

Memorandum 2016-30

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

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

	<i>Exhibit p.</i>
• Robert Flack, Los Angeles (5/20/16)	1
• Frederick Glassman & Fern Topas Salka, Los Angeles (4/25/16)	10
• Lynette Berg Robe, Encino (5/17/16)	15
• Ana Sambold, San Diego (5/18/16)	19
• Supplemental comments from individuals signing the online petition by Citizens Against Legalized Malpractice	21

The Commission also received the following letter, which is directed to the State Bar but relates to this study:

	<i>Exhibit p.</i>
• Letter from Ron Kelly, Berkeley, to Saul Bercovitch, Legislative Counsel, State Bar Office of Governmental Affairs (5/19/16)	22

This memorandum discusses these new communications, as well as some other new developments.

COMMENTS OF ROBERT FLACK

By email, attorney-mediator Robert Flack informed the staff that he has been working with several law school professors on constitutional issues relating to

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.

the Commission's study.² He reported that their analysis is not quite ready, but "a 'high level summary' might be helpful at this time."³ He explained:

Many in the room, while perhaps well meaning, have little practical experience about the interaction, if any, between court proceedings and ADR.

Some who have advised (and testified) are not attorneys.

And, some Commissioners have spent little time in a court room.

Your recent distribution triggered this early submission.

I hope that this summary will be helpful.

Mr. Flack's submission is attached for the Commission's review.⁴ It provides some information about mediation and arbitration.

Among other things, the document notes that "Most Mediation is Performed Outside of the Court's Jurisdiction," that the "1st Amendment Does Not Apply to Independent Jurisdiction," and that "California's Constitutional Right to Privacy Does Apply."⁵ The staff surmises that the intent is to say that most California mediations are not subject to a First Amendment right of access because they are private mediations, not court-connected mediations.

In the staff's view, however, whether a mediation is court-connected or private would have no bearing on whether there is a presumptive (but not absolute) First Amendment right of access to a legal malpractice case that alleges mediation misconduct. Either way, the legal malpractice case would be litigated in the courts and thus would be subject to First Amendment constraints.⁶

Perhaps we have misunderstood the point of Mr. Flack's submission. The analysis he is preparing with the help of law school professors might provide further insight into this matter. We will provide it to the Commission when we receive it.

COMMENTS OF FREDERICK GLASSMAN AND FERN TOPAS SALKA

Frederick Glassman and Fern Topas Salka submitted new comments "[a]s a follow-up to our previous letters to you and our appearance at the Commission's hearing in Los Angeles on December 10, 2015"⁷ They are "family lawyers

2. Exhibit p. 1.

3. *Id.*

4. Exhibit pp. 2-9.

5. *Id.* at 4-5.

6. For further discussion of how the First Amendment right of access applies in the mediation context, see Memorandum 2016-18, pp. 38-50.

7. Exhibit pp. 10-14.

who have each worked in the field for over forty years as litigator, mediator, consulting and collaborative attorney”⁸

They “do not believe an exception to mediation confidentiality is appropriate in any type of mediation.”⁹ They particularly want to emphasize, however, “the potentially devastating effect of any exception to the confidentiality in the family law context”¹⁰

They explain that viewpoint in detail. We will not reiterate all of their points here, but just mention a few highlights.

In particular, Mr. Glassman and Ms. Salka note that “[m]any attorneys consulting with clients in mediation and collaborative law process act as advocates in a limited scope.”¹¹ According to Mr. Glassman and Ms. Salka, such attorneys “provide a very valuable service to families who do not wish to or are unable to afford a more traditional, full representational approach.”¹² Mr. Glassman and Ms. Salka “believe it is especially and acutely necessary to protect confidentiality for family law related matters and that is true whether the attorney ‘acting as an advocate’ is attorney of record or attorney acting under limited scope representation pursuant to Rule 5.425 of the California Rules of Court.”¹³

Mr. Glassman and Ms. Salka further explain that “[f]amily law is different from all other fields of civil or criminal law.”¹⁴ To illustrate this point, they quote from an editorial by the founder of the Conciliation Court:

“... divorce law is a different kind of law; it is law that, because of the nature of human nature, requires attitudes, practices, procedures and a process that are more sensitive to the most sensitive phenomena in the universe — human feelings and human needs. Divorce law is different because the search for truth and justice takes place in the delicate area of human emotions that have been shaped by genetic, sociological, psychological and economic factors. Divorce law is different because it involves, for the most part, normal people, who, in the struggle and agony of great loss and disconnection are, for the moment, engulfed by anger, rage, depression, and a feeling of not being in control, ingredients normally found in all crises and grieving. *If law is to be just and the search for truth is to be an honest one, the divorce law needs a process that*

8. *Id.* at 11.

9. *Id.* at 11.

10. *Id.* at 12; see also *id.* at 10.

11. *Id.* at 11.

12. *Id.*

13. *Id.*

14. *Id.*

contains and helps dissipate these disabling emotions rather than a process that breaks the dams of destructive emotions, resulting in clients who are helplessly swept along, flailing their arms, choking and trying to save themselves and their families in the tumultuous waters of the adversary system in divorce.” (Meyer Elkin, The Conciliation Courts Review, 20, 1982, Editorial: “Cast a Pebble in the Pond,” p. iii-vii.)¹⁵

Mr. Glassman and Ms. Salka say that “[m]ediation and the collaborative law process have enabled those families who are appropriate candidates to by-pass the traditional legal system in favor of a voluntary process which permits the participants to control their own destinies with dignity and respect for each other.”¹⁶ They consider confidentiality crucial to effective family law mediation,¹⁷ and they urge the Commission not to “permit the complaints of a few disgruntled parties to damage the private and voluntary domain of family law mediation.”¹⁸

COMMENTS OF LYNETTE BERG ROBE

Lynette Berg Robe is a family law mediator and a certified Family Law Specialist, who has “mediated many family law cases over the past 30 years.”¹⁹ She sent an earlier letter to the Commission and also attended the meeting in Los Angeles on December 10, 2015. She writes to “reiterate [her] opposition to the creation of any exception to mediation confidentiality.”²⁰

She makes three main points, as described below.

CJA Letter

First, Ms. Robe urges the Commission to read and consider the letter it received from the California Judges Association (“CJA”) opposing the Commission’s proposed new mediation confidentiality exception.²¹ She says she “was shocked that the proposed minutes of the April 14, 2016, meeting reflect that while the commissioners specifically considered the letter of Jeff Kichaven, they apparently did not even read the letter from the California Judges

15. *Id.* (emphasis added).

16. *Id.* at 12.

17. *Id.* at 12-14.

18. *Id.* at 14.

19. *Id.* at 14.

20. Exhibit p. 15.

21. CJA’s letter is attached as Exhibit pages 5-6 to Memorandum 2016-19.

Association”²² “To not even have a discussion of CJA’s letter” strikes her as “a strange omission.”²³

Ms. Robe apparently does not realize that CJA’s letter was attached to and discussed in Memorandum 2016-19. The proposed Minutes of the April meeting correctly report that the Commission “considered ... Memorandum 2016-19 (Public Comment)” at the April meeting.²⁴

Contrary to Ms. Robe’s assertions, CJA’s letter *was* specifically discussed at the meeting.²⁵ The proposed Minutes do not mention as much because the Commission does not make a practice of specifying in its Minutes which documents are “discussed” (as opposed to “considered”) at a meeting.

The staff did not receive Mr. Kichaven’s letter in time to include it in Memorandum 2016-19 or its First Supplement, which were prepared before the April meeting. Instead, we distributed copies of the letter at the meeting and included it in a post-meeting supplement (the Second Supplement to Memorandum 2016-19). Consistent with the Commission’s standard practice in that type of situation, the proposed Minutes state that the Commission “considered a letter from Jeffrey Kichaven, which is attached to the Second Supplement to Memorandum 2016-19.”²⁶

Data on Frequency of Mediation Misconduct

Ms. Robe’s second point is: “If the CLRC is going to create an exception to mediation confidentiality, shouldn’t it be based upon some *reliable research* that shows there is a *substantial* problem, rather than a reaction to basically one extremely bad case?”²⁷ She says that Ron Kelly obtained information from the State Bar demonstrating that “there is *scant evidence* that there is a systemic problem created by mediation confidentiality.”²⁸ She continues:

We know that much of the legislation that works its way through the California Legislature is constituent driven, based on anecdotes heard by the legislator who concludes, “There oughta be a law!” I had hoped for better from the CLRC.²⁹

22. Exhibit p. 15.

23. *Id.*

24. See proposed Minutes (April 2016), p. 5.

25. A recording of the discussion is available from the Commission on request.

26. See proposed Minutes (April 2016), p. 5.

27. Exhibit p. 16 (emphasis in original).

28. Exhibit p. 15 (emphasis in original).

29. *Id.* at 16.

The staff believes that the record of this study (including the many memoranda available on the Commission's website and the testimony memorialized in the Minutes and meeting recordings)³⁰ amply demonstrates that

- (1) The Commission's as-yet-undrafted proposal is not based on "a reaction to basically one extremely bad case" and
- (2) The Commission has been diligent in seeking reliable empirical data, but such data are difficult to obtain in this area.

