

First Supplement to Memorandum 2017-30

Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct (Draft Tentative Recommendation)

Memorandum 2017-30 presents a complete draft of a tentative recommendation to implement the Commission’s decisions in this study.¹ This supplement discusses a few issues relating to that draft. The following new communication pertains to one of those issues:

Exhibit p.

- Ron Kelly, Berkeley (5/12/17) 1

The Commission needs to resolve the issues discussed in this supplement, and then decide whether to approve the draft (with or without revisions) as a tentative recommendation, to be posted to the Commission’s website and circulated for comment.

MEDIATOR TESTIMONY AND OTHER REQUESTS FOR EVIDENCE FROM A MEDIATOR

At the April meeting, the Commission made the following decisions regarding attempts to obtain testimony and other evidence from a mediator:

Proposed Evidence Code Section 1120.5 should be revised to expressly state how it applies to a request for evidence from a mediator.

Under that section, a request for written evidence from a mediator should be treated the same way as a request for oral testimony from a mediator. Both types of requests should be subject to the same general rule and exceptions as in Evidence Code Section 703.5.

Proposed Section 1120.5 should expressly state that it does not alter or affect Section 703.5.²

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. *Draft Minutes (April 2017)*, p. 5.

The Commission asked the staff to draft language to implement this approach and present it for the Commission’s approval at the June meeting.³ The Commission also asked the staff to analyze “how to handle an attempt to obtain evidence of a mediator’s communications from a source other than the mediator, such as another mediation participant or an Internet service provider.”⁴ Those two points are discussed in order below.

Implementation of April Decisions

To implement the decisions described above, the staff added the following language to proposed Evidence Code Section 1120.5:

(e) No mediator shall be competent to provide evidence pursuant to this section, through oral or written testimony, production of documents, or otherwise, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with a mediation that the mediator conducted, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure.

(f) Nothing in this section is intended to alter or affect Section 703.5.

The corresponding part of the Comment states:

Under subdivision (e), a mediator generally cannot testify or produce documents pursuant to this section, whether voluntarily or under compulsion of process, regarding a mediation that the mediator conducted. That general rule is subject to the same exceptions stated in Section 703.5, which does not expressly refer to documentary evidence.

Subdivision (f) makes clear that the enactment of this section in no way changes the effect of Section 703.5.

The staff also made conforming revisions in the preliminary part (narrative portion) of the tentative recommendation. In particular, the preliminary part would explain:

A Mediator Generally Could Not Testify or Provide Documentary Evidence Pursuant to the Exception

Subject to some exceptions and limitations, Evidence Code Section 703.5 makes a mediator incompetent to testify about a mediation in a subsequent civil proceeding:

3. *Id.*

4. *Id.*

703.5. No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure. However, this section does not apply to a mediator with regard to any mediation under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

Whether this restriction applies to a request for documentary evidence is not expressly stated. There does not appear to be any case law squarely resolving that point.

Section 703.5 serves to safeguard perceptions of mediator impartiality and protects a mediator from burdensome requests for testimony. Rather than simply relying on Section 703.5 to provide those important benefits in the context of its proposed new exception, the Commission proposes to include some language protecting a mediator in the exception itself. The proposed language on this point is similar to Section 703.5, but it makes explicit that a mediator is precluded from providing documentary evidence pursuant to the exception, not just oral testimony.

In proposing this approach, the Commission takes no position on whether Section 703.5 also precludes a mediator from providing documentary evidence about a mediation. The proposed legislation is not intended to have any impact on that or any other aspect of Section 703.5. The new provision would expressly state as much.⁵

Are these revisions acceptable to the Commission?

Access to Mediator Communications

In discussing mediator testimony and related issues at the April meeting, issues came up about how to handle an attempt to obtain evidence of a mediator's communications from a source other than the mediator, such as another mediation participant or an Internet service provider. Several people put the question this way: "Should it be possible to go in the back door if you can't go in the front door?"

