

Memorandum 2016-28

Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct: Existing *In Camera* Approaches

At the April meeting, the Commission directed the staff to “prepare a document that reiterates previously presented information on existing *in camera* approaches to the intersection of mediation confidentiality and mediation misconduct, which might serve as possible models for California.”¹ The Commission requested such a document for purposes of convenient reference.² This memorandum is intended to fulfill the Commission’s request.

In a previous memorandum, the staff described nine existing *in camera* approaches to mediation evidence.³ The pertinent pages of that memorandum are attached so that Commissioners and other interested persons can readily refer to them.⁴ The staff is not aware of any other existing *in camera* approaches to mediation evidence.

Most of the nine approaches apply to situations that differ significantly from the context the Commission is trying to address. Most directly on point for purposes of this study would be an existing example of a mediation confidentiality exception that is

- set forth in a statute or court rule and
- applies in a legal malpractice case or State Bar disciplinary proceeding and
- expressly calls for *in camera* screening
- of evidence relating to attorney misconduct

1. Draft Minutes (April 14, 2016), p. 5.

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. Draft Minutes (April 14, 2016), p. 5.

3. See Memorandum 2015-55, pp. 10-30.

4. See Exhibit pp. 1-21.

- that allegedly occurred in the context of a mediation.⁵

The staff is not aware of any existing mediation confidentiality exception that meets all of these criteria.

In particular, while the following approaches may still be instructive, they differ from the context at hand in significant ways, as described below:

Alabama Approach.⁶ Alabama does not have a statute or court rule that expressly requires the use of an *in camera* screening process. Rather, the Comment accompanying its mediation confidentiality rule says that any “review of mediation proceedings” under the rule “should be conducted in an *in camera* hearing or by an *in camera* inspection.” The rule also lacks an exception that is specifically directed to attorney misconduct.

Michigan Approach.⁷ Michigan has a court rule with a mediation confidentiality exception that expressly requires the use of an *in camera* screening process, but that exception does not apply in a legal malpractice case or a State Bar disciplinary proceeding. Rather, the *in camera* screening process would occur “in a proceeding to enforce, rescind, reform, or avoid liability on a document signed by the mediation parties or acknowledged by the parties on an audio or video recording that arose out of mediation”⁸ The exception in question is not specifically directed to attorney misconduct.

New Mexico Approach.⁹ New Mexico has a statute with a mediation confidentiality exception that expressly requires the use of an *in camera* screening process, but that exception does not apply in a legal malpractice case or a State Bar disciplinary proceeding. Rather, the *in camera* screening process would occur “in an action on an agreement arising out of a mediation evidenced by a record.”¹⁰ The exception in question is not specifically directed to attorney misconduct.

Wisconsin Approach.¹¹ Wisconsin has a statute with a mediation confidentiality exception that expressly requires the use of an *in camera* screening process in “an action or proceeding

5. See Memorandum 2016-18, pp. 1, 4-5 (summarizing Commission’s tentative decisions to date).

6. Alabama’s *in camera* approach is described at p. 10 of Memorandum 2015-55, which is reproduced at Exhibit p. 1.

7. Michigan’s *in camera* approach is described at pp. 10-12 of Memorandum 2015-55, which are reproduced at Exhibit pp. 1-3.

8. Mich. Ct. R. 2.412(D)(12).

9. New Mexico’s *in camera* approach is described at pp. 12-13 of Memorandum 2015-55, which are reproduced at Exhibit pp. 3-4.

10. N.M. Stat. Ann. 44-7B-5(B).

11. Wisconsin’s *in camera* approach is described at pp. 18-19 of Memorandum 2015-55, which are reproduced at Exhibit pp. 9-10.

distinct from the dispute whose settlement is attempted through mediation.”¹² That language would be broad enough to cover a legal malpractice case or a State Bar disciplinary proceeding, but the exception is not limited to that context. Similarly, the exception is broad enough to cover attorney misconduct, but it is not specifically directed to that situation. There appears to be little case law interpreting this Wisconsin exception, so there is not much guidance on how it would apply to the context the Commission is trying to address.

Uniform Mediation Act (“UMA”) Section 6(b).¹³ The UMA includes two exceptions that expressly require the use of an *in camera* screening process (Section 6(b)(1) & (2)), but those exceptions do not apply in a legal malpractice case or a State Bar disciplinary proceeding. Neither of those exceptions is specifically directed to attorney misconduct.

Federal Administrative Dispute Resolution Act of 1996.¹⁴ This Act includes a mediation confidentiality exception that expressly requires the use of an *in camera* screening process, but that exception is not specifically directed to attorney misconduct (much less attorney misconduct in the mediation context).¹⁵ The exception appears to apply in a broad range of cases; it is not limited to a legal malpractice case or a State Bar disciplinary proceeding.

Rinaker v. Superior Court.¹⁶ This juvenile delinquency case interpreted California law to require use of an *in camera* hearing to determine the admissibility of certain mediation evidence. The evidence in question did not relate to attorney misconduct, much less attorney misconduct in the mediation context.

The two existing *in camera* approaches that seem most relevant for the Commission’s purposes are:

Texas Approach.¹⁷ The Texas approach is statutory, overlaid with case law interpreting the statutory scheme. It is worth a close look, because Texas courts have used *in camera* screening in much the same type of situation that the Commission is trying to address: alleged professional misconduct in the mediation context.

12. Wis. Stat. § 904.085(e).

13. The UMA’s *in camera* approach is described at pp. 19-22 of Memorandum 2015-55, which are reproduced at Exhibit pp. 10-13.

14. The *in camera* approach in the Federal Administrative Dispute Resolution Act is described at p. 22 of Memorandum 2015-55, which is reproduced at Exhibit p. 13.

15. See 5 U.S.C. § 574(a)(4)(C).

16. *Rinaker v. Superior Court*, 62 Cal. App. 4th 155, 74 Cal. Rptr. 2d 464 (1998), is a California juvenile delinquency case that involved mediation confidentiality issues. It is described at pp. 23-25 of Memorandum 2015-55, which are reproduced at Exhibit pp. 14-16.

17. The Texas *in camera* approach is described at pp. 13-18 of Memorandum 2015-55, which are reproduced at Exhibit pp. 4-9.

