Study K-402 July 18, 2016

Memorandum 2016-38

Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct: Preliminary *In Camera* Filtering

In its study of the relationship between mediation confidentiality and attorney malpractice and other misconduct, the Commission is in the process of drafting a tentative recommendation, which will propose an exception to the mediation confidentiality statutes (Evid. Code §§ 1115-1128) to address attorney misconduct in the context of a mediation.[1] The proposed new exception would apply in a State Bar disciplinary proceeding and in a legal malpractice case.[2] It would only apply to alleged misconduct of an attorney acting as an advocate, not to alleged misconduct of an attorney-mediator.[3]

At the June meeting, the Commission asked the staff to further investigate two concepts for preliminary *in camera* filtering of a legal malpractice case that alleges mediation misconduct:

- "A mandatory pre-filing Early Neutral Evaluation Conference ('ENEC') conducted by a private mediator (preferably with legal malpractice expertise), not by a judicial officer. As conceived by the Commission, this ENEC would be an opportunity for the putative parties to try to resolve their differences in private and thereby keep their mediation communications from becoming public."[4]
* "An approach modeled on Civil Code Section 1714.10 (alleged conspiracy between attorney and client), but conducted in a

1. See Minutes (Oct. 2015), pp. 4-5; see also Minutes (Aug. 2015), p. 5.

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. See Minutes (Oct. 2015), p. 5; see also Memorandum 2015-45, pp. 21-23, 25.
3. See Minutes (Oct. 2015), p. 4; see also Memorandum 2015-45, pp. 9-17.

For further information about the exception that the Commission is drafting, see Memorandum 2016-18, pp. 4-5.

4. Draft Minutes (June 2016), p. 4.

> manner that would protect mediation communications from public disclosure."[5]

This memorandum addresses those concepts in the order shown above. If time permits, a supplement will briefly explore another approach for preliminary filtering of a legal malpractice case that alleges mediation misconduct.

The following materials are attached for the Commission's consideration:

MANDATORY ENEC WITH A PRIVATE MEDIATOR

In a memorandum for the June meeting, the staff discussed five possible approaches for preliminary *in camera* filtering of a legal malpractice case that alleges mediation misconduct.[6] One of those possibilities was to provide an ENEC similar to the semi-optional ENEC that is available in a State Bar disciplinary proceeding.[7] Under Rule 5.30 of the State Bar Rules of Procedure, the parties to a State Bar disciplinary proceeding have an opportunity to request an ENEC before the State Bar files formal charges:

> **Rule 5.30 Prefiling, Early Neutral Evaluation Conference**
>
> **(A) Early Neutral Evaluation Conference.** Prior to the filing of disciplinary charges, the Office of the Chief Trial Counsel will notify the member in writing of the right to request an Early Neutral Evaluation Conference. Either party may request an Early Neutral Evaluation Conference. A party will have 10 days from the date of service of notice to request a conference. The time is not extended by the method of computing time set forth in Rule 5.28(A). Failure to request a conference within that time is deemed a waiver of the right to request a conference. If proper notice is provided, failure to hold a conference will not be a basis for dismissal of a proceeding. A State Bar Court hearing judge will conduct the conference within 15 days of the request.

5. *Id.*
6. See Memorandum 2016-27.
7. See *id.* at 5-7.

(B) Judicial Evaluation. At the conference, the judge must give the parties an oral evaluation of the facts and charges and the potential for imposing discipline. If the parties then resolve the matter in a way that requires Court approval, the Office of the Chief Trial Counsel must document the resolution and submit it to the Evaluation judge for approval or rejection.

(C) Evidence. The Office of the Chief Trial Counsel must submit a copy of the draft notice of disciplinary charges, or other written summary to the judge prior to the conference. The documentation must include the rules and statutes alleged to have been violated by the member, a summary of the facts supporting each violation, and the Office of the Chief Trial Counsel's settlement position. Each party may submit documents and information to support its position.

(D) Confidentiality. The conference is confidential. A party may designate any document it submits for in camera inspection only.

(E) Trial Judge. Unless otherwise stipulated by the parties, the Early Neutral Evaluation judge cannot be the trial judge in a later proceeding involving the same facts.

The Commission decided to explore the ENEC idea further, with a few refinements:

- The ENEC would be "conducted by a private mediator (preferably with legal malpractice expertise), not by a judicial officer."[8] The ENEC would thus be a mediation, not a judicial settlement conference. The purpose of the ENEC ("Mediation #2" or "the ENEC Mediation") would be to resolve a dispute over alleged legal malpractice in an earlier mediation ("Mediation #1").
- The ENEC would be mandatory, not optional.[9]

As conceived by the Commission, this ENEC "would be an opportunity for the putative parties to try to resolve their differences in private and thereby keep their mediation communications from becoming public."[10] Two premises appear to be inherent in that concept:

(1) The mediation confidentiality statute would not prevent the putative parties from telling the ENEC neutral what was said in Mediation #1.