Of particular note, the State Bar specifically informed the Commission that it *does not have* any reliable data on the frequency of mediation misconduct:

[T]he State Bar has no empirical data concerning the relationship between mediation confidentiality and 1) attorney malpractice or other misconduct that could form the basis of civil liability; or 2) attorney misconduct that could form the basis of State Bar disciplinary action. We do not have data on the number or frequency of complaints about attorney misconduct in California mediations, or a subset of California mediations, or the nature of any such complaints. When the State Bar receives a complaint about alleged attorney misconduct, there are certain allegations that are coded, but we do not have a code for allegations involving alleged misconduct in the course of a mediation.³¹

As in the past, **we encourage anyone with relevant empirical data to submit it to the Commission for consideration.** Later in this memorandum, we report on Ron Kelly's recent efforts to obtain pertinent information from the State Bar.³²

Any Exception Should Be Narrow

Ms. Robe is "vehemently opposed to interfering with the shield of confidentiality that has protected the mediation process since it was added to the Evidence Code"³³ However, "if the CLRC continues to barrel down the road toward creating an exception,"³⁴ she urges it to "please make it a very limited exception."³⁵

In particular, she makes the following suggestions:

30. See <http://www.clrc.ca.gov/K402.html>. The meeting recordings are available from the Commission on request.

31. See Memorandum 2015-5, Exhibit p. 1. See also Memorandum 2015-22, pp. 47-48 (describing information from State Bar regarding disciplinary proceeding involving alleged mediation misconduct); First Supplement to Memorandum 2015-22, pp. 3-4 (same); Memorandum 2016-8, p. 2 (reporting on further contact with State Bar).

32. See discussion of "Ron Kelly's Request for State Bar Records" *infra*.

33. Exhibit p. 18.

34. *Id.* at 16.

35. *Id.* at 18.

- Evidence Code Section 703.5 should be left as is.³⁶
- Any exception should apply only in a State Bar disciplinary proceeding or legal malpractice case, not in a proceeding to enforce a mediated settlement.³⁷
- Any exception should be limited to private attorney-client communications. “Mediation statements made by other parties and attorneys in the mediation and any documents prepared by others *must remain immune* from disclosure and must be protected in order to preserve the integrity of the mediation process.”³⁸
- If the exception is limited to private attorney-client communications, Ms. Robe “do[es] not think an *in camera* proceeding would be needed.”³⁹
- Any new exception should be consistent with Evidence Code Section 1122(a)(2),⁴⁰ which permits disclosure of certain mediation evidence under specified conditions, but only if that evidence “does not disclose anything said or done or any admission made in the course of mediation.”
- There should be “a standard list of admonitions written in plain English that attorneys and mediators can give to any client who indicates that he or she is interested in mediation, addressing the downside of participating in mediation as well as the benefits, and ensuring informed consent to the mediation process.”⁴¹
- Among other things, that list should deal with modification of an attorney fee agreement. “If, during the mediation, as an inducement to settlement, the attorney agrees to accept a lower fee, or, if there is an agreement to enhance the attorney’s fee, any modification of the fee agreement must be set forth in a writing signed by the party and his/her attorney before any overall settlement agreement is executed by the various parties and approved by the various attorneys.”⁴²
- The proposed legislation should perhaps have a 3-5 year sunset provision and direct the State Bar to collect relevant data while it is in effect, so that there will be “*actual data* for the Legislature to review to determine whether or not the statute should be extended.”⁴³
- The exception should not apply to family law mediation and collaborative law.⁴⁴

36. *Id.* at 16. The Commission is not proposing to revise Section 703.5. See Minutes (Oct. 2015), p. 6.

37. Exhibit p. 16. The Commission’s proposed new exception would not apply in a proceeding to enforce a mediated settlement agreement. See Minutes (Oct. 2015), p. 5.

38. Exhibit p. 16.

39. *Id.* at 17.

40. *Id.*

41. *Id.*

42. *Id.*

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

44. *Id.* at 17-18.

Ms. Robe implores the Commission not to “punish the many attorneys who participate in mediation as mediators and/or limited scope representation for clients in mediation for the ungracious acts of a tiny group of attorneys.”⁴⁵

COMMENTS OF ANA SAMBOLD

Ana Sambold is with the National Conflict Resolution Center in San Diego. She recently helped the San Diego County Bar Association organize a debate entitled “Good, Bad and the Ugly: What Will Become of California’s Mediation Confidentiality?” Afterwards, she made it possible for the staff to watch a video-recording of the debate free-of-charge and provided us with a letter about the event.⁴⁶

At the debate, “Jeff Kichaven explained the arguments in favor of creating an exception to the mediation confidentiality rules,” and another very experienced California mediator, Lee Jay Berman, “was against it.”⁴⁷ Ms. Sambold says that “this program was very successful, with 39 people attending in person, and 29 watching the live webcast from all over California.”⁴⁸

“[I]n the beginning three people from the audience were in favor of creating the new exception”⁴⁹ According to Ms. Sambold, by the end of the debate everyone was against the idea.⁵⁰

She summarizes the reasoning as follows:

[A]s Lee Jay Berman explained, creating an exception to the mediation confidentiality statutes is not the way to address the issue. There are many other options. The most effective one is educating the parties about the implications of mediation confidentiality and having them sign an informed consent, either knowingly accepting the full confidentiality, or opting out of it before the mediation begins. ... The statutes should focus on requiring the mediator to provide a clear explanation of the confidentiality rules, and allow the parties to exercise self-determination, regarding what level of protection, transparency and options they want.⁵¹

45. *Id.* at 18.

46. Exhibit pp. 19-20.

47. *Id.* at 19.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

Ms. Sambold also points out that mediation is the only dispute resolution process that provides confidentiality to people who want it,⁵² and settlement conferences are available for people who do not want to use a confidential process.⁵³

Finally, she addresses the argument that parties have not been deterred from using mediation in states that have a mediation confidentiality exception for lawyer malpractice. She says it “d[oes] not seem to be a very good argument,”⁵⁴ for two reasons:

First, there is no evidence to support such statement. Second, it is unfair to compare California, which already had protections in place prior to the adoption of the UMA, with states such as Illinois, Iowa, Indiana and Nebraska.⁵⁵ In those states mediation is not as commonly used and it does not resolve as many disputes as in California. The UMA was created to provide some measure of structure and confidentiality in those states that had none. It was never intended to reduce the protections that existed in other, more mediation evolved states.⁵⁶

UPDATE ON ONLINE PETITION

As previously reported, the Change.org website includes a petition by a group called Citizens Against Legalized Malpractice. The petition says:

As a member of the public, I do not support allowing attorneys to legally commit malpractice against clients. Attorneys need to be held accountable for their misdeeds just like everyone else whether in mediation or any other context. No other state allows this and I do not believe California should allow it either.

I would not make use of mediation if it allows my attorney to use the state statutes to commit acts against me more severe than what led to the mediation. That is the conclusion from Justice Chin's comment that an attorney can get away with anything unless they can be criminally charged. The Hadley v. Cochran case sure suggests that I have surrendered all my rights if the attorney can legally fabricate an agreement that could be very damaging to me without my knowing about it.

I do not believe it was the CLRC or the California Legislatures intent to create this windfall for attorneys when it updated the mediation statutes in 1997. I urge you to correct the mistake. The attorneys who have written to support keeping the statutes the

52. *Id.* at 20.

53. *Id.* at 19.

54. *Id.* at 20.

55. Illinois, Iowa, Nebraska, and eight other states (plus the District of Columbia) have enacted the Uniform Mediation Act. Indiana has not. See Memorandum 2014-24, p. 3.

56. *Id.*

same which also keeps malpractice legal, do not represent my point of view only their own.⁵⁷

As of May 23, 2016, the total number of signatories was about 450.⁵⁸ A few of the new signatories provided brief supplemental comments.⁵⁹ None of those supplemental comments refer to mediation.⁶⁰

RON KELLY'S REQUEST FOR STATE BAR RECORDS

On May 19, 2016, mediator Ron Kelly formally requested some data from the State Bar of California.⁶¹ He sent us a copy of that request and promised to keep the Commission posted on its status.

In particular, Mr. Kelly "respectfully request[ed], under the common law right of public access cited in the Sander decision, access to the data existing in the State Bar's database evidencing how many complaints found valid by a State Bar investigator in the past five years, 2011 through 2015, involved clients complaining about their lawyers' misconduct during a mediation."⁶² More specifically, he wrote:

I hereby respectfully request that the State Bar

- 1) perform a routine keyword search of the electronic records of all complaints found valid by a State Bar investigator in the past five years, 2011 through 2015, identifying those complaint files containing the word "mediation",
- 2) review those complaints to determine how many involved a client alleging misconduct by their lawyer during a mediation, and
- 3) either
 - a) provide the anonymized statistical information, or
 - b) provide copies of those files in which it was determined that reasonable cause existed to file discipline charges, redacted to eliminate any

57. See https://www.change.org/p/the-california-law-revision-commission-change-the-statutes-that-legalize-malpractice?response=b21b75d0be86&utm_source=target&utm_medium=email&utm_campaign=one_thousand.

58. One webpage refers to "446 Supporters," while another refers to "454 Supporters." Compare https://www.change.org/p/the-california-law-revision-commission-change-the-statutes-that-legalize-malpractice?response=b21b75d0be86&utm_source=target&utm_medium=email&utm_campaign=one_thousand with https://www.change.org/o/citizens_against_legalized_malpractice_2.

59. See Exhibit p. 21.

60. See *id.*

61. See Exhibit pp. 22-23.

62. *Id.* at 22.

information which would violate privacy or confidentiality.

If a countervailing interest exists which clearly outweighs the public's interest in disclosure identified above, I respectfully request you clearly identify this interest.