*Olam v. Congress Mortgage Co.*¹⁸ In this case construing federal and California law, U.S. Magistrate Judge Wayne Brazil followed an *in camera* approach in determining the admissibility of mediation evidence. The situation was similar to the one that the Commission is trying to address: alleged professional misconduct in the mediation context.

The staff encourages the Commissioners and other interested persons to pay particular attention to the attached descriptions of those two approaches (Exhibit pages 4-9 (Texas) and 16-21 (*Olam*)).

Respectfully submitted,

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Chief Deputy Counsel

18. *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110 (N.D. Cal. 1999), is a federal case in which U.S. Magistrate Judge Wayne Brazil addressed mediation confidentiality issues under California and federal law. It is described at pp. 25-30 of Memorandum 2015-55, which are reproduced at Exhibit pp. 16-21. It is described in greater detail in Memorandum 2014-45.

EXISTING *IN CAMERA* APPROACHES

Several *in camera* approaches to mediation evidence already exist. Those approaches are described below.

Alabama Approach

Alabama Civil Court Mediation Rule 11 says that “[a]ll information disclosed in the course of a mediation, including oral, documentary, or electronic information, shall be deemed confidential and shall not be divulged by anyone in attendance at the mediation”⁴⁸ That general rule is subject to several exceptions.⁴⁹ Of particular note, Rule 11(b)(3) states that the confidentiality provision does not apply:

- (i) to a communication made during a mediation that constitutes a threat to cause physical injury or unlawful property damage;
- (ii) to a party or mediator who uses or attempts to use the mediation to plan or to commit a crime; or
- (iii) to the extent necessary if a party to the mediation files a claim or complaint against a mediator or mediation program alleging professional misconduct by the mediator arising from the mediation.⁵⁰

Rule 11 does not expressly refer to an *in camera* screening process, but the accompanying Comment does. It says that “[a]ny review of mediation proceedings as allowed under Rule 11(b)(3) should be conducted in an *in camera* hearing or by an *in camera* inspection.” Neither the Comment nor any other source we located provides further details regarding this *in camera* process. Consequently, Alabama’s approach does not provide much potential guidance.

Michigan Approach

In Michigan, mediation communications “are confidential.”⁵¹ With certain exceptions, they are not admissible or subject to discovery, and they may not be disclosed to anyone other than the mediation participants.⁵²

One of the exceptions to mediation confidentiality is Michigan Court Rule 2.412(D)(12), which applies “in a proceeding to enforce, rescind, reform, or avoid liability on a document signed by the mediation parties or acknowledged by the parties on an audio or video recording that arose out of mediation” Under

48. Ala. Civ. Ct. Mediation R. 11(a).

49. See Ala. Civ. Ct. Mediation R. 11(b).

50. Ala. Civ. Ct. Mediation R. 11(b)(3).

51. Mich. Ct. R. 2.412(C).

52. *Id.*

this exception, a court may permit disclosure of mediation communications in such a proceeding if it

finds, *after an in camera hearing*, that the party seeking discovery or the proponent of the evidence has shown

(a) that the evidence is not otherwise available, and

(b) that the need for the evidence substantially outweighs the interest in protecting confidentiality.⁵³

Michigan thus uses an *in camera* screening process in which a court is to examine whether proffered or otherwise specified mediation communications constitute evidence that is “not otherwise available.” If the court finds that there are other means of proof, then the mediation communications must remain confidential. If the court finds that the mediation communications constitute evidence that “is not otherwise available,” then it must further find that “the need for the evidence *substantially outweighs* the interest in protecting confidentiality.”⁵⁴ Only then may the court permit disclosure of the mediation communications in “a proceeding to enforce, rescind, reform, or avoid liability on a document signed by the mediation parties or acknowledged by the parties on an audio or video recording that arose out of mediation”⁵⁵

As currently conceptualized, the Commission’s proposed new exception to the mediation confidentiality statutes would not apply in the type of proceeding addressed in Michigan Court Rule 2.412(D)(12).⁵⁶ Still, the Commission might want to give some thought to Michigan’s requirements that (1) the evidence “is not otherwise available” and (2) “the need for the evidence *substantially outweighs* the interest in protecting confidentiality.”

Importantly, the Commission’s proposed new exception would only apply to evidence of attorney misconduct that allegedly occurred in the context of a mediation.⁵⁷ It is therefore likely that *some* mediation evidence would be necessary to prove or disprove the allegations.

53. Mich. Ct. R. 2.412(D)(12) (emphasis added).

54. *Id.* (emphasis added).

55. *Id.*

56. See Draft Minutes (Oct. 8, 2015), p. 5. For background on this decision, see Memorandum 2015-45, pp. 21-23, 25.

57. See Draft Minutes (Oct. 8, 2015), p. 5. “This would include misconduct that allegedly occurred at *any* stage of the mediation process (encompassing the full span of mediation activities, such as a mediation consultation, a face-to-face mediation session, a mediation brief, a mediation-related phone call, or other mediation-related activity).” *Id.* (emphasis in original). The determinative factor is “whether the misconduct allegedly occurred in a mediation context, not the time and date of the alleged misconduct.” *Id.* For background on this decision, see Memorandum 2015-45, pp. 17-21.

That does not mean, however, that the two Michigan requirements discussed above would *necessarily* be met with regard to *every* mediation communication proffered under the Commission’s proposed new exception. Rather, a proffered mediation communication might pertain to a point that the proponent could prove through other means. For example, suppose a client alleges that his attorney gave him erroneous tax advice in a mediation. Suppose further that the client seeks to introduce a statement from a mediation brief relating to the cost basis for a particular stock investment. In that situation, other evidence almost certainly would be available to prove the cost basis; it would be wrong to say that evidence of the point in question “is not otherwise available.”

Similarly, a proffered mediation communication might be irrelevant to, or only marginally related to, the alleged misconduct. If so, there would be no need for the evidence that “substantially outweighs the interest in protecting confidentiality.”