5. See Memorandum 2017-30, pp. 136-37 (footnotes omitted).

For instance, if proposed Section 1120.5 would preclude a litigant from compelling a mediator to produce an email message sent by the mediator, could the litigant instead obtain the same email message by subpoenaing the mediator’s Internet service provider? Alternatively, could the litigant obtain the same email message by subpoenaing or requesting discovery from another mediation participant? The April discussion touched on both of these scenarios, as well as some other hypotheticals.

After debating the matter for awhile, the Commission appeared divided and concluded that it was not ready to reach a resolution. It postponed its decision and asked for further information on the matter.

After the April meeting, mediator Ron Kelly submitted a letter on the matter and Lisa Zonder (a family law mediator, attorney, and collaborative divorce professional) wrote a *Daily Journal* article referring to it.⁶ We discuss their views next. Afterwards, we describe some existing protections under the Electronic Communications Privacy Act and then provide some staff analysis.

Views of Ron Kelly

In his letter, Ron Kelly reminds the Commission that both the Public Employment Relations Board (“PERB”) and the California Judges Association (“CJA”) expressed concerns about the Commission’s proposal, particularly relating to mediator communications. To help address the concerns raised by those groups, he urges the Commission to “exclude evidence of a ‘communication between the mediator and any of the parties to the mediation.’”⁷

Mr. Kelly notes that the same language is already used in Evidence Code Section 1125(a)(5). Under that provision, a mediation ends when “[f]or 10 calendar days, there is no *communication between the mediator and any of the parties to the mediation* relating to the dispute.”⁸

Mr. Kelly further explains:

Using this phrase in the new exception will still allow dissatisfied clients to later obtain and use all relevant mediation-related communications with their accused lawyers, and vice versa. Both will still also be able to obtain and use all relevant mediation communications with all other participants except those with the mediator.⁹

6. See Lisa Zonder, *I’ll Never Mediate Again*, Daily J. (May 26, 2017). Due to copyright considerations, the staff did not reproduce Ms. Zonder’s article in this supplement.

7. Exhibit p. 1, quoting Evid. Code § 1125(a)(5).

8. Emphasis added.

9. Exhibit p. 1.

He also says that “[k]eeping our current protections for confidential communications with the mediator will greatly reduce opposition to the Commission’s current draft.”¹⁰

Views of Lisa Zonder

In her *Daily Journal* article, Lisa Zonder gives two main reasons for faulting the Commission’s current approach. First, she expresses concern that emails, voicemails, texts, and documents “exist not only in the records of the mediator” but “can possibly be subpoenaed directly from the internet service and wireless service providers.”¹¹ Second, she says that even if the Commission decides to fully insulate “communications made by the mediator,” that would not be sufficient; it is also critical to protect “communications by the parties or attorneys while they are with the mediator.”¹² In her view, “[t]he focus on whose statements are admissible misses the point.”¹³

She suggests that in addressing the concerns that prompted this study, “[t]he barrier to entry for invading confidential mediation communications must be set extraordinarily high.”¹⁴ She thus says that “[a]ll written and oral communications made either *by or with* a mediator should remain privileged.”¹⁵

More specifically, she suggests:

1. If a client mediates confidentially with a neutral and thereafter files a claim of malpractice against his/her attorney arising from the underlying mediated dispute, a mediation privilege (or statute) should *prohibit disclosures between the neutral mediator and clients*. This includes *written and oral* communications.

2. The *pre-mediation preparation communications* should likewise be protected. To avoid opening the floodgates to admissibility of all evidence, the mediation materials including flipcharts and photos of the poster boards, confidential questionnaires and email exchanges will be considered privileged and inadmissible.

The *only* exceptions should be as follows:

A. Private settlement communications and written statements between the parties will be admissible. *This would be new* and lifts a cloak of confidentiality not previously available.