I respectfully request that you advise me of whether there exists within the State Bar disciplinary system a written policy which prohibits receiving or recording information about allegations of lawyer misconduct in mediation. If so, I respectfully request you provide a copy of this policy, including the year it went into effect.⁶³

The remainder of Mr. Kelly's State Bar request seeks to demonstrate that (1) there is "sufficient public interest" in the requested information to justify its disclosure and (2) the other requirements for disclosure are also satisfied.⁶⁴ In so doing, it emphasizes the Commission's ongoing study and potential value of such information in deciding whether to revise California's mediation confidentiality statute.⁶⁵

EXCERPT FROM ARTICLE IN *ABA LITIGATION NEWS*

In April, Larry Doyle (lobbyist for the Conference of California Bar Associations) alerted the staff to an article in the *ABA Litigation News* on *Grubaugh v. Blomo*,⁶⁶ a recent Arizona case that the staff previously described for the Commission.⁶⁷ The article summarized the case and then reported:

ABA Section of Litigation leaders agree that the appellate court in *Grubaugh* interpreted the statute correctly and reached the right result. Due to the prevalence of mediation, however, Section of Litigation leaders believe that those states that do not presently provide an exception for malpractice claims may want to reconsider their position. By excluding mediation communications, "both the client and the lawyer are forced to litigate with an incomplete record, often making the claim and the defense impossible," explains Hon. Bruce E. Meyerson (ret.), Phoenix, AZ, member of the ABA House of Delegates and a former chair of the Section of Dispute Resolution.⁶⁸

63. *Id.* at 23.

64. See *id.* at 22-23.

65. See *id.*

66. 238 Ariz. 264, 359 P. 3d 1008 (Ariz. Ct. App. 2015).

67. See Memorandum 20165-54, pp. 5-7.

68. http://apps.americanbar.org/litigation/litigationnews/top_stories/031616-mediation-privilege.html.

FURTHER INFORMATION ON INDIANA LAW

Indiana has strict protection for mediation confidentiality, somewhat similar to California.⁶⁹ Recently, the Alternative Dispute Resolution of the Indiana State Bar Association and the Alternative Dispute Resolution Committee of the Judicial Conference of Indiana conducted a study of the Indiana Rules for Alternative Dispute Resolution and suggested various changes. Among other things, they proposed to revise Indiana's mediation confidentiality rule to distinguish between (1) use of mediation evidence in the mediated dispute, which would generally be prohibited, and (2) use of mediation evidence in a collateral matter, which would be permissible in certain circumstances.⁷⁰ They submitted the proposed rule changes to the Indiana Supreme Court Rules Committee for consideration.

In early May, Indiana attorney Patrick Brown provided the following update on the status of that proposal:

The proposed changes were submitted to the Indiana Supreme Court Rules committee for consideration. They made some changes and published them for comment. The comment period closed on April 15th.

The changes they made were largely acceptable, EXCEPT for the changes they made to the mediation confidentiality provisions. They agreed with most of our rewrite, but then reinserted the references to Indiana Rule of Evidence 408 (similar to the Federal Rule). That would have reopened the door to all of the traditional exceptions to Rule 408. That was the point of the Horner decision that was the genesis of the ADR Rules Review Task Force in the first place. The Indiana Bar Assn, the Indiana Association of Mediators, and the Indiana Judicial Conference (the judges association) all objected strenuously to the reinsertion of the reference to Rule 408. So, we will see what happens.⁷¹

Mediation confidentiality appears to be controversial in Indiana, just as in California.

FURTHER INFORMATION ON NEBRASKA LAW

Indiana attorney Patrick Brown also alerted the staff to a new mediation confidentiality case from Nebraska, which was the first state to enact the Uniform Mediation Act ("UMA"), in 2003. The new case is *Shriner v. Friedman*

69. See Memorandum 2014-59, pp. 8-11.

70. See *id.*

71. Email from Patrick Brown to Barbara Gaal (5/3/16).

Law Offices.⁷² To the best of the staff’s knowledge, it is the first published decision to interpret the UMA exception for alleged legal malpractice.⁷³

In *Shriner*, Debra Shriner was injured in a car accident and brought a personal injury suit to recover damages for her injuries. The personal injury suit was mediated and her attorney accepted a \$45,000 settlement offer on her behalf, with her permission. Thereafter, however, Ms. Shriner refused to sign the settlement agreement, saying that the settlement amount was too low and her attorney had wrongfully coerced her to accept it. The defendants successfully moved to enforce the settlement.

Ms. Shriner then brought a legal malpractice case against her attorney. She alleged that he had “coerced her into accepting a settlement offer of \$45,000 in the underlying action and that he breached the standard of care for an attorney by, among other things, failing to properly value and prosecute her claim and advising her to accept the settlement offer.”⁷⁴

The trial court granted summary judgment in favor of the defendant and his firm, but the Nebraska Court of Appeals reversed because it “determined that Shriner’s legal malpractice action [was] not barred under the doctrines of claim preclusion, issue preclusion, judicial estoppel, or equitable estoppel”⁷⁵ The appellate court remanded the case for further proceedings.

In remanding the case, the appellate court “address[ed] the applicability of the mediation communications privilege, because the issue [was] likely to arise on remand.”⁷⁶ Shriner contended that mediator Miller’s testimony was privileged under Nebraska’s version of the UMA “because it recounted mediation communication.”⁷⁷ But the Nebraska Court of Appeals disagreed, explaining that the mediator’s testimony fell within the mediation confidentiality exception for legal malpractice:

Miller’s testimony is relevant to disproving “a claim or complaint of professional misconduct or malpractice filed against a ... representative of a party based on conduct occurring during a mediation.” See § 25-2935(a)(6). Specifically, [the defendant attorney] seeks to use Miller’s testimony to disprove Shriner’s allegations that [the defendant attorney] committed legal malpractice by coercing her into accepting the settlement offer and

72. 877 N.W.2d 272, 23 Neb. App. 869 (Neb. App. 2016).

73. UMA § 6(a)(6).

74. *Shriner*, 23 Neb. App. at 871.

75. *Id.* at 890-91.

76. *Id.* at 893.

77. *Id.*

by improperly advising her during the mediation. Therefore, Miller's testimony falls within the exception contained in § 25-2935(a)(6). If Miller's testimony is offered on remand, caution will be required, since only the portion of a mediation communication necessary for the application of the exception may be admitted. See § 25-2935(d).⁷⁸

We thank Mr. Brown for bringing this important matter to the Commission's attention.

FURTHER INFORMATION ON MARYLAND LAW

In reviewing the law of other jurisdictions, the staff prepared a table summarizing the mediation confidentiality protections in the non-UMA states other than California and the five states that the Commission selected to closely examine.⁷⁹ In presenting the chart, the staff warned that its research had been "extensive, but not exhaustive" and it was "possible that we did not fully describe the pertinent law in one or more jurisdictions."⁸⁰

Among other things, the chart refers to the Maryland Mediation Confidentiality Act, which includes an exception permitting disclosure of mediation communications with regard to alleged mediator misconduct or negligence.⁸¹ As reported in the chart, the Act also includes an exception permitting disclosure of mediation communications

(3) To the extent necessary to assert or defend against *allegations of professional misconduct or malpractice* by a party or any person who was present or who otherwise participated in the mediation at the request of a party, except that a mediator may not be compelled to participate in a proceeding arising out of the disclosure⁸²

It recently came to the staff's attention that the Maryland Mediation Confidentiality Act does not apply when a court refers all or part of a civil case to mediation. In that situation, Maryland has another provision that protects mediation communications: Maryland Rule 17-105.

Like the Maryland Mediation Confidentiality Act, Rule 17-105 includes an exception permitting disclosure of mediation communications with regard to

78. *Id.*

79. See Memorandum 2014-35, Exhibit pp. 5-42. The five states that the Commission selected to closely examine were: Florida, New York, Massachusetts, Pennsylvania, and Texas.

80. First Supplement to Memorandum 2014-35, p. 2.

81. Md. Code, Courts & Judicial Proceedings § 3-1804(b)(2) (emphasis added).

82. See Memorandum 2014-35, Exhibit p. 18, *quoting* Md. Code, Courts & Judicial Proceedings § 3-1804(b)(3) (emphasis added).

alleged mediator misconduct or negligence.⁸³ Unlike the Maryland Mediation Confidentiality Act, however, Rule 17-105 *does not* include an exception expressly permitting disclosure of mediation communications to prove or disprove allegations of professional misconduct by a mediation participant other than the mediator. The staff does not know whether the failure to include such an exception was intentional.

INFORMATION FROM PHYLLIS POLLACK

Mediator Phyllis Pollack recently wrote a blog post on mediation confidentiality, which is entitled “Informed Consent.” She sent the staff a link to the post and asked that we pass it on to the Commissioners for consideration, which we are doing here.⁸⁴

The thrust of the blog post is that the concept of “informed consent” might be preferable to the Commission’s proposed creation of a new mediation confidentiality exception. The post does not take a firm position on the matter.

More specifically, Ms. Pollack refers to several professional rules⁸⁵ and says that they “make a strong argument that an attorney should be ‘competent’ on the subject of mediation confidentiality, especially its rules of inadmissibility and should inform and advise the client about them prior to attending a mediation.”⁸⁶ She raises the prospects of including such information in an attorney-client fee agreement, requiring an attorney to discuss it with the client before a mediation, or requiring a mediator to discuss it at the mediation.⁸⁷

Ms. Pollack also asks whether a mediator should conduct the equivalent of a *voir dire* before a client signs a mediated settlement agreement. She suggests questions such as the following:

- Have you read the proposed settlement agreement?
- Do you fully and completely understand the terms of the proposed settlement agreement?
- Has your attorney explained the terms of the proposed settlement agreement to you and/or answered to your satisfaction any questions you may have about the proposed settlement agreement?

83. See Rule 17-105(d)(2).

84. <http://www.pgpmmediation.com/informed-consent>.