New Mexico Approach

In New Mexico, “all mediation communications are confidential, and not subject to disclosure and shall not be used as evidence in any proceeding.”⁵⁸ There are numerous exceptions to that general rule.⁵⁹

Among other things, “[m]ediation communications may be disclosed if a court, *after hearing in camera and for good cause shown*, orders disclosure of evidence that is sought to be offered and *is not otherwise available* in an action on an agreement arising out of a mediation evidenced by a record.”⁶⁰ Like the Michigan provision discussed above, this New Mexico exception concerns the enforceability of a mediated settlement agreement, a situation in which the Commission’s proposed new California exception would not apply.

Nonetheless, the Commission might want to consider the two substantive requirements of New Mexico’s *in camera* approach. One of them is the identical to a Michigan requirement already discussed: the requirement that the proffered mediation evidence is “not otherwise available.”

58. N.M. Stat. Ann. 44-7B-4.

59. See N.M. Stat. Ann. 44-7B-5.

60. N.M. Stat. Ann. 44-7B-5(B) (emphasis added). This statutory provision makes clear that nothing in it “shall require disclosure by a mediator of any matter related to mediation communications.” *Id.* Similarly, the Commission’s proposed new exception to California’s mediation confidentiality statutes would not alter the existing provision (Evid. Code § 703.5) under which a mediator is incompetent to testify in most civil proceedings. See Draft Minutes (Oct. 8, 2015), p. 6. For background on that decision, see Memorandum 2015-45, pp. 41-43.

The other requirement is simply a showing of “good cause.” The New Mexico statute does not define “good cause.” Presumably, the Legislature intended to let New Mexico’s courts flesh out that concept. In that respect, the statute is similar to many California statutes that include a “good cause” requirement.⁶¹

Texas Approach

The Texas approach is worth a close look, because Texas courts have used *in camera* screening in much the same type of situation that the Commission is trying to address: professional misconduct in the mediation context. We first describe the statutory scheme, and then turn to the Texas case law on *in camera* screening of mediation communications. Lastly, we discuss some possible lessons from the Texas approach.

Statutory Scheme

Texas has two key statutes on mediation confidentiality. Section 154.053 of the Texas Civil Practice and Remedies Code establishes a broad rule regarding the confidentiality of an alternative dispute resolution (“ADR”) proceeding. It is subject to a single express exception, which relates to mandated reporting of specified abuse, exploitation, or neglect.⁶²

The other key statute is Section 154.073 of the Texas Civil Practice and Remedies Code. Like Section 154.053, it protects ADR communications, making them confidential, inadmissible, and protected from disclosure.⁶³ Unlike Section 154.053, it contains multiple exceptions.⁶⁴ The relationship between this section and Section 154.053 is not altogether clear.⁶⁵

Among the exceptions to Section 154.073 is one that calls for *in camera* screening. Subdivision (e) provides:

(e) If this section *conflicts with other legal requirements for disclosure* of communications, records, or materials, the issue of confidentiality may be presented to the court having jurisdiction of the proceedings *to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the court or*

61. See, e.g., Code Civ. Proc. § 1054(a); Evid. Code § 1228.1(b); Prob. Code § 1051(b).

62. See Tex. Civ. Prac. & Rem. Code § 154.053(d).

63. See Tex. Civ. Prac. & Rem. Code § 154.073(a).

64. See Tex. Civ. Prac. & Rem. Code § 154.073(c)-(f).

65. See Eric Galton & Kimberlee Kovach, *Texas ADR: A Future So Bright, I Gotta Wear Shades*, 31 St. Mary’s L.J. 949, 967 (2000); see also Memorandum 2014-44, p. 5.

whether the communications or materials are subject to disclosure.⁶⁶

Arkansas, Louisiana, and Mississippi have closely similar provisions that call for *in camera* screening of mediation communications.⁶⁷ Thus, Texas cases interpreting Section 154.073(e) might be influential not only in Texas, but also in those jurisdictions.

Leading Texas Case Interpreting Section 154.073(e)

As discussed at pages 7-15 of Memorandum 2014-44, the leading case interpreting Section 154.073(e) is *Avary v. Bank of America, N.A.*⁶⁸ In *Avary*, the guardian for two minor children (Avary) sued the bank that served as executor of their father's estate. On behalf of the minors, she brought claims for breach of fiduciary duty, negligence, fraud, and conspiracy, which allegedly occurred at a mediation. In particular, she claimed that the bank wrongfully rejected, and failed to properly disclose information about, a settlement offer made during the mediation, which would have provided more money to the minors than the offer it accepted. The bank moved for summary judgment, contending that Avary had no evidence to support the claims because all of the mediation communications were confidential under Section 154.073.

The trial court concluded that the bank's fiduciary obligations constituted a "legal requirement for disclosure," which conflicted with the confidentiality requirement of Section 154.073. Because of that conflict, the trial court "undertook the analysis under section 154.073(e), whether disclosure of the confidential communications was warranted under the facts and circumstances presented."⁶⁹ After conducting an *in camera* hearing in which he heard testimony from the bank's representative, the trial judge permitted some discovery of mediation evidence, but not as much as Avary requested. In particular, the trial judge ordered disclosure of the bank representative's *in camera* testimony, but he did not conduct an *in camera* hearing to determine the "facts, circumstances, and context" of anyone else's potential testimony, and he did not permit any other discovery regarding what occurred at the mediation.⁷⁰ Thereafter, he granted the bank's motion for summary judgment, and Avary appealed.

66. Emphasis added.

67. Emphasis added.

68. See Ark. Code Ann. § 16-7-206(c); La. Rev. Stat. § 9:4112(D); Miss. Ct. Annexed Mediation R. VII(D).

69. *Id.* at 796.

70. *Id.* at 786.

In a lengthy opinion, the Texas Court of Appeals reversed and remanded. It found that there was “more than a scintilla of evidence” to support Avary’s claims for breach of fiduciary duty, negligence, and fraud, “even without further discovery of communications made at the mediation.”⁷¹ Consequently, summary judgment on those claims was improper.⁷²

With regard to the conspiracy claim, the trial record did not include sufficient evidence to support the claim.⁷³ The Court of Appeals thus concluded that “summary judgment on this cause of action was proper unless Avary should have been permitted to conduct further discovery.”