B. Settlement discussions and written statements after mediation without the neutral mediator will be admissible.

10. *Id.*

11. Zonder, *supra* note 6.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* (emphasis added).

C. Written communications and discussions between the mediation client and his/her litigation attorney will be admissible. *This would be new* and lifts a cloak of confidentiality not previously available.

D. This privilege does not protect from disclosure “any evidence otherwise” and independently discoverable merely because it was presented during a mediation.

E. If a court is faced with asserted mediation confidentiality (privilege), but the aggrieved client or attorney is unable to prove or disprove an allegation that a lawyer breached a professional duty when representing the [client,] proposed new legislation should allow [consideration of] confidential mediation statements and writings via an *in camera* inspection. The judicial officer would consider whether the asserted privilege is outweighed and that weakening our current mediation confidentiality protections is absolutely necessary.¹⁶

Electronic Communications Privacy Act

The concern about being able to obtain a person’s communications or other electronic records from a service provider such as Google or Yahoo has already been addressed to some extent in the federal Electronic Communications Privacy Act (“ECPA”).¹⁷ More specifically, ECPA includes the Stored Communications Act (“SCA”),¹⁸ which serves to “lessen the disparities between the protections given to established modes of private communication and those accorded new communications media.”¹⁹

As the court explained in *O’Grady v. Superior Court*, discovery of electronic communications “is theoretically possible only because of the ease with which digital data is replicated, stored, and left behind on various servers involved in its delivery, after which it may be retrieved and examined by anyone with the appropriate ‘privileges’ under a host system’s security settings.”²⁰ In contrast,

[t]raditional communications rarely afforded any comparable possibility of discovery. After a letter was delivered, all tangible evidence of the communication remained in the sole possession

16. *Id.* (emphasis added). Ms. Zonder proposes that the judicial officer should use a balancing test “drawn directly from section 574(a)(4)(C) of the Federal Administrative Dispute Resolution Act of 1996 ...” *Id.* Under that test, a mediation communication would not be admissible or subject to disclosure unless the judicial officer “first determines in 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.” *Id.*

17. Pub. L. No. 99-58 (Oct. 21, 1986).

18. 18 U.S.C. §§ 2701-2712.

19. *O’Grady v. Superior Court*, 139 Cal. App. 4th 1423, 1444, 44 Cal. Rptr. 3d 72 (2006).

20. *Id.* at 1445.

and control of the recipient or, if the sender retained a copy, the parties. A telephone conversation was even less likely to be discoverable from a third party: in addition to its intrinsic privacy, it was as ephemeral as a conversation on a street corner; no facsimile of it existed unless a party recorded it — itself an illegal act in some jurisdictions, including California.²¹

In enacting the SCA, Congress “sought not only to shield private electronic communications from government intrusion, but also to encourage ‘innovative forms’ of communication by granting them protection against unwanted disclosure *to anyone*.”²²

Under the SCA, “a person or entity providing an electronic communication service to the public *shall not knowingly divulge* to any person or entity the contents of a communication while in electronic storage by that service”²³ An “electronic communication service” or “ECS” is broadly defined as “any service which provides users thereof the ability to send or receive wire or electronic communications,” such as email.²⁴

The SCA includes a similar rule applicable to a “remote computing service.”²⁵ A “remote computing service” or “RCS” provides “computer storage or processing services by means of an electronic communications system,”²⁶ such as iCloud.

The SCA thus “plainly prohibits an electronic communication or remote computing service to the public from knowingly divulging to any person or entity the contents of customers’ electronic communications or records pertaining to subscribing customers.”²⁷ That prohibition is, however, subject to certain enumerated exceptions.²⁸

Importantly, there is no express exception for civil discovery, such as a subpoena seeking a mediator’s electronic communications for purposes of a legal malpractice case.²⁹ Nor have courts been willing to imply such an exception.³⁰

21. *Id.*

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

23. 18 U.S.C. § 2702(a)(1) (emphasis added).

24. 18 U.S.C. § 2510(15).