(2) Despite the Commission's proposed new exception to the mediation confidentiality statute, which in certain circumstances would allow use of mediation communications to prove or

8. Draft Minutes (June 2016), p. 4.
9. See *id.*
10. *Id.*

> disprove legal malpractice, any discussions between the ENEC neutral and the putative parties would stay confidential. In other words, there would essentially be an exception to the Commission's proposed new exception. This "exception to the exception" would protect the ENEC discussions against subsequent disclosure in the legal malpractice case relating to Mediation #1.

In the discussion below, we consider how to implement those premises and analyze various other issues relating to use of an ENEC approach.

Precedent for Creating an "Exception to the Exception" to Facilitate Certain Mediations

In a recent letter, Ron Kelly refers to the ENEC concept that the Commission decided to explore:

> At their last meeting on June 1, 2016, several Commissioners seemed interested in the idea of allowing a client and attorney to maintain mediation confidentiality when they attempted to voluntarily resolve alleged mediation malpractice claims through a subsequent mediation. This was informally characterized as an exception to the exception.[11]

Mr. Kelly says that "[t]his general idea was originally suggested by an attorney who has specialized for decades in bringing legal malpractice actions" and "regularly mediates malpractice cases."[12] That attorney reportedly considers confidentiality "an important element in his being able to resolve these cases voluntarily and advocate[s] an exception to the exception for malpractice mediations."[13]

Mr. Kelly further writes that that if the Commission "wishes to further develop this option, it might want to refer to a similar concept in the Uniform Mediation Act."[14] He explains:

> The drafters of the UMA decided to craft an exception to their general rule of confidentiality, for communications evidencing alleged child or elder abuse. They decided, however, that they wanted to retain the benefits of confidentiality for those mediations where the purpose was specifically to address alleged child or elder abuse.[15]

11. Exhibit p. 1.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*

As Mr. Kelly points out,[16] the UMA drafters addressed these points through Section 6(a)(7) of the Uniform Mediation Act ("UMA"), which provides:

> **SECTION 6. EXCEPTIONS TO PRIVILEGE.**
>
> (a) There is no privilege under Section 4 for a mediation communication that is:
>
> ….
>
> (7) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party, unless the
>
> [Alternative A: [State to insert, for example, child or adult protection] case is referred by a court to mediation and a public agency participates.]
>
> [Alternative B: public agency participates in the [State to insert, for example, child or adult protection] mediation].

The accompanying Comment explains:

> **Section 6(a)(7). Evidence of abuse or neglect.**
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> An exception for child abuse and neglect is common in domestic mediation confidentiality statutes, and the Act reaffirms these important policy choices States have made to protect their citizens.…
>
> By referring to "child and adult protective services agency," the exception broadens the coverage to include the elderly and disabled if that State has protected them by statute and has created an agency enforcement process. It should be stressed that this exception applies only to permit disclosures in public agency proceedings in which the agency is a party or nonparty participant.…
>
> *The last bracketed phrases make an exception to the exception to privilege of mediation communications in certain mediations involving such public agencies.* Child protection agencies in many States have created mediation programs to resolve issues that arise because of allegations of abuse. *Those advocating the use of mediation in these contexts point to the need for privilege to promote the use of the process, and these alternatives provide it.…* These alternatives are bracketed and offered to the states as recommended model provisions because of concerns raised by some mediators of such cases that mediator testimony sometimes can be necessary and appropriate to secure the safety of a vulnerable party in a situation of abuse.…
>
> ….
>
> Each state may choose to enact either Alternative A or Alternative B. The Alternative A exception only applies to cases referred by the court or public agency. In this situation, allegations already have been made in an official context and a court has made the determination that settlement of that case is in the public

16. *Id.*

> interest by referring it to mediation. In Alternative B exception, no court referral is required. A state enacting Alternative B would be adopting a policy that it is sufficient that the public agency favors settlement of a particular case by its participation in the mediation. ….[17]

UMA Section 6(a)(7) thus

- creates an exception to mediation confidentiality for evidence relating to abuse of a child or dependent adult, but only in a case where a protective services agency is a party, and
- *makes that exception inapplicable to a mediation in such a case* under specified circumstances.

Similarly, the Commission could propose to

- create an exception to mediation confidentiality for evidence relating to attorney misconduct, but only in a legal malpractice case or a State Bar disciplinary proceeding, and
- *make that exception inapplicable to an ENEC mediation in such a case* under specified circumstances.

Because the UMA differs in structure from California's mediation confidentiality statute, it would not be possible to closely track the UMA language if the Commission decides to follow such an approach. We will discuss the drafting details later, if the Commission decides to further pursue the ENEC concept.

For now, it would be helpful to confirm the two premises that appear to be inherent in the ENEC concept as discussed at the June meeting:

(1) The mediation confidentiality statute (Evid. Code §§ 1115-1128) would not prevent the potential parties to a legal malpractice case alleging mediation misconduct from telling the ENEC neutral what was said in the mediation in which the misconduct allegedly occurred, or providing the ENEC neutral with confidential documents from that mediation.