In determining whether further discovery was warranted, the Court of Appeals agreed with much of the trial court’s analysis regarding the mediation evidence. It said:

[B]ecause of the conflict between the Bank’s duty to disclose and the confidentiality provisions of section 154.073, the trial judge undertook the analysis under section 154.073(e), whether disclosure of the confidential communications was warranted under the facts and circumstances presented. The trial judge correctly concluded the Bank’s fiduciary obligations warranted disclosure of mediation communications under these circumstances.⁷⁴

The Court of Appeals acknowledged that “confidentiality of communications is an important part of the statutory scheme of alternative dispute resolution,” and “[w]ithout a guarantee of confidentiality, parties may be reluctant to speak freely and address the heart of their dispute.”⁷⁵ The court also pointed out, however, that an executor’s fiduciary duty of disclosure is a “high duty” requiring full disclosure of all material facts that might affect the beneficiaries’ rights.⁷⁶ In addition, the court said there is an important public policy to preserve significant and well-established procedural and substantive rights.⁷⁷ In the circumstances before it, the Court of Appeals determined that the balance between the competing interests weighed in favor of disclosure.

It explained:

Here, the parties to the original litigation have peaceably resolved their dispute, as the ADR statute contemplates. Avary

71. *Id.* at 791.

72. *Id.*

73. *Id.* at 793.

74. *Id.* at 796-97.

75. *Id.* at 797.

76. *Id.* at 796-97.

77. *Id.* at 799.

now seeks to prove a *new and independent tort* that she alleges occurred between her and her own fiduciary, the Bank, *during the course of the mediation proceeding*. She *does not* propose to discover evidence to allow her to obtain additional funds from the [mediation] defendants or to use mediation communications to establish any liability on their part after they have peaceably resolved their dispute. Instead, Avary proposes to offer the evidence in a *separate case against a separate party* to prove a claim that is *factually and legally unrelated* to the wrongful death and survival claims.⁷⁸

The court further pointed out that Avary would not disturb the mediated settlement by pursuing her claim,⁷⁹ and “[s]ignificant substantive and procedural rights of Avary’s are implicated, including the opportunity to develop evidence of her claim and to submit contested fact issues to a judge or jury.”⁸⁰

Although the Court of Appeals agreed with much of the trial judge’s analysis, it said he abused his discretion by only permitting discovery of mediation evidence from the bank’s representative. According to the Court of Appeals, the circumstances of the case did “not justify restricting discovery to a single witness who admittedly lacked knowledge of facts material to Avary’s claims.”⁸¹ In its view, the trial judge should at least have conducted *in camera* proceedings regarding whether to allow additional discovery from different witnesses.⁸²

The Court of Appeals recognized that conducting an *in camera* hearing with regard to each potential witness was a “potentially cumbersome” process.⁸³ It pointed out, however, that “convenience is secondary” given “the important considerations involved.”⁸⁴

The Court of Appeals also provided some guidance regarding factors that the trial judge could consider at the *in camera* hearings on remand.⁸⁵ In particular, it suggested examining (1) whether a particular mediation participant had knowledge of facts relevant to the pending claims, and, if so, (2) whether that evidence was critical to the pending claims and (3) whether the evidence was protected by the attorney-client or work product privilege.⁸⁶ In addition, it said

78. *Id.* at 797-98 (emphasis added).

79. *Id.* at 800.

80. *Id.*

81. *Id.* at 802.

82. *Id.*

83. *Id.* at 802.

84. *Id.*

85. *Id.* at 801.

86. *Id.* at 800-01.

the trial judge could (4) “weigh any potential harm to the mediation process by disclosure of communications the parties made under the expectation that they would remain confidential.”⁸⁷ The Court of Appeals explained that “[i]t is one thing to order discovery from a party alleged to have committed a tort during the mediation process; *it is another to reach across the mediation table to parties who have settled the claims against them.*”⁸⁸

Other Cases Interpreting Section 154.073(e)

A few later cases follow *Avary’s* approach to mediation communications.⁸⁹ Some other Texas decisions distinguish *Avary*, making clear that the *Avary* approach only applies when a party seeks disclosure of mediation communications to prove or disprove a new and independent tort that allegedly occurred in a mediation, not when a party seeks such disclosure in connection with an attack on a mediated settlement.⁹⁰

These subsequent cases do not shed much light on details of the *in camera* screening approach required by Section 154.073. Accordingly, they do not warrant further discussion here.

Lessons From the Texas Approach

Like the Commission’s proposed attorney misconduct exception to California’s mediation confidentiality statutes, the approach to mediation communications that the Texas Court of Appeals used in *Avary* only applies with respect to misconduct that allegedly occurred *in the mediation context*. As previously discussed, that type of misconduct allegation presents the strongest basis for seeking disclosure of mediation communications, because such communications are likely to be the only means of proving or disproving the allegation.

For the same reason, it probably will not be sufficient to hold an *in camera* hearing with regard to the admissibility of a single piece of evidence in such a situation. Instead, as already noted, a court considering an allegation of mediation misconduct is likely to have to make multiple rulings on admissibility or disclosure of mediation communications.

87. *Id.* at 801.

88. *Id.* (emphasis added).

89. See, e.g., *Alford Bryant*, 137 S.W.3d 916 (Tex. Ct. App 2004). For discussion of *Alford* and similar cases, see Memorandum 2014-44, pp. 11-13.

90. See, e.g., *In re Empire Pipeline*, 323 S.W.3d 308 (Tex. Ct. App. 2010). For discussion of *Empire Pipeline* and similar cases, see Memorandum 2014-44, pp. 13-15.

Avary demonstrates that point. In *Avary*, the Texas Court of Appeals faulted the trial court for conducting only one *in camera* hearing on the admissibility of mediation evidence and remanded so that the trial court could conduct additional *in camera* screening under Section 154.073(e). The Court of Appeals acknowledged that this requirement was “potentially cumbersome,” but stressed that “convenience is secondary,” given the importance of the competing interests at stake.

In developing its attorney misconduct exception to the mediation confidentiality statutes, the Commission should thus consider the burdens that *in camera* screening would potentially impose on courts and litigants. In particular, the Commission will need to decide whether it agrees with the Texas of Court of Appeals that “convenience is secondary,” given the importance of the competing interests at stake.