85. Bus. & Prof. Code § 6068(m); Cal. R. Prof. Conduct 3-110, 3-500.

86. <http://www.pgpmmediation.com/informed-consent>.

87. *Id.*

- Did anyone force, threaten or pressure you into agreeing to this proposed settlement? That is, are you entering it voluntarily and of your own free will?
- Has anyone promised you anything OTHER than what is set forth in the proposed settlement agreement? That is, are there any additional oral or written side agreements or representations?
- Do you understand that you have the right NOT to sign this proposed settlement agreement and instead proceed to trial?
- Do you understand that once you sign this proposed settlement agreement it is binding, admissible and enforceable and you can NOT change your mind?
- Do you understand that because this settlement is occurring in the mediation, nothing said, or written will be admissible in court?
- Are you satisfied with the representation given to you by your attorney here today? Do you understand that because this settlement has occurred as part of a mediation, you are giving up the right to later complain about this representation either to the State Bar of California or by filing a complaint in court?
- Are you under any physical, emotional or mental disability that is preventing you from thinking clearly or impairing your ability to understand the terms of the proposed settlement agreement and the questions I have just asked?
- Have you taken any medication or under the influence of any substance (alcohol or drugs) that is preventing you from thinking clearly or impairing your ability to understand the terms of the proposed settlement agreement and the questions I have just asked?
- Are there any questions you wish to ask of me or anyone else?⁸⁸

In addition to providing a link to her blog, Ms. Pollack also sent the staff some court documents relating to *Wolf v. Loring Ward International, Ltd.*,⁸⁹ a pending California case that involves mediation confidentiality issues. A recent *Daily Journal* column by A. Marco Turk also discusses that case in some detail.⁹⁰ To avoid the possibility of interfering in pending litigation, we will not say more about it here.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

88. *Id.* (capitalization in original).

89. No. BC445310 in Los Angeles Superior Court.

90. A. Marco Turk, *Mediation Confidentiality Still Uncertain*, S.F. Daily Journal (April 22, 2016).

EMAIL FROM ROBERT FLACK (5/20/16)

Re: Mediation Confidentiality — California Constitutional Foundations

Barbara,

I've been working with several law school professors on these Constitutional Issues. Our tome is not quite ready for publication. But, I thought a "high level summary" might be helpful at this time.

Many in the room, while perhaps well meaning, have little practical experience about the interaction, if any, between court proceedings and ADR.

Some who have advised (and testified) are not attorneys.

And, some Commissioners have spent little time in a court room.

Your recent distribution triggered this early submission.

I hope that this summary will be helpful.

Best regards,

-Bob

Robert J. Flack, MBA, JD
Attorney and Counselor at Law
Arbitrator and Mediator - AAA

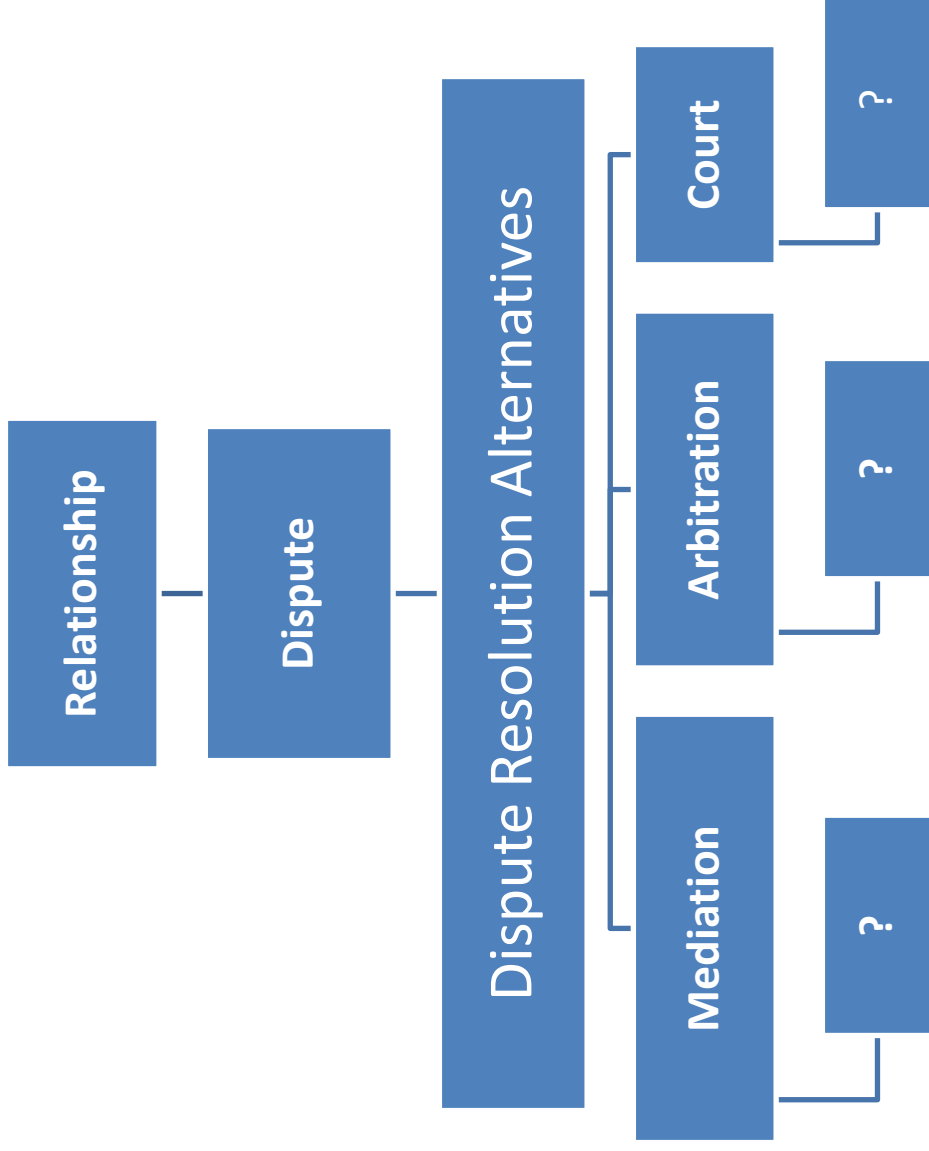
949-250-9601 Direct
213-437-6042 Los Angeles
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LegalFlack@gmail.com
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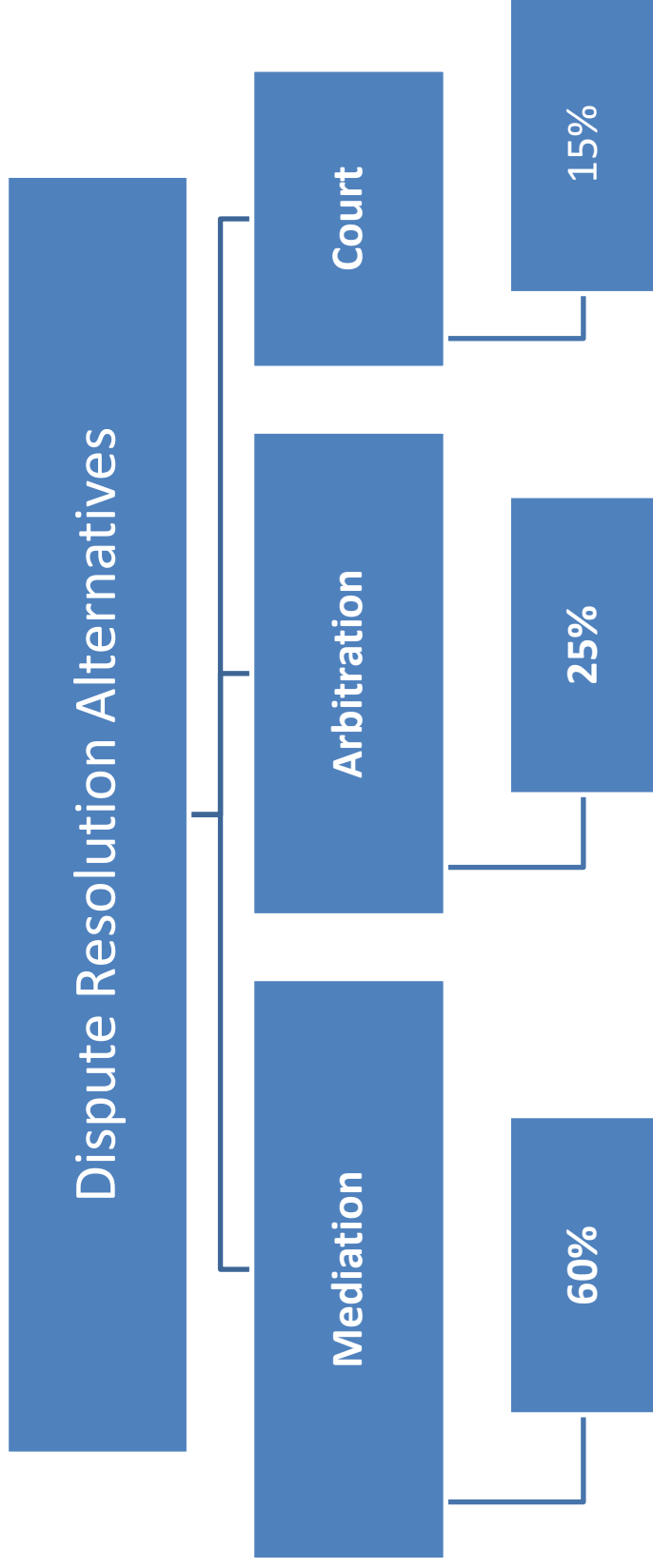
Mediation Processes and Either Independent or Court Jurisdiction