25. See 18 U.S.C. § 2702(a)(2).

26. See 18 U.S.C. § 2711(2).

27. *In re Subpoena Duces Tecum to AOL, LLC*, 550 F. Supp. 2d 606, 609-10 (E.D. Va. 2008).

28. See 18 U.S.C. § 2702(b).

29. See *id.*

30. See, e.g., *Subpoena Duces Tecum*, 550 F. Supp. 2d at 609-12; *O’Grady*, 139 Cal. App. 4th at 1442-47.

In *O’Grady*, for example, the court said that “by enacting a number of quite particular exceptions to the rule of nondisclosure, Congress demonstrated that it knew quite well how to make exceptions to that rule.”³¹ The lack of an express exception for civil discovery provides an “appropriate occasion to apply the maxim *expressio unius exclusio alerius est*, under which the enumeration of things to which a statute applies is presumed to exclude things not mentioned.”³²

The court in *O’Grady* further explained that there are good reasons for precluding civil discovery of customer records from an ECS or RCS:

[T]he threat of routine discovery requests seems inherent in the implied exception sought by Apple, which would seemingly permit civil discovery from the service provider whenever its server is thought to contain messages relevant to a civil suit.... Responding to such routine subpoenas would indeed be likely to impose a substantial new burden on service providers. Resistance would likely entail legal expense, and compliance would require devoting some number of person-hours to responding in a lawful and prudent manner. Further, routine compliance might deter users from using the new media to discuss any matter that could conceivably be implicated in litigation — or indeed, corresponding with any person who might appear likely to become a party to litigation.

... Congress could reasonably conclude that to permit civil discovery of stored messages from service providers without the consent of subscribers would provide an informational windfall to civil litigants at too great a cost to digital media and their users. Prohibiting such discovery imposes no new burden on litigants, but shields these modes of communication from encroachments that threaten to impair their utility and discourage their development. The denial of discovery here makes Apple no worse off than it would be if an employee had printed the presentation file onto paper, placed it in an envelope, and handed it to petitioners.

In other words, Congress could quite reasonably decide that an e-mail service provider is a kind of data bailee to whom e-mail is entrusted for delivery and secure storage, and who should be legally disabled from disclosing such data in response to a civil subpoena without the subscriber’s consent. This does not render the data wholly unavailable; it only means that the discovery must be directed to the owner of the data, not the bailee to whom it was entrusted.³³

31. 139 Cal. App. 4th at 1443.

32. *Id.*

33. *Id.* at 1446-47.

Other courts have echoed such sentiments.³⁴

The SCA's prohibition on disclosure of customer records by an ECS or RCS is, however, subject to an exception where the customer gives "lawful consent" to disclosure.³⁵ Thus, "when a user has expressly consented to disclosure, the SCA does not prevent enforcement of a civil subpoena seeking materials in conformity with the consent given."³⁶ Moreover, a court order directing a litigant to provide discovery of certain materials constitutes "lawful consent" within the meaning of the SCA exception.³⁷ Otherwise, a litigant could evade discovery obligations by warehousing documents with an ECS or RCS under strict instructions to release them only with the litigant's consent.³⁸

But a court order directing a litigant to provide discovery seems materially different from a court order directing a mediator to let an ECS or RCS disclose the mediator's electronic records. If the Commission's proposed new exception became law, it would expressly make a mediator incompetent to provide discovery pursuant to the exception.³⁹ The staff is dubious that a mediator could provide "lawful consent" for an ECS or RCS to disclose records the mediator could not disclose himself or herself. Accordingly, a court order requiring a mediator to give such "consent" probably would not satisfy the SCA requirement of "lawful consent." It thus seems unlikely that anyone could use the SCA's consent exception to obtain access to a mediator's electronic records.

Staff Analysis

In deciding "how to handle an attempt to obtain evidence of a mediator's communications from a source other than the mediator," **the Commission first needs to figure out its objective.** A number of different possibilities come to mind:

34. See, e.g., *Subpoena Duces Tecum*, 550 F. Supp. 2d at 611 ("Agreeing with the reasoning in *O'Grady*, this Court holds that State Farm's subpoena may not be enforced consistent with the plain language of the Privacy Act because the exceptions enumerated in § 2702(b) do not include civil discovery subpoenas.").