Like the Michigan approach and the New Mexico approach discussed above, the Texas approach used in *Avary* also provides some ideas regarding possible criteria for a court to consider when it holds an *in camera* hearing on disclosure of mediation communications pursuant to the Commission’s proposed attorney misconduct exception. Specifically, *Avary* identifies the following factors bearing on the propriety of disclosing a mediation participant’s *in camera* testimony:

- (1) Whether the mediation participant has knowledge of facts relevant to the pending claims.
- (2) If the mediation participant has relevant knowledge, whether that evidence is critical to the pending claims.
- (3) If the mediation participant has relevant knowledge, whether that evidence is protected by a privilege, such as the attorney-client privilege or the work product privilege.
- (4) Whether and to what extent disclosure of the mediation participant’s testimony would cause potential harm to the mediation process, particularly if the disclosure would reveal mediation confidences of someone who is not a party to the pending dispute.

Wisconsin Approach

In Wisconsin, “no oral or written communication relating to a dispute in mediation made or presented in mediation by the mediator or a party is admissible in evidence or subject to discovery or compulsory process in any judicial or administrative proceeding.”⁹¹ That general rule is subject to several

91. Wis. Stat. § 904.085.

express exceptions, including the following exception that involves an *in camera* hearing:

(e) In an action or proceeding *distinct from the dispute whose settlement is attempted through mediation*, the court may admit evidence otherwise barred by this section if, after an *in camera* hearing, it determines that admission is *necessary to prevent a manifest injustice of sufficient magnitude to outweigh the importance of protecting the principle of confidentiality in mediation proceedings generally*.⁹²

There appears to be little case law interpreting this Wisconsin exception, so it is not clear what would constitute “a manifest injustice of sufficient magnitude to outweigh the importance of protecting the principle of confidentiality in mediation proceedings generally.”⁹³ Likewise, the proper procedure for the statutorily required *in camera* hearing does not seem to have been fleshed out.

Still, the Wisconsin provision is potentially instructive to some extent. It focuses on whether admission of a mediation communication is “necessary,” requires a court to consider “the importance of protecting the principle of confidentiality in mediation proceedings generally,” and directs the court to balance that interest against an as-yet-ill-defined competing interest in preventing a “manifest injustice.” Those are all concepts that might warrant discussion in drafting the Commission’s proposed attorney misconduct exception to California’s mediation confidentiality statutes.

Uniform Mediation Act Section 6(b)

The Uniform Mediation Act (“UMA”) has been enacted in the District of Columbia and eleven states.⁹⁴ Subject to certain exceptions and limitations, a mediation communication is privileged under the UMA and is not subject to discovery or admissible in evidence.⁹⁵

Two of the exceptions to that general rule call for an *in camera* hearing. The first one (UMA Section 6(b)(1)) pertains to criminal cases:

(b) There is no privilege under Section 4 if a court, administrative agency, or arbitrator finds, *after a hearing in camera*, that the party seeking discovery or the proponent of the evidence has shown that the evidence is *not otherwise available*, that there is a

92. Wis. Stat. § 904.085(e) (emphasis added).

93. See Memorandum 2014-35, Exhibit p. 41.

94. The UMA states are: Hawaii, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, and Washington. See Memorandum 2014-24.

95. UMA § 4(a).

need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in:

(1) a court proceeding involving a felony [or misdemeanor] ...⁹⁶

This exception permits use of mediation communications in a felony case (or, in some jurisdictions, a misdemeanor case), but only if the party seeking to use that evidence shows at an *in camera* hearing that

- The evidence is not otherwise available, *and*
- There is a need for the evidence that “substantially outweighs” the interest in protecting confidentiality.

The other UMA exception that calls for an *in camera* hearing (UMA Section 6(b)(2)) uses exactly the same test for admissibility or disclosure of mediation communications. It applies in “a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.”⁹⁷ Unlike UMA Section 6(b)(1), a party may not invoke UMA Section 6(b)(2) to compel a mediator to testify.⁹⁸

The UMA privilege is also subject to a number of other exceptions, which do not entail an *in camera* hearing. The exception relating to professional misconduct (UMA Section 6(a)(6)) falls into this category.

The drafters’ Comment to UMA Section 6 explains the reasoning behind the differing treatment of the various UMA exceptions:

This Section articulates specific and exclusive exceptions to the broad grant of privilege provided to mediation communications in Section 4....

The exceptions listed in Section 6(a) apply regardless of the need for the evidence because society’s interest in the information contained in the mediation communications may be said to *categorically outweigh* its interest in the confidentiality of mediation communications. In contrast, the exceptions under Section 6(b) would apply only in situations where the relative strengths of society’s interest in a mediation communication and mediation participant interest in confidentiality *can only be measured under the facts and circumstances of the particular case*. The Act places the burden on the proponent of the evidence to persuade the court in a non-public hearing that the evidence is not otherwise available, that the need for the evidence substantially outweighs the confidentiality interests and that the evidence comes within one of

96. Emphasis added.

97. UMA § 6(b)(2).

98. See UMA § 6(b)(2), (c).

the exceptions listed under Section 6(b). In other words, the exceptions listed in 6(b) include situations that should remain confidential but for overriding concerns for justice.⁹⁹

In other words, the UMA drafters concluded that the *in camera* screening test described above is appropriate in contexts where (in their opinion) there should be case-by-case balancing of the competing interests, but not where (in their opinion) “the justice system’s need for the evidence may be said to categorically outweigh its interest in the confidentiality of mediation communications such that it would be either unnecessary or impractical for the parties, and administratively inefficient for the court system to hold a full evidentiary hearing on the applicability of the exception.”¹⁰⁰

Interestingly, several drafts of the UMA applied the *in camera* screening approach to the professional misconduct exception.¹⁰¹ The UMA drafters later reversed course; they must have ultimately decided that case-by-case balancing of the competing interests was not necessary in that context.

The Commission should consider whether it agrees with that assessment. If a mediation communication is relevant to a claim of professional misconduct, is that necessarily sufficient reason to permit introduction of the communication? Do any other factors matter, such as:

- Whether the mediation communication is only marginally relevant to the professional misconduct claim;
- Whether other evidence could be used to make the same point in the professional misconduct case instead of the mediation communication; or
- Whether the mediation communication reveals highly sensitive information about a mediation participant who is not a party to the misconduct claim?