- **MOST Arbitrations and Mediations Are Never Exposed to the Court System**
 - Benefits Sought are Economy, Efficiency and Privacy
 - These Benefits are Unavailable through the Courts
- **Mediation is a Non Compulsory ALTERNATIVE**
- **ADR Saves Time, Expense and Delay for BOTH the Courts and for the Parties**
- **CONFIDENTIALITY is an ESSENTIAL Part of the Mediation Process**

Mediation Processes and Either Independent or Court Jurisdiction

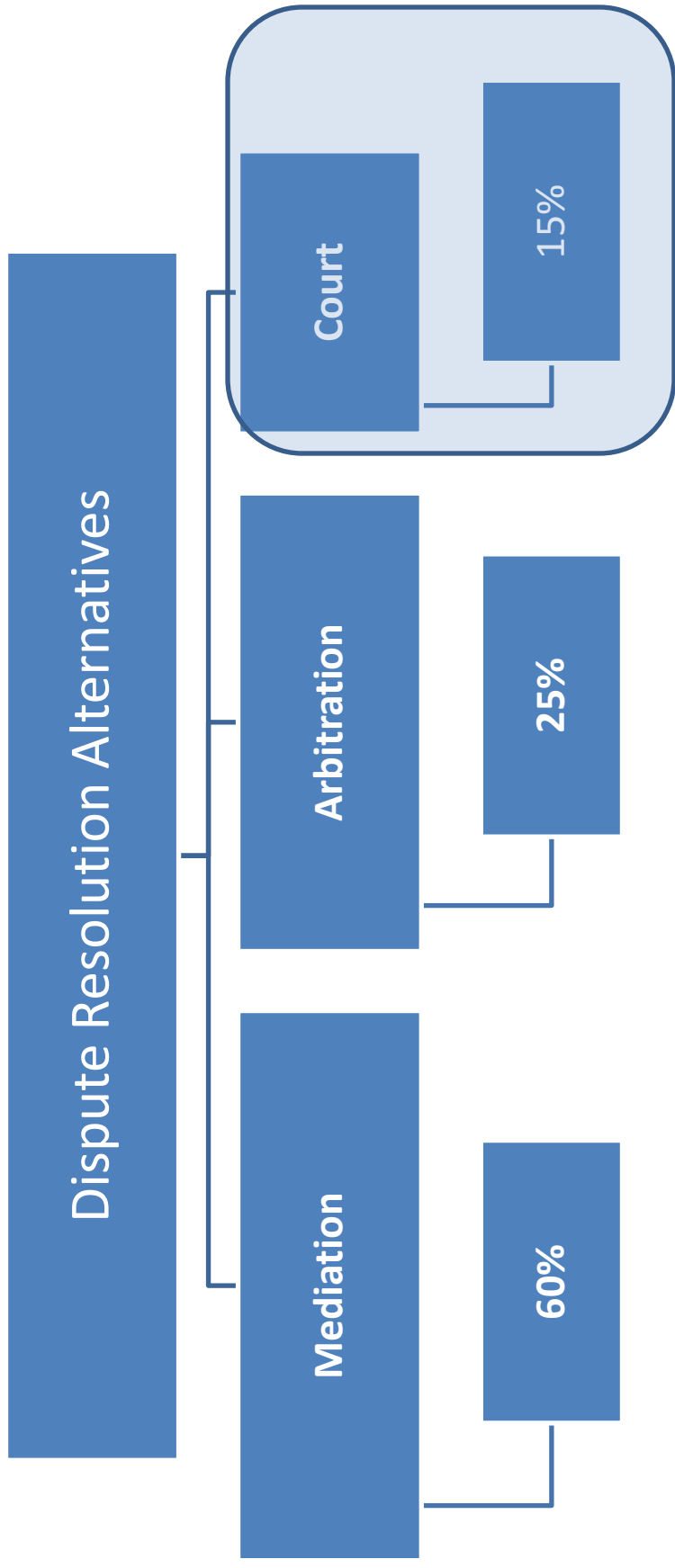


Mediation Processes and Either Independent or Court Jurisdiction



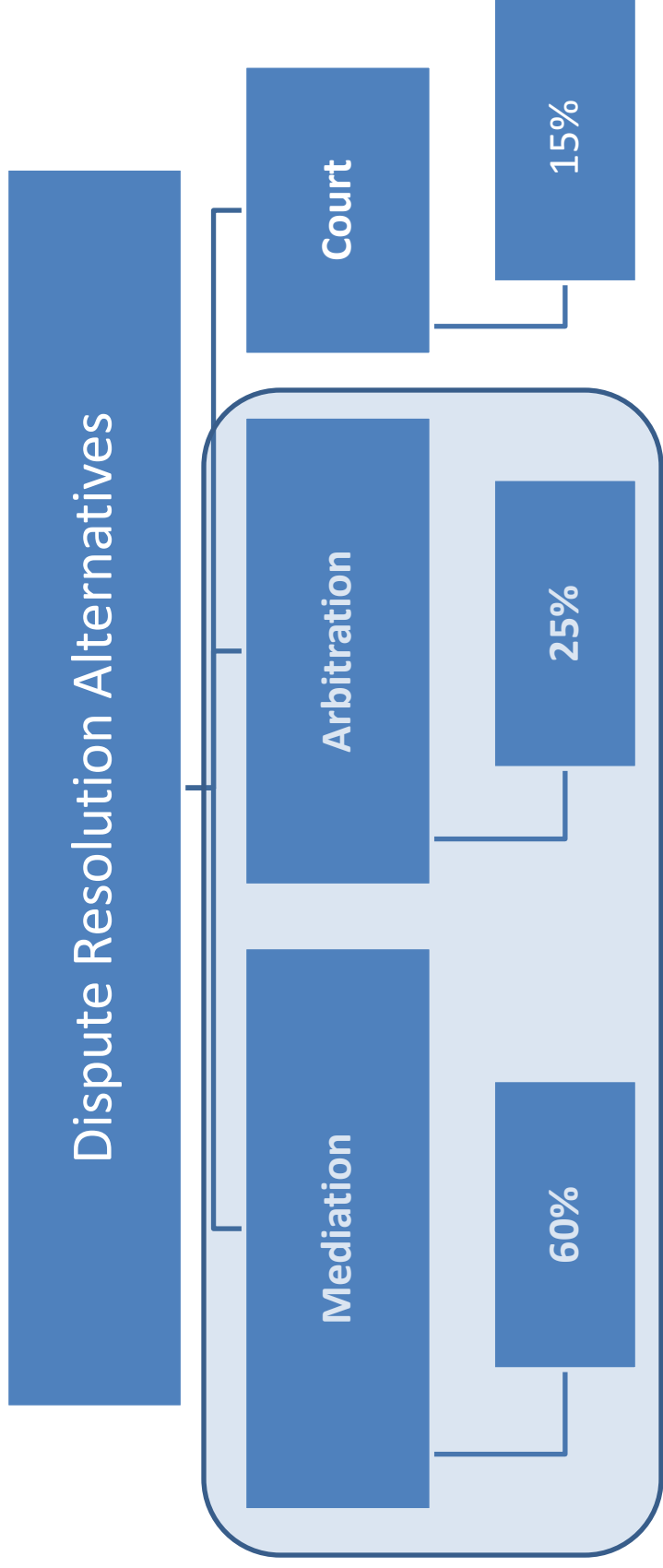
***Most Mediation is Performed Outside of the Court's Jurisdiction**

Mediation Processes and Either Independent or Court Jurisdiction



***Most Mediation is Performed Outside of the Court's Jurisdiction**
****1st Amendment May Apply to Court Jurisdiction**

Mediation Processes and Either Independent or Court Jurisdiction



**** 1st Amendment Does Not Apply to Independent Jurisdiction**

*** California's Constitutional Right to Privacy Does Apply**

Mediation Processes and Either Independent or Court Jurisdiction

- Most of Mediation is Private and Outside of the Jurisdiction of the Courts
- California's Constitutional Right to Privacy Prevents Intervention in the Management of Private Affairs and Contracts
- California is the Only State With an Express Constitutional Right to Privacy

Mediation Processes and Either Independent or Court Jurisdiction

- Mediation and Arbitration are Chosen By The Parties
- Mediation is among the Least Compulsory Forms of Dispute Resolution
- Fundamental Principles of ADR Include:
 - Fairness and Accessibility
 - Efficiency and Economy
 - Privacy and Confidentiality
 - Predictability, Based on Established Law
 - Jurisdiction Based on Private Right of Contract

Mediation Processes and Either Independent or Court Jurisdiction

- MOST Arbitrations and Mediations Are Never Exposed to the Courts
- Mediation is an ALTERNATIVE
- Mediation is NON- Compulsory
- ADR Saves Time, Expense and Delay for BOTH the Courts and the Parties
- CONFIDENTIALITY is an ESSENTIAL Part of the Mediation Process
- California's Constitution Guarantees Privacy

FREDERICK J. GLASSMAN
A Professional Law Corporation

CONCENTRATION IN
COLLABORATIVE LAW
AND MEDIATION

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April 25, 2016

VIA ELECTRONIC MAIL

bgaal@clrc.ca.gov

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

Re: ***Study K-402***
Mediation Confidentiality

Dear Ms. Gaal:

As a follow-up to our previous letters to you and our appearance at the Commission's hearing in Los Angeles on December 10, 2015, we want to emphasize how any exception to mediation confidentiality affects families in divorce.

