. What I hear from families involved in special education mediation is that no one has any idea the process as it stands today can so significantly compromise their rights.

I was recently doing some research related to the federal "Freedom of Information Act" and came across a statement by President Obama, quoting Justice Louis Brandeis, who said "Sunlight is said to be the best of disinfectants." I thought that was an appropriate quotation for the CLRC's process and its discussion of California's mediation confidentiality issues.

However, even more apt is another statement attributed to Justice Brandeis, where he said "If we desire respect for the law, we must first make the law respectable." I believe that as the law governing mediation and mediation confidentiality presently stands and is interpreted in California, it is neither "respectable" nor is there "respect" for it, as it sacrifices the rights of ordinary citizens for the benefit of officers of the court through misinterpretation of the

mediation statutes, and benefits the rights of attorney/participants over the rights of the party/participants for whom the statutes were ostensibly enacted. In my mind, that is wrong and I hope the Commission takes steps to set things right.

I am aware many feel the openness and control of evidence as the parties negotiated in the original *Porter* settlement is neither desirable nor warranted in litigation where accountability and transparency are not so significant a factor. However, where a party's right to confidentiality and control over evidence from the past can be coopted by an attorney, and used against the client and the client's interests, confidentiality is not a blessing, but instead becomes a curse.

Ultimately, it is the party's right to decide, not the attorney's, but that right has been thwarted by *Cassel*, *Porter* and *Wimsatt*, and all the other cases where courts have allowed attorneys to run roughshod over the rights of the party. I believe that any of those who so fervently believe in the absolute nature of mediation confidentiality would be whistling quite a different tune had they walked the past ten years in our shoes.

Thank you for the opportunity to provide this input. Should you or other Commission staff or Commission members have any questions, please feel free to contact me.

Deborah Blair Porter – August 4, 2015