Assuming that the Commission continues to believe an *in camera* approach is worth exploring, it should consider whether its *in camera* approach should incorporate either of UMA Section 6(b)’s requirements for admission or disclosure of a mediation communication:

- The evidence is not otherwise available.

99. Emphasis added.

100. Richard Reuben, *The Sound of Dust Settling: A Response to Criticisms of the UMA*, 2003 J. Disp. Resol. 99, 121 (2003).

101. See Jan. 2000 UMA Discussion Draft (§ 2(f)(4)); March 2000 UMA Discussion Draft (§ 8(b)(1)); Aug. 2000 UMA Revised Interim Draft (§ 9(b)(1)).

- There is a need for the evidence that “substantially outweighs” the interest in protecting confidentiality.

Those requirements are identical to the ones used in the Michigan provision discussed above. The requirement that the evidence “is not otherwise available” is also used in the New Mexico provision.

Federal Administrative Dispute Resolution Act of 1996

The Federal Administrative Dispute Resolution Act of 1996 presents another possible model for *in camera* screening of mediation communications. Under Section 574(a)(4)(C),

A mediation communication made inadmissible or protected from disclosure by the provisions of this chapter shall not become admissible or subject to disclosure under this section unless a court first determines at an *in camera* hearing that this is *necessary to prevent harm to the public health or safety of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential.*¹⁰²

This provision calls for an *in camera* hearing and establishes a stiff standard to meet at that hearing. For a mediation communication to be admissible or subject to disclosure, a court must determine that such use is:

- (1) *necessary to prevent harm,*
- (2) *the potential harm is “to the public health or safety,” and*
- (3) *the potential harm is “of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential.”*

Some time ago, mediator Ron Kelly expressed a preference for this standard, if the Commission concluded that weakening the mediation confidentiality statutes was absolutely necessary and it decided to use an *in camera* hearing process.¹⁰³ The Commission should keep this approach in mind going forward.

If the Commission decides to look hard at the approach, the staff would need to do some research on what constitutes a harm to “public health or safety.” We are not sure what would fall into that category, instead of being a harm to “public welfare.”

102. Emphasis added.

103. See Third Supplement to Memorandum 2014-60, Exhibit p. 3.

Rinaker v. Superior Court

Another *in camera* model comes from *Rinaker v. Superior Court*,¹⁰⁴ a California juvenile delinquency case in which the minors were charged with vandalism. To disprove the charges against them, the minors sought to compel the mediator of a related case to testify. They anticipated that the mediator would say their accuser admitted in the mediation that he did not actually see who committed the vandalism. The mediator objected to testifying, relying on California's mediation confidentiality statutes and constitutional right of privacy. The trial court ruled against her, and the mediator sought a writ in the court of appeal.

Like the trial court, the appellate court concluded that "when balanced against the competing goals of preventing perjury and preserving the integrity of the truth-seeking process of trial in a juvenile delinquency proceeding, *the interest in promoting settlements ... through confidential mediation ... must yield to the constitutional right to effective impeachment.*"¹⁰⁵ The court of appeal agreed, however, with the mediator's argument that "before allowing the minors to question the mediator under oath ... concerning statements made during confidential mediation, *the juvenile court should have conducted an in camera hearing to weigh the 'constitutionally based claim of need against the statutory privilege' and determine whether the minors have established that [her] testimony is necessary to 'vindicate their rights of confrontation.'*"¹⁰⁶ The court explained that "[r]equiring an *in camera* hearing *maintains the confidentiality of the mediation process while the juvenile court considers factors bearing upon whether the minors' constitutional right of effective impeachment compels breach of the confidential mediation process.*"¹⁰⁷

The court of appeal went on to provide some guidance about how to conduct the *in camera* hearing. It said:

- (1) During the *in camera* hearing, the juvenile court can determine whether the mediator is competent to testify regarding the accuser's alleged statement that he did not see who committed the vandalism. "If she denies that [the accuser] made the inconsistent statement attributed to him by the minors, or does not recall whether he made such a statement, that would *eliminate the need*

104. 62 Cal. App. 4th 155, 74 Cal. Rptr. 2d 464 (1998).

105. *Id.* at 167-68.

106. *Id.* at 169 (emphasis added).

107. *Id.* at 169 (emphasis added).

for her to testify in open court during the juvenile delinquency proceeding.”¹⁰⁸

- (2) Assuming the mediator acknowledges she heard the alleged inconsistent statement, “the juvenile court can *assess the statement’s probative value* for the purpose of impeachment.”¹⁰⁹ “If the circumstances under which [the accuser] made inconsistent statements during mediation convince the juvenile court that such statements were *untrustworthy* in the sense they were made for the purpose of compromise rather than as true allegations of the minors’ conduct, it follows that the minors’ constitutionally based claim of need for the evidence *would not outweigh the countervailing public interest in maintaining the confidential[ity] of the mediation process.*”¹¹⁰
- (3) “[D]uring the in camera hearing, the juvenile court may be able to determine whether the evidence sought by the minors can be introduced without breaching the confidentiality of mediation.”¹¹¹ For example, “the court could conclude [the mediator’s] testimony would be *cumulative* to other evidence reasonably available to the minors ... [and thus] “is *not necessary* to vindicate the minor’s constitutional right to confront and effectively cross-examine their accuser.”¹¹²
- (4) The minors should *not be required to demonstrate that there is no other evidence*, unrelated to the mediation, that could be used to undermine the accuser’s testimony that the minors were the culprits. The mediator is a disinterested witness and may therefore have more credibility than other witnesses. “Hence, even if other witnesses could testify to [the accuser’s] inconsistent statements or impeach his veracity in other ways, [the mediator’s] testimony could be necessary to vindicate the minors’ right of confrontation if the credibility of the other witnesses is suspect.”¹¹³

The court of appeal thus sought to carefully accommodate both of the competing policy interests, and remanded the case to the trial court for further proceedings consistent with its opinion.

Rinaker is quite different from the situation that the Commission is trying to address: alleged misconduct in the context of a mediation. While *Rinaker* involved only one statement allegedly made during a mediation, proving or disproving an allegation of mediation misconduct is likely to require a lot of mediation evidence. Further, *Rinaker* involved mediator testimony, but Evidence

108. *Id.* at 170 (emphasis added).

