

First Supplement to Memorandum 2015-45

**Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct: Comments of Rachel Ehrlich**

Yesterday afternoon, the Commission received the following communication, which addresses some of the points discussed in Memorandum 2015-45<sup>1</sup>:

*Exhibit p.*

- Rachel Ehrlich (Oct. 5, 2015).....1

Ms. Ehrlich is a mediator who has regularly attended and participated in the Commission meetings relating to this study.

Ms. Ehrlich “remain[s] undecided on the issues in part because many of the problems that can ensue may be ameliorated with considered drafting.”<sup>2</sup> Her new input “assume[s] that the Commission will proceed to create exceptions to mediation confidentiality in claims for attorney misconduct, including malpractice.”<sup>3</sup>

Among other things, Ms. Ehrlich makes the following comments and suggestions, which we list roughly in the same order as they appear in Memorandum 2015-45:

- *Inclusion of attorney-mediators in the Commission’s proposed new exception.* Ms. Ehrlich observes that “the Commissioners appear to be seeking ... consequences for bad behavior on the part of mediators.”<sup>4</sup> She says the “form that these consequences will take and the forum in which they will be decided are key to managing the extent of opposition that the proposal is likely to engender.”<sup>5</sup>  
 In particular, Ms. Ehrlich warns that “any time a person who is unhappy with a settlement reached in mediation sues his/her own

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. Exhibit p. 1.
3. *Id.*
4. Exhibit p. 4.
5. *Id.*

attorney for malpractice the mediator will also be sued for malpractice.”<sup>6</sup> She suggests two possible means of reducing the likelihood of that scenario: (1) limit the proposed new exception to State Bar investigations and proceedings, or (2) “[r]equire that there be a State Bar investigation and subsequent proceeding regarding the attorney-mediator’s alleged misconduct and that only upon findings of a certain nature in that proceeding (or possibly settlement) may a malpractice action against the mediator proceed.”<sup>7</sup>

Ms. Ehrlich warns that “creating an exception to mediation confidentiality for attorney-mediatory misconduct in anything *other than* a State Bar investigation and proceeding with their attendant protections could lead to the need for an extensive statutory scheme suggesting what is mediator malpractice and the remedy for it.”<sup>8</sup> Thus, “[i]f the Commission decides to recommend amending the current statutory scheme to allow exceptions to mediation confidentiality for attorney-mediator misconduct or both misconduct and malpractice, [she] suggest[s] that the Commission also recommend a mediator certification and regulatory scheme similar to that employed in Florida in order to provide **all** mediators with guidance regarding standards that will be applied to judge their conduct and practice.”<sup>9</sup> She specifically mentions a need for guidance regarding the extent to which a mediator can disclose mediation communications.<sup>10</sup>

Consistent with the above perspective, Ms. Ehrlich questions whether the solution to alleged mediator misconduct “should be confined to attorney-mediators, not for competitive reasons but rather due to the possibility of unequal results.”<sup>11</sup> In her view, “any change to the law regarding mediators ought not to be limited to attorney-mediators.”<sup>12</sup>

Ms. Ehrlich also notes that “[i]f the Commission decides to table the issue of attorney-mediator misconduct ... it could still suggest that the Legislature charge the State Bar to study the issue ....”<sup>13</sup> She provides some specific suggestions in this regard.<sup>14</sup>

- *Definition of attorney.* Ms. Ehrlich points out some potential ambiguities regarding who to treat as an “attorney” for purposes of the Commission’s proposed new exception relating to attorney misconduct. She suggests that the Commission provide clear guidance on these matters.<sup>15</sup>

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6. *Id.*

7. Exhibit p. 5.

8. Exhibit p. 5 (emphasis added).

9. *Id.* (boldface in original).

10. Exhibit pp. 6-7

11. Exhibit p. 8, n.1.

12. Exhibit p. 8.

13. Exhibit p. 7.

14. Exhibit pp. 7-8.

15. See Exhibit pp. 2-3.

- *Mediator immunity.* Ms. Ehrlich cautions that if the Commission sticks with its June decision regarding mediator immunity, it will be challenging for the Commission to “harmonize existing quasi-judicial immunity with allowing presently confidential communications to be used in evidence.”<sup>16</sup>
- *Code placement and fee modification during a mediation.* Ms. Ehrlich says that “if the Commission wishes to specifically address amendments to fee agreements this might be best addressed in the Business & Professions Code...”<sup>17</sup> For a number of reasons, she considers it problematic to have the mediator “explain to people that they should memorialize any amendments to fee arrangements that are made during mediation.”<sup>18</sup>

The staff will provide additional discussion of Ms. Ehrlich’s comments in future memoranda as appears appropriate.