35. 18 U.S.C. § 2702(b)(3); see, e.g., *Negro v. Superior Court*, 230 Cal. App. 4th 879, 888, 179 Cal. Rptr. 3d 215 (2014).

36. 1-2A California Deposition and Discovery Practice § 2A.14[3] (2017).

37. *Id.*

38. See, e.g., *Flagg v. City of Detroit*, 252 F.R.D. 346, 363 (E.D. Mich. 2008); *Juror Number One v. Superior Court*, 206 Cal. App. 4th 854, 864, 142 Cal. Rptr. 3d 151 (2012).

39. See proposed Evid. Code § 1120.5(e) & Comment.

- (1) **Make sure a mediator is “left alone.”** To safeguard a mediator’s reputation for neutrality,⁴⁰ insulate a mediator from having to provide discovery or evidence at trial.

Proposed Section 1120.5(e) might suffice to accomplish this objective at least as well as existing Section 703.5. It may actually offer better protection, because it expressly refers to documentary evidence while Section 703.5 does not.

- (2) **Preclude a civil litigant from obtaining a mediator’s electronic files from the mediator’s ECS or RCS.** In addition to making sure a mediator is “left alone” (Objective #1 above), the Commission may want to prevent “backdoor” discovery of a mediator’s electronic files from an ECS or RCS.

The SCA already appears to provide this type of protection. The Commission could try to reinforce the SCA by adding similar language to proposed Section 1120.5, but that might lead to questions about why other provisions in the codes do not include such language. The staff is leery of addressing this type of concern on a piecemeal basis, rather than more globally. There is a danger of unexpected and problematic ramifications.

Instead of adding any language to proposed Section 1120.5, the Commission could **revise the proposed Comment to Section 1120.5 along the following lines:**

Under subdivision (e), a mediator generally cannot testify or produce documents pursuant to this section, whether voluntarily or under compulsion of process, regarding a mediation that the mediator conducted. That general rule is subject to the same exceptions stated in Section 703.5, which does not expressly refer to documentary evidence.

For restrictions on obtaining a mediator’s electronic records from the mediator’s service provider, see 18 U.S.C. § 2702(a); O’Grady v. Superior Court, 139 Cal. App. 4th 1423, 44 Cal. Rptr. 3d 72 (2006).

- (3) **Preclude disclosure of a specific category of evidence.** In addition to Objective #1 and possibly Objective #2 above, the Commission may want to further protect mediator neutrality by precluding disclosure of a specific category of evidence, such as:

- All of a mediator’s records relating to a mediation conducted by the mediator.

40. See the discussion of “Special Considerations Relating to Mediator Testimony” in the draft tentative recommendation attached to Memorandum 2017-30.

- All *oral or written* communications *made by a mediator in the course of a mediation conducted by the mediator.*
- All *oral or written* communications *exchanged between a mediator and a mediation participant in the course of a mediation conducted by the mediator.*

These are just some examples; there are other possibilities. Among the potential variables are (a) whether to protect both oral and written evidence from disclosure, (b) whether to limit the protection to communications, or also protect evidence like personal notes, (c) whose communications or records to protect from disclosure, and (d) whether the protection for a communication should vary depending on to whom it was directed (a mediation party, any mediation participant, etc.).

If the Commission is inclined to preclude disclosure of a specific category of evidence, **it could do so by revising proposed Section 1120.5(a) along the following lines:**

1120.5. (a) A communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if ~~both~~ all of the following requirements are satisfied:

(1) The evidence is relevant to prove or disprove an allegation that a lawyer breached a professional requirement when representing a client in the context of a mediation or a mediation consultation.