Confidentiality of communication in mediation has been established by and through California Evidence Code Sections 703.5 and 1115-1128. For almost 20 years since the passage of these sections in 1997, the California Supreme Court has rejected challenges to the existing statutory protocol for mediation confidentiality and has upheld excluding evidence of mediation communications. The most recent Supreme Court decision (following the preceding cases of *Foxgate Homeowners' Ass'n, Inc. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, *Rojas v. Superior Court* (2004) 33 Cal.4th 407, *Fair v. Bakhtiari* (2006) 40 Cal.4th 189, and *Simmons v. Ghaderi* (2008) 44 Cal.4th 570) is *Cassel v. Superior Court*, (2011) 51 Cal.4th 113. *Cassel* again confirmed that even for the limited purpose of alleging malpractice against an attorney who represents a client in a mediation, all communication during in the mediation process is excluded including such communication occurring during mediation but outside the presence of the mediator.

Following the *Cassel* decision, the California Law Revision Commission began addressing, and is currently considering creating an exception to mediation confidentiality existing pursuant to California Evidence Code Section 1119, et seq. which would carve out the ability of a disputant to claim "alleged misconduct of an attorney acting as an advocate"

in mediation. Many attorneys consulting with clients in mediation and collaborative law process act as advocates in a limited scope. California Rule of Court 5.425 provides for such representation between an attorney and the client whereby the scope of legal services is limited to tasks that, among other things, can avoid appearing in court, engaging in full and expensive discovery, and overseeing all aspects of a case. Such attorneys are commonly known as “consulting attorneys” for disputants in family law matters either engaged in mediation and/or in the collaborative law process pursuant to California Family Code Section 2013. They provide a very valuable service to families who do not wish to or are unable to afford a more traditional, full representational approach. Collaborative Law Stipulations or participation agreements adopt and commit the parties and counsel to be bound by California Evidence Code Sections 1115-1128 and thus are affected by changes to mediation confidentiality laws.

We want to make it clear that we do not believe an exception to mediation confidentiality is appropriate in any type of mediation. Having said that, we believe it is especially and acutely necessary to protect confidentiality for family law related matters and that is true whether the attorney “acting as an advocate” is attorney of record or attorney acting under limited scope representation pursuant to Rule 5.425 of the California Rules of Court. Accordingly, and as family lawyers who have each worked in the field for over forty years as litigator, mediator, consulting and collaborative attorney, we address our remarks to demonstrate why the proposed exception by the California Law Revision Commission is so harmful in family law matters.

Family law is different from all other fields of civil or criminal law. In 1982, Meyer Elkin, who founded the Conciliation Court wrote the following in a well-known editorial:

“...divorce law is a different kind of law; it is law that, because of the nature of human nature, requires attitudes, practices, procedures and a process that are more sensitive to the most sensitive of phenomena in the universe- human feelings and human needs. Divorce law is different because the search for truth and justice takes place in the delicate area of human emotions that have been shaped by genetic, sociological, psychological and economic factors. Divorce law is different because it involves, for the most part, normal people, who, in the struggle and agony of great loss and disconnection are, for the moment, engulfed by anger, rage, depression, and a feeling of not being in control, ingredients normally found in all crises and grieving. If law is to be just and the search for truth is to be an honest one, then divorce law needs a process that contains and helps dissipate these disabling emotions rather than a process that breaks the dams of destructive emotions, resulting in clients who are helplessly swept along, flailing their arms, choking and trying to save themselves and their families in the tumultuous waters of the adversary system in divorce.” (Meyer Elkin, *The Conciliation Courts Review*, 20, 1982, Editorial: “Cast a Pebble in the Pond,” p. iii-vii.)

Every person who seeks a divorce, annulment, parentage, or other family related matter must pass through the doors of the judicial system, a system designed primarily for tortfeasors, criminals and business persons, and ill-designed for families who must continue to function well, particularly for the sake of their children. For the most part, families going through separation or divorce are in crisis. In particular, as parents, they will need, for the benefit and best interests of their children, to figure out ways to have a continuing relationship. In so doing, they aspire to find expeditious and sensitive means of achieving resolution away from court intervention. Peace and tranquility are of the utmost importance to them. To achieve such goals, they often seek mediation or collaborative law process. Mediation and the collaborative law process have enabled those families who are appropriate candidates to by-pass the traditional legal system in favor of a voluntary process which permits the participants to control their own destinies with dignity and respect for each other.

The heart and soul of any mediation is confidentiality. It has long been recognized that the sine qua non of mediation is the assurance of confidentiality, which is crucial to the open discussions which are necessary to reach agreement. The Court in *In re Marriage of Kieturakis* (2006) quotes Anne Lober, the mediator in that matter: "Confidentiality and neutrality are the life and breath of mediation. A party must be guaranteed that statements made by him or her will not be admissible in a later action, for without this guaranty the party will never speak frankly and honestly." In *Rojas v. L.A. Super. Ct.* (2004), the Court stressed the importance of confidentiality assurances to mediation:

"One of the fundamental ways the Legislature has sought to encourage mediation is by enacting several 'mediation confidentiality provisions.' (*Foxgate Homeowners' Assn. v. Bramalea California, Inc.* (2001).) As we have explained, 'confidentiality is essential to effective mediation' because it 'promote[s] a candid and informal exchange regarding events in the past This frank exchange is achieved only if participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes.' [Citations.]" (*Ibid.*)

In order to grasp the potentially devastating effect of any exception to the confidentiality in the family law context, it is necessary to understand that and how family law mediation is different from traditional civil or criminal matters. Those who voluntarily participate in family law mediations are assured that it will be totally confidential no matter who is trying to get the information and no matter what the reason. No judicial officer can later say that he or she has made a decision that alters the understanding reached by the participants. Mediation is, in other words, a safe haven where participants can risk sharing very personal information, hopes and concerns without fear that their confidences will be repeated and exposed in open court. Thus, the participants can and do suggest mutually beneficial solutions that often times meet each other's interests instead of posturing for litigation. They look for options that take into account not only the law but their feelings,

their personal responsibilities to each other and their children, as well as their business and tax concerns. As a result, other considerations such as social, moral economic, political or religious factors may be brought to the mediation. It is a secure place where they can experiment to see what works for their particular situation. For example, they can choose to have spousal support “buyouts” in lieu of support and for waiving such rights that cannot be ordered by a court. They can try unique parenting arrangements, many of which most likely would not be ordered by a Court. They can set up procedures for future conflict resolution and require mediation or counseling. Bottom line: they can control their divorce or other family law matter and preserve the very essence of their lives!

Lawyers who consult with clients engaging in mediation or collaborative law process are willing to participate (and for the most part earn considerably less than we did as traditional litigation counsel) because we believe that we offer a very important service. We are willing to permit clients to weigh the emotional or financial cost to them or their families and elect not to spend countless dollars and time doing full discovery. Instead, husbands and wives can choose to settle their issues with their partners with input they receive on declarations of disclosure for assets, liabilities, income and expenses, all of which are signed under penalty of perjury. (Please refer to *Lappe v. Superior Court* (2014) 232 Clap. 4th 774, where such judicial council mandated disclosure forms are not exempt from discovery.) Such mandated disclosures constitute the “good housekeeping seal of approval” for consulting attorneys. But for existing mediation protections, consulting attorneys would spend significant energy doing extensive formal discovery. We would require full reports and appraisals instead of streamlined input from financial professionals. We would urge clients to wait until long after the initial separation to make any decisions and exercise such full disclosure to comply with our “due diligence” before attempting to resolve the dispute. We would tell clients to let us do the talking and thinking for them. As Retired Commissioner Keith Clemens has detailed in a letter to the Law Revision Commission, “mediation would be entirely transformed and for the worse.”

Moreover, if consulting attorneys to family law mediation or collaborative law process become gun shy about serving clients without the protection of confidentiality, such consensual or collaborative law process dispute resolution process could be adversely affected, to the detriment of families. Further, attorney and judicial mediators, who frequently adjust power imbalances between husbands and wives or mothers and fathers by suggesting that the parties have consulting counsel, will have little or no ability to do so. This will surely have a chilling effect on the availability of mediation and collaborative law process and the manner in which they are practiced. That would be a great shame not only for attorneys but for families, children, the courts and society in general.

While it is possible that there are some family law attorneys who give poor advice in consulting with mediation clients, it is neither our general experience nor that of our colleagues and there does not exist any statistical data to support such a concern. Moreover, it is very difficult to even assess what is bad advice when the factors which are

being weighed include not only legal standards but such personal and other considerations as we previously discussed. Retired Judge Isabel Cohen, in her letter to the Law Revision Commission discussing IRMO Namikas, addresses this issue in detail, saying "I believe that the Commission must weigh the harm which would result from permitting any exception to mediation confidentiality in a family law matter against the ability of a client who has entered a voluntary process to sue his or her attorney." There is much at stake in this decision as to whether to permit the complaints of a few disgruntled parties to damage the private and voluntary domain of family law mediation.

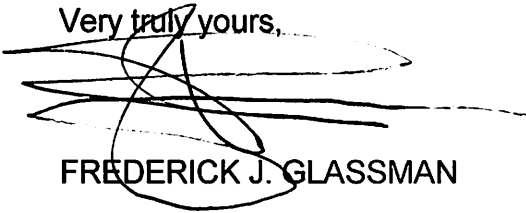
In Ms. Salka's capacity as co-chair of the State Bar CDR Sub-Committee, she organized numerous presentations in which adult children of divorce discussed their experiences of their parents' divorces. Their moving stories confirmed the studies which conclude that only those children whose parents do not engage in adversarial warfare do well after their parents' divorces. However, those parents who do not have a peaceful path to navigate their divorces create irreparable harm to their children, and the harm experienced by children with warring parents continues through the generations.