Respectfully submitted,

Barbara Gaal  
Chief Deputy Counsel

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16. See Exhibit p. 7.

17. Exhibit p. 4.

18. Exhibit p. 4; see also Exhibit p. 6.

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MEMORANDUM

Date: October 5, 2015

To: Barbara Gaal, Deputy Chief Counsel, California Law Revision Commission

From: Rachel K. Ehrlich, Mediator

Regarding: Study K-402, Ref. Memorandum 2015-45

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Thank you for issuing Memorandum 2015-45. That document was very helpful in setting out what the Commission Staff understands occurred at the August 2015 meeting and cogently defines for all of us the scope of the issues presented and the questions that need to be answered.

This memo addresses a number of disparate subjects, some of which are raised in Memorandum 2015-45.

What follows are analysis and questions that assume that the Commission will proceed to create exceptions to mediation confidentiality in claims for attorney misconduct, including malpractice. In addition, I want to take this opportunity to pass along more anecdotal remarks that for some reason people are not conveying directly to the Commission and Staff.

I remain undecided on the issues in part because many of the problems that can ensue may be ameliorated with considered drafting. And the hope is that what is raised in this memo will add to the information that goes into drafting.

Casse/ highlighted the injustice that can result from the current Evidence Code provisions governing mediation confidentiality. That it further has the appearance of attorneys shielding bad acting attorneys is distasteful and many attorneys have expressed that they believe it is wrong. In addition, attorneys have expressed concern that recommending mediation could be a violation of Rule 3-400 that prohibits "prospectively [limiting an attorney's] liability to the client for the [attorney's] professional malpractice; ...". For these and a host of other reasons the Commission has decided to change the current laws governing mediation confidentiality.

A preliminary question, in creating new exceptions to what is currently an exclusionary rule, is the Commission inclined to keep this as such or to change it to be a privilege that can be waived?

### Anecdotes

Legal malpractice plaintiff attorneys have remarked that before *Cassel*, testimony was regularly admitted in legal malpractice cases regarding attorney-client communications in mediation. Those people have asked why the law is going to go further than what existed before *Cassel*. They would like to see things return to what they had before *Cassel* with a clear exception to mediation confidentiality for attorney malpractice. When asked, they have indicated that they do not want the mediator to be able to testify.

In addition, still more people have expressed the same worry as others have about the potential negative impact to mediation generally if there is an exception to mediation confidentiality for mediator misconduct and malpractice. I have sought to assuage these worries with the same observations that I have previously given orally to the Commission, namely that in states with similar exceptions to those contemplated by the Commission such as UMA states and Florida there has not been a deleterious effect on mediation. People first note my experience has been primarily with commercial matters in which insurance companies are involved so there is an assumption that most people behave in those mediations as they do in settlement conferences and thus assume that people are not as candid with mediators in general. This is coupled with people's sense that California is more litigious than other states, and they say, "But this is California." My sense is that perhaps there has not been a plethora of mediator malpractice cases in states such as Florida because there is a statutory and regulatory scheme in place certifying mediators and clearing setting forth standards for mediator conduct.

### Attorney Misconduct/Malpractice (not Attorney-Mediator)

There are several items for which clarity in the drafting of proposed legislation would be beneficial, I will not repeat most of those that are set out by Staff in Memorandum 2015-45 instead I note that the questions posed there are critical to the rational operation of exceptions to mediation confidentiality. The following are also suggested for the Commission and Staff to consider.

- 1) Definition of attorney for these purposes. As indicated in Memorandum 2015-45, "the text of the resolution and its legislative history 'strongly suggests that the Legislature intended for the Commission to study and provide a recommendation on **the relationship between mediation confidentiality and alleged attorney misconduct in a professional capacity in the mediation process ...**'". [Memorandum 2015-45 p. 9, emphasis in original.] "Professional capacity" is ambiguous particularly as the Commissioners' vote in August of 2015 seems to interpret this to include misconduct of attorney-mediators. For this reason, it may be helpful to define the attorney conduct at issue as that of an attorney-advocate or attorney-representative.
  - a) Any term used would benefit from additional definition so that there is clear applicability or lack thereof to in-house attorneys or persons who happen to be attorneys who are not acting as counsel with an attorney-client relationship in the mediation. It may very well be that the Commission recommends that these

categories in fact be included in the attorney participant type for which the confidentiality exception will apply. This might include:

- i) Expert witnesses who are attorneys (e.g. in actions for legal malpractice, insurance bad faith, business disputes, patent and trademark infringement, et cetera) who attend mediation in that capacity and not as legal representative of a client.
  - ii) Insurance claims professionals who are attorneys but they are not representing the insured in litigation that is the subject of mediation.
    - (1) If there is an exception for this category of attorney participant, will this result in a partial exception to mediation confidentiality in bad faith cases against insurance companies and would that mean there are bad faith cases that present in the form of malpractice actions against these attorneys? What about the effect on the insured whose mediation is attended by a claims professional who is not an attorney that insured has no recourse for similar conduct? What about attorney-claims-professionals who are from out of state or who went to law school but are not a member of any Bar?
  - iii) Corporate representatives who happen to be licensed attorneys but are not attending mediation as counsel to the corporation.
  - iv) General Counsel for a party to litigation who is attending mediation as the corporate representative.
  - v) Individual party who happens to be an attorney who is attending mediation as a party and who has an attorney representing him/her in connection with the mediation.
- 2) In what context would the exception to mediation confidentiality for misconduct (not malpractice<sup>1</sup>) alleged against an attorney-advocate apply?
- a) A State Bar proceeding?
  - b) Some other proceeding regarding misconduct? If so, what kind of proceeding?
    - i) Fee dispute resolution (arbitration and mediation) has been identified by Staff and it makes sense to allow an exception here if it is allowed elsewhere otherwise there could be inconsistent results.
- 3) Whose initial allegations of attorney-advocate misconduct fall within the exception to mediation confidentiality to initiate the proceeding for misconduct (not malpractice)? One or all of the following?
- a) The attorney-advocate's own client(s) in the dispute that was the subject of mediation.
  - b) An attorney-mediator in carrying out the attorney-mediator's obligations under the California Rule of Professional Conduct 1-110 that prohibits any member "knowingly" assisting in violation of the Rules or the State Bar Act?
    - i) Will guidance be provided to attorney-mediators as to what, if any, duty the attorney-mediator has to inquire in order to determine whether a violation has in fact occurred/is occurring? Will guidance be provided to attorney-

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<sup>1</sup> I am assuming that it is self-evident that an action for malpractice is brought in Superior or Federal District Court.

- mediators as to what action they should take if they observe possible violations of the Rules of Professional Conduct or the State Bar Act? Will the attorney-mediator be required to terminate the mediation without explanation to any of the participants, as is at least suggested in other jurisdictions?
- c) Another attorney-advocate in carrying out that attorney-advocate's professional obligations under the California Rule of Professional Conduct 1-110 that prohibits any member "knowingly" assisting in violation of the Rules or the State Bar Act?
  - d) Any mediator.
  - e) Any other participant in mediation.
- 4) Alterations to fee agreements during mediation. As the Commissioners and Staff know this is a subject that has been the subject of a number of discussions and submissions and was one of the allegations against the attorneys in *Casse!*. While the Commissioners voted in August to amend only the Evidence Code, if the Commission wishes to specifically address amendments to fee agreements this might be best addressed in the Business & Professions Code, Chapter 4. Attorneys, Article 8.5 Fee Agreements and Article 13 Arbitration of Attorneys' Fees. It has been suggested that perhaps the mediator should explain to people that they should memorialize any amendments to fee arrangements that are made during mediation. [Memorandum 2015-45 p. 25.] Leaving until later the dilemma that this creates for the mediator, for all participants this is problematic in that it suggests to parties who are represented by attorneys that mediation is a time to revisit the fee arrangement with their attorney-advocate which seems unnecessary and could distract from the purpose of mediation.

### **Attorney-Mediator Misconduct/Malpractice**

A number of comments have already been submitted regarding the issues presented by the Commission's decision to create exceptions to mediation confidentiality in connection with attorney-mediator misconduct or malpractice. Staff Memorandum 2015-45 makes clear that the unanimous vote in June of 2015 was limited to not altering mediator immunity and that is not the same as deciding to allow exceptions for mediator misconduct/malpractice. I confess that I left the June meeting believing that the vote meant that the Commission had decided the scope of the Legislature's charge to it was limited to attorney-advocate misconduct/malpractice, not attorney-mediator misconduct/malpractice.

What the Commissioners appear to be seeking are consequences for bad behavior on the part of mediators. The form that these consequences will take and the forum in which they will be decided are key to managing the extent of opposition that the proposal is likely to engender.