(2) The evidence is sought or proffered in connection with, and is used pursuant to this section solely in resolving, one or more of the following:

(A)

(3) The evidence does not constitute or disclose a mediator's record relating to a mediation conducted by the mediator.

....

In determining its objective(s), the Commission should bear in mind that the more it protects the confidentiality of a mediator's communications and thought processes, the lower the likelihood of harming a mediator's reputation for neutrality in the manner feared by PERB and CJA. On the other hand, the more the Commission restricts the availability of evidence bearing on a misconduct claim, the lower the likelihood of achieving justice in adjudicating that claim.

The Commission needs to determine how to strike the balance between those competing policy interests. As before, the staff refrains from making any recommendation on this controversial matter.⁴¹

OTHER ISSUES

A few other issues warrant the Commission's attention, as explained below. The staff does not plan to raise any of these issues for discussion at the upcoming meeting. If you have a concern about one or more of these points, please bring your concern to the Commission's attention at or before the meeting.

Types of Disputes in Which the New Exception Would Apply: Implementation of April Decisions

At the April meeting, the Commission discussed whether its proposed new exception should apply in a lawyer-client fee dispute, not just in a State Bar disciplinary proceeding or a claim for damages due to legal malpractice. It decided to add subparagraph (C) to proposed Section 1120.5(a)(2), as follows:

(C) A dispute between a lawyer and client concerning fees, costs, or both including a proceeding under the State Bar Act, Chapter 4, Article 12-Arbitration of Attorneys' Fees, Business & Professions Code Sections 6200-6206.

To comply with standard drafting conventions and fit the statutory context, the attached draft uses the following language instead of the language discussed in April:

(C) A dispute between the lawyer and client concerning fees, costs, or both, including, but not limited to, a proceeding under Article 13 (commencing with Section 6200) of Chapter 4 of the Business and Professions Code.

The staff presumes this revision will not raise any concerns.

To further clarify the Commission's intent regarding the types of disputes in which its proposed new exception would apply, the staff made the following revision in subparagraph (A) of proposed Section 1120.5(a)(2):

(A) A ~~complaint~~ disciplinary proceeding against the lawyer under the State Bar Act, Chapter 4 (commencing with Section 6000) of the Business and Professions Code, or a rule or regulation promulgated pursuant to the State Bar Act.

41. See, e.g., Memorandum 2015-33, p. 4.

The staff also revised the pertinent part of the Comment to read:

Paragraph (2) of subdivision (a) specifies the types of claims in which the exception applies:

- A State Bar disciplinary proceeding, which focuses on protecting the public from attorney malfeasance.
- A legal malpractice claim, which further promotes attorney accountability and provides a means of compensating a client for damages from breach of an attorney's professional duties in the mediation context.
- An attorney-client fee dispute, such as a mandatory fee arbitration under the State Bar Act, which is an effective, low-cost means to resolve fee issues in a confidential setting.

The exception does not apply for purposes of any other kind of claim.

In addition, the staff made some conforming revisions in the preliminary part. See the discussion of "The Exception Would Apply Only in a State Bar Disciplinary Proceeding, a Claim for Damages Due to Legal Malpractice, or an Attorney-Client Fee Dispute."

Commissioners should consider whether the above revisions properly reflect the Commission's intent, and speak up if there are any issues requiring discussion.

Other Drafting Issues

Three more drafting issues are worth mentioning here:

- (1) In preparing the draft tentative recommendation attached to Memorandum 207-30, the staff revised proposed Section 1120.5(a)(2) as follows:

1120.5. (a) A communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if both of the following requirements are satisfied:

....

(2) The evidence is sought or proffered in connection with, and is used pursuant to this section solely in resolving, one or more of the following:

....

As revised, paragraph (a)(2) makes clear that the same mediation evidence may be used in more than one proceeding covered by the new exception (e.g., the same mediation evidence could be introduced in both a State Bar disciplinary claim and an attorney-client fee dispute).