Mr. Glassman, a past-President of CPCal, the statewide organization for collaborative law process, has been at the forefront of the collaborative law movement in California. He has participated in extensive family law collaborative cases for over fifteen years. The success of such cases is highly dependent upon the transparency of the disputants, which only happens if they feel safe, a safety which is provided under the umbrella of mediation confidentiality and the prohibition against their counsel appearing in court.

It is for these reasons we are opposing any proposed exception to mediation confidentiality and we urge everyone who cares about easing the path of separation for our State's families to join the opposition and be heard.

Thank you for your consideration.

Very truly yours,

A handwritten signature in black ink, appearing to read "Frederick J. Glassman", is written over a horizontal line. The signature is somewhat stylized and overlaps the line.

FREDERICK J. GLASSMAN

FJG:gm

Very truly yours,

Fern Topas Salka

FERN TOPAS SALKA

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May 17, 2016

Via email to: bgaal@clrc.ca.gov

Barbara Gaal, Chief Deputy Counsel
California Law Revision Commission

Re: Study K-402 and Mediation Confidentiality

Dear Ms. Gaal:

This is my second letter to the California Law Revision Commission. I sent one before I attended the December 10, 2015, hearing in Los Angeles. I am a family law mediator and a certified Family Law Specialist, certified by the California State Bar Board of Legal Specialization, and I have mediated many family law cases over the past 30 years.

California Judges Association Opposition

I want to reiterate my opposition to the creation of any exception to mediation confidentiality. I hope by the June 1st hearing, the commissioners will have had the opportunity to read the letter written on behalf of the California Judges Association by Judge David Long (Ret.). In fact, I was shocked that the proposed minutes of the April 14, 2016, meeting reflect that while the commissioners specifically considered the letter of Jeff Kichaven, they apparently did not even read the letter from the California Judges Association, "The Voice of the Judiciary" of our State! If our esteemed judiciary, who are at the front lines of all these issues, oppose the CLRC's proposed changes to mediation confidentiality, I think the commissioners should give some weight to their concerns. To not even have a discussion of CJA's letter is a strange omission.

Research Showing Abuse of Mediation Confidentiality?

The term "evidence-based" has become a new addition to the American lexicon and is applied to many decisions as to courses of action. If we are going to have opinions and mandate changes to existing systems, it seems that should be "evidence based," based upon substantial evidence, facts or research, that show that the system is operating so badly, there must be changes to "cure" the dysfunction. In a prior memorandum, Ron Kelly pointed out that after a review of State Bar records of 73,717 complaints over the past five years about attorney misconduct or malfeasance, there is scant evidence that there is a systemic problem created by mediation confidentiality. Out of the 73,717 complaints against attorneys received by the State Bar, it appeared there were less than 1% involving mediation. I don't know the number of mediated civil cases that go through our California court system each year, but I perceive there are many thousands throughout the State. Kelly reported that the Office of the Chief Trial Counsel made an informal email poll in

2014 to State Bar investigators and prosecutors about complaints against attorneys in mediation. That inquiry yielded only a total four or five cases that identified a problem involving the current mediation confidentiality protections. Out of all the unknown thousands of cases resolved through mediation, to date, there are a handful of published cases involving attorney misconduct or malfeasance within the context of a mediation.

We know that much of the legislation that works its way through the California Legislature is constituent driven, based on anecdotes heard by the legislator who concludes, “There oughta be a law!” I had hoped for better from the CLRC. I agree that the described behavior of the attorney in the *Cassel* case, if accurate, was disgraceful, but, there is a significant question as to whether an exception to mediation confidentiality, that may significantly adversely impact a process that has operated well and that is a strongly favored public policy, should be based upon one case or a miniscule number of cases compared to the vast number of successful mediations. Ron Kelly states that there have been hundreds of thousands and probably millions of Californians over the past thirty years who have received the benefits of being involved in a less costly and more predictable process of mediation versus the tiny number of cases where clients involved in mediation have sought to discipline their attorneys for misconduct by the State Bar or to sue them for malpractice.

If the CLRC is going to create an exception to mediation confidentiality, shouldn’t it be based upon some reliable research that shows that there is a substantial problem, rather than a reaction to basically one extremely bad case?

Limit Any Exception

In spite of the scant evidence showing a need for an exception, if the CLRC continues to barrel down the road toward creating an exception, I urge the CLRC to limit the exception to the problems of the *Cassel* case, and include the provisions suggested by the CJA and Ron Kelly:

1. *Evidence Code* section 703.5 should be left as it is, making the mediator “incompetent” to testify in any subsequent civil proceeding.
2. Limit any exception only to communications/conduct between the client and his/her attorney in a case where the client has alleged misconduct in a State Bar Court or has filed a civil complaint for malpractice against the client’s attorney. The exception would not apply in a proceeding for enforcement of a mediated settlement agreement or to a proceeding to rescind a mediated settlement agreement. Any proposed statute should have a provision similar to Uniform Mediation Act Section 6(d), which limits the disclosure to “only the portion of the communication necessary.”
3. Mediation statements made by other parties and attorneys in the mediation and any documents prepared by others must remain immune from disclosure and must be protected in order to preserve the integrity of the mediation process. If the CLRC makes an exception, it should be limited to the facts of the *Cassel* case. To expand the exception beyond the

complaining party and his or her attorney, would bring uncertainty to the process and destroy the candor and openness that is one of the major pillars of the process.

4. If the exception is limited to communications between the complaining party and his/her attorney, I do not think an *in camera proceeding* would be needed. If the client or the attorney being sued should try to introduce other evidence from the mediation besides the communications between them, that can be dealt with by traditional motions *in limine* to exclude evidence.

5. As discussed by the Supreme Court in the *Cassel* case (p. 119, 122, 123), the reference to the current Evidence Code section 1122(a)(1) and (2) must also be preserved and should be referenced in any statute creating an exception. The exception must apply only to the communications between the party and his/her attorney, and not bring any of the other participants or their documents into the dispute. Any new law should be consistent with section 1122(a)(2) and which says that a mediation communication may come into evidence if, “The communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree in writing, or orally in accordance with Evidence Code Section 1118, to its disclosure, and the communication, document, or writing does not disclose anything said or done or any admission made in the course of mediation.”

6. Create a standard list of admonitions written in plain English that attorneys and mediators can give to any client who indicates he or she is interested in mediation, addressing the downside of participating in mediation as well as the benefits, and ensuring informed consent to the mediation process.

7. Included in that list should be the other issue in the *Cassel* case, the modification of the attorney fee agreement. If, during the mediation, as an inducement to settlement, the attorney agrees to accept a lower fee, or, if there is an agreement to enhance the attorney’s fee, any modification of the fee agreement must be set forth in a writing signed by the party and his/her attorney before any overall settlement agreement is executed by the various parties and approved by the various attorneys. That is set forth in a previous staff memorandum, 2015-45, option B on p. 25.

8. Consider having any statute “sunset” in a trial three- to five-year time period. Mandate that the State Bar conduct a study during that time period requiring any case involved in mediation to register with the State Bar and then track the cases and the results, so we can have statistics on the number of cases resolved through mediation. It should be easy for the State Bar to track its own cases in which misconduct by an attorney during mediation is alleged. Any attorney filing a civil malpractice suit against a party’s attorney in mediation also should be required to register that case with the State Bar. At the end of the time period, there should be actual data for the Legislature to review to determine whether or not the statute should be extended.

9. Another consideration is to exclude family law mediation and collaborative law from any exception. Most civil cases are like the *Cassel* case; they are resolved by a sum of money. Mr. Cassel thought that his attorneys had made him settle for only \$1.25 million when he thought his


case was worth \$5 million. In family law, there are child custody issues, child support, spousal support, property division, which can have disputes over community versus separate property, allocation of debts, and many related issues such as breach of fiduciary duty, etc. Further, family law and collaborative law cases may require numerous mediation sessions, often over a period of years. The process enables families to participate in a process which offers a "safe haven" to the participants to resolve their cases in a secure process that is sensitive to the emotional issues that are involved. In family law mediation, factors may be taken into consideration that would be deemed "irrelevant" in a courtroom. Creative solutions can be found that could not be ordered in by a court. The CLRC should seriously consider exempting family law mediation and collaborative law from the proposed exception to mediation confidentiality.

Although I am vehemently opposed to interfering with the shield of confidentiality that has protected the mediation process since it was added to the Evidence Code, if the CLRC creates an exception, it should be limited to the disclosures to the above. If the CLRC is essentially abrogating the Supreme Court decision in the *Cassel*, it does not need to remove the protections to mediation confidentiality beyond that. Otherwise, the entire mediation process will be disrupted if other attorneys and parties can be sucked into the dispute between one party and his or her own attorney. Few attorneys will even recommend mediation to their clients, much less participate in mediation with them.

Confidentiality is the key to successful mediation. Trust and candid discussions are essential to the process. Please do not punish the many attorneys who participate in mediation as mediators and/or limited scope representation for clients in mediation for the ungracious acts of a tiny group of attorneys.

I urge the CLRC to consider the many benefits that mediation has brought to our legal system, enabling litigants to control their destinies by consensual dispute resolution in a confidential, private way. If the CLRC proceeds to create an exception, please make it a very limited exception.

Yours truly,



Lynette Berg Robe

EMAIL FROM ANA SAMBOLD (5/18/16)

Re: SDCBA Program on Mediation Confidentiality

Hi Barbara,

I'm so glad that you found the program interesting. By organizing this event, I wanted to bring this topic to the attention of the legal and mediation community in San Diego, as well as making it available to others across the state via webcast. I wanted to educate people about the case law and background of this topic (in a very neutral way) and then offer the two sides of the argument to allow the audience decide for themselves. For our bar, this program was very successful, with 38 people who attended in person, and 32 who watched the live webcast.