People have commented to me (and many of the comments to the Commission since August have done so implicitly or explicitly) that any time a person who is unhappy with a settlement reached in mediation sues his/her own attorney for malpractice the mediator will also be sued for malpractice. And, that any time a client sues his/her own

attorney for malpractice in a case that did not settle at mediation and a less favorable resolution (settlement or judgment) is achieved, the mediator will be sued for malpractice. Perhaps the likelihood of this could be reduced while still allowing for there to be consequences for attorney-mediator misconduct or malpractice if one of the following were done:

1. Limit the exception to confidentiality for attorney-mediator misconduct to State Bar investigations and proceedings only. In other words, do not allow an exception to mediation confidentiality in instances of suits for mediator malpractice<sup>2</sup>; or,
2. Require that there be a State Bar investigation and subsequent proceeding regarding the attorney-mediator's alleged misconduct and that only upon findings of a certain nature in that proceeding (or possibly settlement) may a malpractice action against the mediator proceed. This would lower the likelihood of the joint suit of mediator and attorney in a single action but would not prevent it entirely because if mediator misconduct/malpractice occurred outside of the context of mediation session or consultation (namely if what is presently admissible in a malpractice suit against a mediator) the suit could still proceed without the necessity of the State Bar finding.

When compared with the core question of consequences for attorney-advocate misconduct/malpractice the study conducted thus far by the Commission has focused less on mediator misconduct/malpractice than attorney-advocate misconduct/malpractice. And the study has even less on appropriate remedies for mediator misconduct. One difference between a disciplinary proceeding and a malpractice action is the remedy that each affords the complaining party. Without additional study it may be that creating an exception to mediation confidentiality for attorney-mediator misconduct in anything other than a State Bar investigation and proceeding with their attendant protections could lead to the need for an extensive statutory scheme suggesting what is mediator malpractice and the remedy for it.

If the Commission decides to recommend amending the current statutory scheme to allow exceptions to mediation confidentiality for attorney-mediator misconduct or both misconduct and malpractice, I suggest that the Commission also recommend a mediator certification and regulatory scheme similar to that employed in Florida in order to provide **all** mediators with guidance regarding standards that will be applied to judge their conduct and practice. Please note that there is opportunity to improve upon what Florida has in place. For example, Florida has not reconciled for attorney-mediators rules of professional conduct requiring keeping confidences and the exception to mediation confidentiality for attorney-advocate misconduct and malpractice requiring reporting. In addition, the decisional trend in Florida is to limit mediator malpractice to instances where there has been a binding settlement agreement but the statutory scheme does

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<sup>2</sup> This has the added benefit of justifying different treatment of attorney-mediators from mediators in general because the State Bar generally does not have jurisdiction over non-attorney-mediators.

not yet address the issue. There are other opportunities for improvement that could be identified with in depth study and discussion by the Commission.

Further regarding the earlier noted suggestion in Memorandum 2015-45 on page 25 that the mediator (or counsel) inform people that they should memorialize any amendments to fee arrangements that are made during mediation. While this sounds good because it ensures the clients will learn of the issue, it puts the mediator in the uncomfortable position of policing compliance with rules and it assumes the clients are present. I can attest to how awkward it is when I am required to report to the Court that a local rule requiring that a client with authority physically attend mediation was violated. I can only imagine the awkwardness that would ensue if the mediator has to remind the attorney that there needs to be an admissible writing memorializing fee changes. And, what if the mediator is unaware of any alteration? And, finally, echoing some of the comments of others, if exceptions exist only for attorney-mediators how will this serve the interests of the public if mediators who are not attorneys are not required to remind attorney-advocates of their obligations?

Finally, how will the attorney-mediator defend against allegations of misconduct or malpractice if only part of the confidential communications received in mediation are excepted from confidentiality? As noted in Memorandum 2015-25 at page 32 in the second bullet point, "Private lawyer-client communications 'will often disclose what others have said during the mediation.' Using a private, mediation-related lawyer-client communication in a later lawyer-client dispute may thus harm the interest of persons who are not involved in that dispute. ..." This is even more likely to occur when it is the mediator who is accused, the mediator could be put in the position of violating the confidences of other participants to the mediation and thereby expose him/herself to allegations of misconduct/malpractice by those other participants. Will revealing confidential communications of other participants, not the complaining participant, be a violation of Rule of Professional Conduct 3-100? While attorney-advocates are permitted to breach client confidentiality because it is deemed waived by the complaining client, will the mediator be able to use all confidential communications or only those of the complaining participant?