109. *Id.* (emphasis added).

110. *Id.* (emphasis added).

111. *Id.*

112. *Id.* at 171 (emphasis added).

113. *Id.*

Code Section 703.5 seems to make a mediator incompetent to testify in a legal malpractice case, one of the contexts in which the Commission's proposed exception would apply.¹¹⁴ *Rinaker* also involved the constitutional right of confrontation, which would not be at stake in a legal malpractice case or, in all likelihood, a State Bar disciplinary proceeding (the other context where a party could invoke the Commission's proposed exception).¹¹⁵

Despite these differences, the staff urges the Commission to pay close attention to *Rinaker*. What strikes us as most noteworthy about the case is that the court of appeal was so careful to try to accommodate both (1) the minors' constitutional right to confront their accuser with an inconsistent statement *and* (2) the policy interest in maintaining the confidentiality of mediation communications. That is especially striking when one considers that the court could have said a juvenile delinquency case is essentially criminal in nature and thus the mediation confidentiality statute does not apply at all. If the Commission shows a similar degree of sensitivity to the policy interest in mediation confidentiality in drafting its proposed exception, that might yield beneficial substantive results and help reduce the level of concern about creating the exception.

Olam v. Congress Mortgage Co.

U.S. Magistrate Judge Wayne Brazil's decision in *Olam v. Congress Mortgage Co.*¹¹⁶ builds on *Rinaker's* model of *in camera* screening with regard to mediation communications. *Olam* is discussed at length in Memorandum 2014-45. We describe the case more briefly below, and then try to draw some lessons from it.

Case Description

Olam involved a dispute between a borrower and a lender, which Judge Brazil referred to mediation under the court-sponsored ADR program. After a long day of negotiations, the parties prepared and signed a Memorandum of Understanding ("MOU"), which "contemplated the subsequent preparation of a

114. See Evid. Code § 703.5.

115. See, e.g., *Rosenthal v. State Bar*, 43 Cal. 3d 612, 634, 738 P. 2d 723, 238 Cal. Rptr. 377 (1987) ("Petitioner's citations to criminal cases and attempted invocation of a 'quasi-criminal' talisman do not support his confrontation-clause claims. Petitioner's only due process entitlement is a 'fair hearing,' and the rules of criminal procedure do not apply in State Bar disciplinary proceedings.").

116. 68 F. Supp. 2d 1110 (N.D. Cal. 1999).

formal settlement contract but expressly declared that it was ‘intended as a binding document itself.’”¹¹⁷

Months passed, but the borrower never signed the formal settlement contract contemplated in the MOU. Consequently, the lender and the other defendants filed a motion to enforce the settlement agreement and enter judgment accordingly. The borrower opposed the motion, alleging that when she signed the MOU she “was incapable (intellectually, emotionally, and physically) of giving legally viable consent.”¹¹⁸ More specifically, she contended that she was subjected to “undue influence” under California law because “she was suffering from physical pain and emotional distress that rendered her incapable of exercising her own free will.”¹¹⁹

To facilitate resolution of the dispute over the enforceability of the MOU, all of the parties clearly and expressly waived any “mediation privilege” that might attach to communications that were made during the mediation (with some limitations that are not necessary to describe here).¹²⁰ To avoid putting the mediator “in an awkward position where he might have felt he had to choose between being a loyal employee of the court, on the one hand, and, on the other, asserting the mediator’s privilege under California law,” Judge Brazil “proceed[ed] on the assumption that [the mediator] was respectfully and appropriately asserting the mediator’s privilege and was formally objecting to being called to testify about anything said or done during the mediation.”¹²¹

As a preliminary matter, Judge Brazil determined that California law applied to the mediation confidentiality issues, but he was not bound to follow California’s procedural mechanisms relating to mediation confidentiality. Instead, as a federal magistrate judge, he could use a different procedure so long as it “would substantially parallel in *effect* the procedure adopted by the courts of California, and, in that parallelism, would cause no greater harm to substantive privilege interests than California courts would be prepared to cause.”¹²²

In deciding whether to compel the mediator to testify, Judge Brazil viewed *Rinaker* as the “most important opinion by a California court in this arena.”¹²³ He explained that “the *Rinaker* court held that the mediator could be compelled to

117. *Id.* at 1117.

118. *Id.* at 1118.

119. *Id.*

120. *Id.* at 1118-19, 1129-30.

121. *Id.* at 1130.

122. *Id.* (emphasis in original).

123. *Id.* at 1131.

testify if, after *in camera* consideration of what her testimony would be, the trial judge determined that her testimony might well promote significantly the public interest in preventing perjury and the defendant's fundamental right to a fair judicial process."¹²⁴

Judge Brazil then described in detail his view of the *Rinaker* procedure. He said that *Rinaker* calls for a two-stage balancing analysis, as follows:

In essence, the *Rinaker* court instructs California trial judges to conduct a two-stage balancing analysis. The goal of the first stage balancing is to determine whether to compel the mediator to appear at an *in camera* proceeding to determine precisely what her testimony would be. In this first stage, the judge considers all the circumstances and weighs all the competing rights and interests, including the values that would be threatened not by public disclosure of mediation communications, but by ordering the mediator to appear at an *in camera* proceeding to disclose only to the court and counsel, out of public view, what she would say the parties said during the mediation. At this juncture the goal is to determine whether the harm that would be done to the values that underlie the mediation privileges simply by ordering the mediator to participate in the *in camera* proceedings can be justified — by the prospect that her testimony might well make a singular and substantial contribution to protecting or advancing competing interests of comparable or greater magnitude.

The trial judge reaches the second stage of balancing analysis only if the product of the first stage is a decision to order the mediator to detail, *in camera*, what her testimony would be. A court that orders the *in camera* disclosure gains precise and reliable knowledge of what the mediator's testimony would be — and only with that knowledge is the court positioned to launch its second balancing analysis. In this second stage the court is to weigh and comparatively assess (1) the importance of the values and interests that would be harmed if the mediator was compelled to testify (perhaps subject to a sealing or protective order, if appropriate), (2) the magnitude of the harm that compelling the testimony would cause to those values and interests, (3) the importance of the rights or interests that would be jeopardized if the mediator's testimony was not accessible in the specific proceedings in question, and (4) how much the testimony would contribute toward protecting those rights or advancing those interests — an inquiry that includes, among other things, an assessment of whether there are alternative sources of evidence of comparable probative value.¹²⁵

124. *Id.*

125. *Id.* at 1131-32.