Did you notice that in the beginning three people from the audience were in favor of creating the new exception and at the end of the debate they changed their minds and they were against? At the end of the event, everyone agreed that what happened in Cassel was very unfortunate and mediation confidentiality shouldn't be used as a shield to immunize lawyers from malpractice claims. However, as Lee Jay Berman explained, creating an exception to the mediation confidentiality statutes is not the way to address the issue. There are many other options. The most effective one is educating the parties about the implications of mediation confidentiality and having them sign an informed consent, either knowingly accepting the full confidentiality, or opting out of it before the mediation begins. The consensus is that the choice should belong to the parties, not to the statutes. The public should be the one deciding if they want to proceed or not with the mediation once they are fully informed about its implications. The statutes need to concentrate on requiring the mediator to provide a clear explanation of the confidentiality rules, and allowing the parties to decide with their own self-determination, what level of protection, transparency and options they want.

It was also a good reminder that parties can contract out of the statutory confidentiality any time they want to, but if it's removed, or the exception is created, they can never opt back into it. Thus, the impact of creating exceptions to the existing protections effectively removes it for good, opening the door to abuses in the future.

Another good reminder was that people still have available to them (mandatory and voluntary) settlement conferences, which still serve to settle cases, but are explicitly not confidential. With this settlement option available (that doesn't provide confidentiality) it probably doesn't make sense to create exceptions to confidentiality when the parties can simply agree to enter into the other process instead. And, in that process, should an attorney commit malpractice, the settlement master (or special master) is allowed, and in some cases, even obliged to report such practice to the judge and/or the state bar.

Additionally, the argument that mediation has not been deterred in other states where lawyer malpractice exceptions are contemplated like in the UMA states, it did not seem to a very good argument. First of all, there is no evidence to support such statement and it's very unfair to compare California, which already had our protections in place prior to the advent of the UMA, with states like illinois, Iowa, Indiana and Nebraska. In those states mediation is not as commonly used and it doesn't resolve as many disputes as in California. The UMA was created to provide some measure of structure and confidentiality in those states that had none. It was never intended to reduce the protections that existed in other, more evolved states.

Hopefully, these points give you a better idea of what transpired at this event and what was the general consensus.

As you can tell, I'm very passionate about this topic. Let me know if you have any questions or need anything else.

All my best,

Ana

**SUPPLEMENTAL COMMENTS OF PETITIONER CARYL TIPPENS
(BURBANK, CA — 4/29/16)**

Corruption needs to stop!

**SUPPLEMENTAL COMMENTS OF PETITIONER MICHELLE ANDERSON
(DAVENPORT, IA — 4/27/16)**

I believe everyone deserves a fair trial.

**SUPPLEMENTAL COMMENTS OF PETITIONER DONNA DIONNE
(HAVERHILL, MA — 4/25/16)**

I am sighing because all of the corruption going on all over the United States it's getting sick Ning between the judges the district Attorney's the GAL the senator s. We the people need to start standing up to this corrupt Government and take our country back.

**SUPPLEMENTAL COMMENTS OF PETITIONER ERIC CARLSON
(ONOWAY, CA — 4/21/16)**

This stinks worse than a pile of dog poop!

**SUPPLEMENTAL COMMENTS OF PETITIONER TERRIE HENDERSON
(OZARK, AL — 4/19/16)**

Unamerican and inhumane nothing absolutely nothing good comes from this. No justice in this at all!

Re: Request for Information Relating to Allegations of Lawyer Misconduct in Mediation
California Law Revision Commission Study K-402
Via Email and Certified Mail

Dear Mr. Bercovitch,

I hereby respectfully request, under the common law right of public access cited in the Sander decision, access to the data existing in the State Bar's database evidencing how many complaints found valid by a State Bar investigator in the past five years, 2011 through 2015, involved clients complaining about their lawyers' misconduct during a mediation.

The California Supreme Court's 2013 decision in *Sander v. State Bar of California* states in relevant part "under the common law right of public access, [when] there is a sufficient public interest in the information contained in [its]...database...the State Bar is required to provide access to it if the information can be provided in a form that protects the privacy of [individuals] and no countervailing interest outweighs the public's interest in disclosure."

There is a sufficient public interest in the information for the following reasons.

1. In 2012, the Legislature directed the California Law Revision Commission to conduct its current Study K-402, and to determine if the public interest would be served by removing some of the current protections for confidentiality of mediation communications when there is an allegation of lawyer misconduct. Commission staff has sought – but has not been able to identify and obtain – reliable data to establish the frequency of lawyer misconduct in California mediations. Among other sources, Commission staff requested data last year from the State Bar. Staff was advised that "the State Bar has no empirical data concerning the relationship between mediation confidentiality and...attorney malpractice or other misconduct...[because] we do not have a code for allegations involving alleged misconduct in the course of a mediation."(CLRC Staff Memorandum 2015-5 page Ex 1)
2. In the course of this study the State has already invested very significant resources to enable Commission staff to research and prepare more than fifty in-depth memoranda, and to receive, study, and summarize many hundreds of public comments. Hundreds of interested and affected organizations and members of the public have already invested the time to read, analyze, and comment on various proposals. Many have taken extensive time away from work to appear at Commission meetings.
3. Those opposed to weakening our existing protections assert that over the past thirty years hundreds of thousands and probably millions of Californians have gained the benefits of our current predictable mediation confidentiality. They argue that the Commission's current proposal would remove that public benefit, mostly making it easier for just a few clients to sue their attorneys for alleged malpractice. Opposition statements have been submitted by the State of California's own Mediation and Conciliation Service, the California Judges Association, the California Dispute Resolution Council, the Southern California Mediation Association, the Association for Dispute Resolution of Northern California, the Contra Costa and Marin County Bar Associations, Community Boards of San Francisco, and by hundreds of individual mediators from all sectors of practice ranging from the immediate past president of JAMS to former family law bench officers. (Available in "Public Comments" memos at <<http://www.clrc.ca.gov/K402.html>>)
4. Commission staff particularly summarizes the opposition from the California Judges Association as follows - "CJA says that private mediation 'lessens the burdens of the terribly underfunded civil trial courtrooms, civil trial judges and staff by resolving cases with no economic cost to the court or the justice system'" and "CJA is convinced that mediation confidentiality 'is simply too valuable to the civil court system in our state as a matter of public (and effective) policy to sacrifice ..." (CLRC Staff Memorandum 2016-19, pages 2-3)
5. Preliminary sampling strongly suggests the problem does not occur frequently enough to justify the impacts of the proposed change. An informal email poll was sent to all State Bar investigators and

prosecutors in 2014 by the Office of the Chief Trial Counsel. Responses identified only four or five cases where our current mediation confidentiality protections had posed a significant problem for them during the previous year. A recent search for the keyword "mediation" of all published State Bar Court appellate level decisions for the period 11/19/2010 through 5/19/15 (in the Review Department Opinions published online) identified only four cases containing this term. These were Southwick 11-O-11334, Guzman 11-O-17734, Leonard 09-O-11175, and Weiss 09-O-10499. None of these referenced allegations of misconduct by lawyers in mediation. Law Revision Commission staff reviewed the results of a Judicial Council study of numerous court mediation programs around the state, and found the "result tends to suggest that there was little or no professional misconduct." (CLRC Staff Memorandum 2015-6 page 13)

6. Given the amount of time and resources already expended and yet to be expended by government staff and affected parties, and given the CJA's predictions of a significant increase in cost to the public court system if the Commission continues in its current direction and the Legislature adopts its recommendations, there is a sufficient public interest in obtaining any reliable evidence which would help establish the actual frequency of lawyer misconduct in California mediations.

The State Bar has the means to help establish whether there is in fact a need for the proposed change using its existing database of complaints against lawyers. Over the most recent five year period for which records are available, the State Bar reported that it received 68,646 complaints against lawyers (page 13, State Bar Annual Discipline Report dated April 30, 2015, and page 9, Report dated April 29, 2016). Unless these complaint records have been destroyed, or are kept only as handwritten notes, the data does exist in the State Bar's computer system evidencing how many complaints found valid by a State Bar investigator in this five year period involved clients complaining about their lawyers' mediation conduct.

I hereby respectfully request that the State Bar

- 1) perform a routine keyword search of the electronic records of all complaints found valid by a State Bar investigator in the past five years, 2011 through 2015, identifying those complaint files containing the word "mediation",
- 2) review those complaints to determine how many involved a client alleging misconduct by their lawyer during a mediation, and
- 3) either
 - a) provide the anonymized statistical information, or
 - b) provide copies of those files in which it was determined that reasonable cause existed to file discipline charges, redacted to eliminate any information which would violate privacy or confidentiality.

If a countervailing interest exists which clearly outweighs the public's interest in disclosure identified above, I respectfully request you clearly identify this interest.

I respectfully request that you advise me of whether there exists within the State Bar disciplinary system a written policy which prohibits receiving or recording information about allegations of lawyer misconduct in mediation. If so, I respectfully request you provide a copy of this policy, including the year it went into effect.

Thank you in advance for your courtesy and cooperation in this effort. I believe your timely response will greatly benefit the public interest.

Yours,
Ron Kelly
2731 Webster St.
Berkeley CA 94705

cc by email only:

Ms. Jayne Kim, Chief Trial Counsel, State Bar of California
Ms. Barbara S. Gaal, Chief Deputy Counsel, California Law Revision Commission
Hon. David W. Long (Ret.), Executive Board Member, California Judges Association
Ms. Heather S. Anderson, Supervising Attorney, Judicial Council of California
Mr. John S. Warnlof, President, California Dispute Resolution Council