It is easy to envision a circumstance in which during a mediation Side A confidentially shares with the mediator that it has evidence that will eviscerate Side B's case but does not authorize the mediator to share that with anyone on Side B because Side A is worried that the person who gave them the evidence could be retaliated against by Side B. Side B's attorney-advocate asks the mediator to opine in front of Side B's client whether a particular settlement option is good. The mediator does opine that it is good and provides a number of reasons why it seems to be good for Side B but does not reveal Side A's eviscerating evidence. The case settles at mediation, Side B's client later sues both Side B attorney-advocate and the mediator for malpractice. In defense of that malpractice case the attorney-mediator will now have to decide whether to reveal all of the bases for the mediator's analysis of the case thereby revealing the information that was conveyed confidentially by Side A. An in camera review would balance whether

the risk to the source is greater than the mediator's need to defend against the malpractice action.

While State Bar prosecutions bear the same risk of disclosure generally, State Bar investigations do not [Business & Professions Code §6068.1] but this does not ameliorate the ethical issue facing the attorney-mediator. I recommend that any recommended legislative solution drafted by the Commission allowing actions for attorney-mediator misconduct (including but not limited to malpractice) address this issue in order to obviate the need for the Courts to decide the issue. In addition to addressing the issue in malpractice cases the Commission would need to advise on how to harmonize Business & Professions Code §6085 Rights of Person Complained Against with Rule 3-100.

Assuming that the Commission hews to its June decision that the scope of its charge from the legislature did not include recommending a change to quasi-judicial immunity for mediators, another challenge facing the Commission in drafting exceptions to mediation confidentiality relating to attorney-mediators is to harmonize existing quasi-judicial immunity with allowing presently confidential communications to be used in evidence. Does the creation of the exceptions to mediation confidentiality effectively create a new cause of action for malpractice?

If the Commission decides to table the issue of attorney-mediator misconduct (including malpractice) it could still suggest that the Legislature charge the State Bar to study the issue in a similar fashion to what was done in Business & Professions Code §6068.11<sup>3</sup>(repealed by its own terms). Such charge could amend §6095.1 Complaints Against Attorneys – Statistical Information: Reports to Legislative Committees by adding attorney-mediators and their types to the data points that are required to be tracked and reported upon. Alternatively, if the Commission decides that the issue is broader than

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<sup>3</sup> B&P §6068.11 Attorneys: Defense of Insureds, State Bar Study

(a) The Legislature finds and declares that the opinion in *State Farm Mutual Auto Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422, raises issues concerning the relationship between an attorney and an insurer when the attorney is retained by the insurer to represent the insured. These issues involve both the Rules of Professional Conduct for attorneys and procedural issues affecting the conduct of litigation.

(b) The board in consultation with representatives of associations representing the defense bar, the plaintiffs bar, the insurance industry and the Judicial Council, shall conduct a study concerning the legal and professional responsibility issues that may arise as a result of the relationship between an attorney and an insurer when the attorney is retained by the insurer to represent an insured, and subsequently, the attorney is retained to represent a party against another party insured by the insurer. The board shall prepare a report that identifies and analyzes the issues and, if appropriate, provides recommendations for changes to the Rules of Professional Conduct and relevant statutes.

The board shall submit the report to the Legislature and the Supreme Court of California on or before July 1, 2002.

(c) This section shall remain in effect only until January 1, 2003, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2003, deletes or extends that date. (Added by Stats. 2000, ch. 472. Amended by Stats. 2001, ch. 438.)

attorney-mediator misconduct (including malpractice) then it may wish to highlight the issue as one deserving of attention and study.<sup>4</sup>

### **Conclusion**

In its August vote the Commission determined that its charge from the Legislature is to address misconduct by attorneys in mediation (including attorney-mediators). The challenge facing the Commission is how to change mediation confidentiality in a way that least diminishes the benefits the citizens of the State of California derive from mediation under the current law. From comments received and examples in other jurisdictions it appears that any change to the law regarding mediators ought not to be limited to attorney-mediators. As indicated above and in previous oral comments made to the Commission, we have examples that can assist the Commission in drafting to meet the challenge of changing mediation confidentiality in the UMA States, Florida, and others.

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<sup>4</sup>There have been a number of people who have spoken to the Commission describing alleged misconduct by mediators. These descriptions are greatly disturbing and, if pervasive, may indeed militate in favor of removing the shield that mediation confidentiality provides. Like others I question whether the solution should be confined to attorney-mediators, not for competitive reasons but rather due to the possibility of unequal results. In addition, attorney-advocates might expose themselves to liability if they recommend a non-attorney-mediator who engages in misconduct and for which there is no exception to mediation confidentiality.