As revised, paragraph (a)(2) also addresses the possibility that evidence sought or proffered pursuant to the new exception might also be sought or proffered pursuant to another mediation confidentiality exception or limitation (e.g., the evidence might be proffered in a criminal case). The revisions make clear that the new exception would not preclude such use.

- (2) In preparing the Comment to proposed Section 1120.5, the staff added a sentence to the paragraph that describes subdivision (b):

Comment...

Subdivision (b) is modeled on Section 6(d) of the Uniform Mediation Act. It establishes an important limitation on the admissibility or disclosure of mediation communications pursuant to this section.

....

This revision helps to explain the purpose of subdivision (b).

- (3) After releasing Memorandum 2017-30, the staff thought of a way to express one point more clearly. On page 121, lines 10-11, it may be helpful to make the following revisions:

One possibility in this study would be to let the policy of Section 958 completely override the mediation confidentiality statutes. In other words

We will incorporate this revision in the next draft unless the Commission otherwise directs.

NEXT STEP

After resolving the issues discussed above and any other issues that are raised at or in connection with the upcoming meeting, **the Commission needs to decide whether to approve the draft attached to Memorandum 2017-30 as a tentative recommendation (with or without revisions).** If the Commission takes that step, the staff will implement any necessary revisions (possibly subject to approval by the Chair and/or Vice Chair), post the tentative recommendation on

the Commission's website, distribute a press release, and circulate the proposal broadly for comment.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

May 12, 2017

Re: Study K-402 - Drafting Issue Raised at April Meeting

Dear Chairperson Lee, Commissioners, and Staff,

At its last meeting, the Commission agreed it wanted to respond fully to the California Public Employment Retirement Board's previous requests. Chairperson Lee appeared to state a consensus in saying the Commission wanted to "take PERB's opposition off the table." (Commission audio record.)

In their letter dated October 1, 2015, PERB and the State Mediation and Conciliation Service it oversees had described the basis for their requests as follows. "For a mediator and the participants to understand the central issues, the motivations, and the risks of not resolving their dispute, the parties must be assured that the mediator will not divulge their confidential disclosures." "Were SMCS to lose the promise of absolute confidentiality, it risks losing its neutrality in the eyes of our constituents. The result would be failed mediations and costly and disruptive labor disputes." (Commission Memorandum MM15-46s3.) PERB's General Counsel, Mr. Felix de la Torre, had also appeared personally - for the second time - on February 2, 2017, to directly restate to the Commission his request that documents evidencing confidential communications with a mediator be protected wherever they might exist, not only in a mediator's files.

During the April meeting, the Commissioners and attendees discussed the problem that digitally transmitted communications (documents, emails, texts, voice mails) between a mediator and a party exist not only in the mediator's records, but also in the digital records of the receiving and transmitting parties, and of the internet service and wireless providers that convey them. Judge David Long, appearing for the California Judges Association, gave an example of an email he had just sent to a party asking specific questions about its confidential mediation brief. Commissioner Boyer-Vine summarized this concern, stating "I don't think you should be able to come in through the back door if you can't get through the front door". (Commission audio record.) Staff was asked to consider this problem and to prepare a memo discussing whether and how to address it.

The Commission and attendees had earlier discussed crafting language to keep our current protections for communications "from", "of", or "with" a mediator. To prevent disclosure of the communications Mr. de la Torre and Judge Long have identified in their letters, I urge the Commission to use the same phrase that already exists in Ev. Code section 1125(a)(5), and to exclude evidence of a "communication between the mediator and any of the parties to the mediation." Keeping our current protections for confidential communications with the mediator will greatly reduce opposition to the Commission's current draft. Using this phrase in the new exception will still allow dissatisfied clients to later obtain and use all relevant mediation-related communications with their accused lawyers, and vice versa. Both will still also be able to obtain and use all relevant mediation communications with all other participants except those with the mediator.

cc Hon. David W. Long, California Judges Association
Ms. Heather Anderson, California Judicial Council

Respectfully submitted,
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