Judge Brazil went on to conduct such a two-stage balancing analysis in *Olam*. In the first stage, he considered numerous factors bearing on whether to compel the mediator to appear at an *in camera* proceeding to determine precisely what her testimony would be.¹²⁶ Some of those factors were case-specific or only relevant to mediator testimony. Among the other factors he considered were:

- The legislative determination that “without the promise of confidentiality it would be appreciably more difficult to achieve the goals of mediation programs.”¹²⁷
- The parties’ express waivers of mediation confidentiality, which he said reduced the force of the above legislative determination in the case at hand.¹²⁸
- The nature of the testimony being sought, such as whether it would entail an effort to “nail down and dissect” a mediation participant’s specific words, as opposed to “assess[ing] at a more general and impressionistic level [the] condition and capacities” of a mediation participant.¹²⁹
- The interest in doing justice. Justice Brazil deemed this “an interest of considerable magnitude” because “[c]onfidence in our system of justice as a whole, in our government as a whole, turns in no small measure on confidence in the courts’ ability to do justice in individual cases.”¹³⁰
- The interest in “re-assur[ing] the community and the court about the integrity of the mediation process that the court sponsored.”¹³¹
- The potential impact of the proposed testimony on the attitudes and behavior of future participants in the court’s mediation program.¹³²
- The likelihood that the proposed testimony would be probative, material, and reliable.¹³³
- Whether the proposed testimony would be a “source of presumptively disinterested, neutral evidence,” and whether other such sources existed.¹³⁴

Judge Brazil concluded that the first stage balancing test pointed in favor of requiring the mediator to testify privately. He explained:

126. *Id.* at 1133-39.

127. *Id.* at 1133.

128. *Id.*

129. *Id.* at 1136; see also *id.* at 1134-36.

130. *Id.* at 1136.

131. *Id.* at 1137.

132. See *id.*

133. See *id.* at 1138-39.

134. *Id.* at 1138.

In short, there was a substantial likelihood that testimony from the mediator would be the most reliable and probative on the central issues raised by the plaintiff And there was no likely alternative source of evidence on these issues that would be of comparable probative utility. So it appeared that testimony from the mediator would be crucial to the court’s capacity to do its job — and that refusing to compel that testimony posed a serious threat to [key values]. California courts clearly would conclude the first stage balancing analysis by ordering the mediator to testify *in camera* ... so that the court ... could make a refined and reliable judgment about whether to use that testimony to help resolve the substantive issues”¹³⁵

Instead of requiring the mediator to attend a separate *in camera* hearing, however, Judge Brazil called the mediator to testify at the same evidentiary hearing as the other witnesses in the case. But he took the mediator’s testimony only after all of the other key witnesses had testified, and he did so in closed proceedings, under seal. He chose that approach for several reasons, including a desire to avoid making the mediator testify twice, first *in camera* and then during the evidentiary hearing itself.¹³⁶

Once the mediator testified under seal, Judge Brazil “gain[ed] precise and reliable knowledge of what the mediator’s testimony would be.”¹³⁷ Armed with that knowledge, he proceeded to the second stage of the analysis: whether to unseal and use the mediator’s testimony. Based on all of the information presented in the evidentiary hearing, he considered it “clear that the mediator’s testimony was essential to doing justice,” so he decided to unseal and use it.¹³⁸

From that testimony and the other evidence in the case, Judge Brazil concluded that the plaintiff was not “subjected to anything remotely close to undue pressure.”¹³⁹ He thus granted the defendants’ motion to enforce the MOU reached in the mediation.¹⁴⁰

His decision in *Olam* predated all of the California Supreme Court’s decisions on protection of mediation communications. Those decisions make clear that in general courts are to interpret the California statutes on mediation evidence

135. *Id.* at 1139.

136. See *id.* at 1126-28.

137. *Id.* at 1132.

138. *Id.* at 1139.

139. *Id.* at 1150.

140. See *id.* at 1151.

strictly, without judicially creating any exceptions.¹⁴¹ The Court has not overruled *Olam*, but it has narrowly limited its application.¹⁴²

Lessons From the Olam Decision

Several points come to mind in considering *Olam*. First, the case serves as an important reminder that an *in camera* screening approach would entail two different types of disclosure decisions: (1) whether to require disclosure of mediation communications to a judge or other decisionmaker *in camera*, and (2) whether to require disclosure of such communications more broadly after completion of an *in camera* review. In crafting an *in camera* procedure, the Commission will need to consider what rules should apply with regard to each type of disclosure decision.

Second, *Olam* demonstrates that conducting a separate *in camera* hearing is not the only means available to protect mediation communications from public scrutiny while a court evaluates whether public disclosure is appropriate. A court may be able to achieve the same sort of result through other judicial tools, such as sealing of testimony taken privately, as in *Olam*.

Third, *Olam* provides additional ideas regarding factors for a court to consider when it screens mediation evidence on an *in camera* basis (see the bulletpoint list on pages 27-28). The Commission might want to incorporate some or all of those factors into whatever screening test or standard it develops.

Finally, it is worth noting that Judge Brazil weighed the facts and circumstances in *Olam* without “putting a thumb on the scale” in any express manner. In contrast, the UMA’s *in camera* exceptions require a showing that the “need for the evidence *substantially outweighs* the interest in protecting confidentiality.”¹⁴³ It is also notable that the UMA’s *in camera* approach only allows use of mediation communications if the evidence is “not otherwise available,” while *Olam* lacks such a restriction.¹⁴⁴ The Commission should bear these distinctions in mind.

141. See Memorandum 2013-39, pp. 18-29.

142. See Memorandum 2014-45, pp. 12-13.

143. UMA § 6(b).

144. See John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 U.C.L.A. L. Rev. 69, 105-06 (2002).