(2) Despite the Commission's proposed new exception to the mediation confidentiality statute, which in certain circumstances would allow use of mediation communications to prove or disprove legal malpractice, any documents used in the ENEC and any discussions between the ENEC neutral and the potential parties to a legal malpractice case alleging mediation misconduct would stay confidential. In other words, any ENEC documents and the content of any ENEC discussions would be protected

17. Emphasis added; citations omitted.

against subsequent disclosure in the legal malpractice case to the same extent that other mediation communications are protected under the mediation confidentiality provisions in the Evidence Code.

Assuming, without yet deciding, that the Commission votes to further pursue the ENEC concept, **does it agree with these two premises regarding the extent of confidentiality?** If so, does the Commission further agree that **these two points would have to be addressed by statute?**

ENEC Purpose and Structure: Two Existing Programs to Consider As Models

If the Commission further pursues the ENEC concept, it will need to determine the purpose and structure of an ENEC in a legal malpractice case that alleges mediation misconduct. To help the Commission make that determination, we first describe two existing programs:

- The semi-optional, pre-filing ENEC in a State Bar disciplinary proceeding (Rule 5.30 of the State Bar Rules of Procedure).
- The Early Neutral Evaluation ("ENE") program in the U.S. District Court for the Northern District of California.

After describing those programs, we raise a number of issues regarding the appropriate purpose and structure of an ENEC in a legal malpractice case that alleges mediation misconduct.

Semi-Optional, Pre-Filing ENEC in a State Bar Disciplinary Proceeding

The Commission's proposed new mediation confidentiality exception would apply in the following types of proceedings:

- A legal malpractice case alleging that an attorney (acting as an advocate) committed malpractice in the context of a mediation.
- A State Bar disciplinary proceeding alleging that an attorney (acting as an advocate) committed professional misconduct in the context of a mediation.

As previously mentioned, a semi-optional, pre-filing ENEC already exists in a State Bar disciplinary proceeding, regardless of whether the proceeding involves alleged mediation misconduct. Since such an ENEC would be available in one type of proceeding covered by the Commission's proposed new mediation confidentiality exception (i.e., a State Bar disciplinary proceeding alleging that an attorney committed professional misconduct in the context of a mediation), it is natural to consider whether a similar ENEC should be available in the other type

of proceeding covered by the proposed new exception (i.e., a legal malpractice case alleging that an attorney committed malpractice in the context of a mediation).

The State Bar has provided an ENEC process in disciplinary proceedings since 1999.[18] A State Bar ENEC has the following features:

> ***Purpose.*** The rule governing a State Bar ENEC (Rule 5.30 of the State Bar Rules of Procedure) does not expressly state the purpose of such a proceeding.[19] Neither do the guidelines for scheduling and conducting a State Bar ENEC (attached as Exhibit pp. 2-3), which were prepared by the State Bar Court Hearing Department.[20]
>
> It is clear that one purpose of a State Bar ENEC is to provide the potential parties with a neutral's assessment of the as-yet-unfiled disciplinary proceeding. Rule 5.30 says that the ENEC judge "must give the parties *an oral evaluation* of the facts and charges and the potential for imposing discipline."[21]
>
> Another, related purpose of a State Bar ENEC appears to be promotion of settlement. The guidelines state that "[t]he ENEC Judge *will* address settlement of the case, and therefore, the parties should be prepared to discuss settlement positions and *should have settlement authority*."[22] Similarly, Rule 5.30 requires the Office of Chief Trial Counsel to provide the ENEC judge with documentation that includes "the Office of Chief Trial Counsel's settlement position."
>
> Whether a State Bar ENEC has additional purposes, such as helping the parties reach agreement on procedural aspects of the as-yet-unfiled disciplinary proceeding, is not clear from Rule 5.30 and the guidelines. The guidelines refer to the possibility of filing a stipulation,[23] but they might only mean to encompass a stipulation relating to settlement.[24]
>
> ***Optional vs. Mandatory.*** Rule 5.30 says that "[e]ither party *may* request an Early Neutral Evaluation Conference."[25] A State Bar ENEC is thus optional, but participation becomes mandatory if the other party requests an ENEC.
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> ***Timing.*** Before filing disciplinary charges against an attorney, the State Bar Office of the Chief Trial Counsel must notify the

18. Former Rule 75 of the State Bar Rules of Procedure (the predecessor of Rule 5.30) was effective on February 1, 1999.
19. The text of Rule 5.30 is reproduced at the start of the discussion of "Mandatory ENEC with a Private Mediator."
20. See Exhibit pp. 2-3. The guidelines are available onliine at http://www.statebarcourt.ca.gov/Portals/2/documents/courtForms/Rev%20ENEC%20Guidelines_20151208.pdf.
21. Emphasis added.
22. Exhibit p. 2 (emphasis added).
23. See Exhibit p. 3.
24. See *id.*
25. Emphasis added.

attorney "in writing of the right to request an Early Neutral Evaluation Conference."[26] Both potential parties have ten days from the date of service of that notice in which to request an ENEC,[27] using a court-approved form.[28] If a party requests an ENEC, the ENEC is to occur "within 15 days of the request."[29] If the ENEC does not result in a settlement, "the Office of the Chief Trial Counsel may file a notice of disciplinary charges and should advise the opposing counsel when it will be filed."[30]

Multiple Sessions. The ENEC guidelines recognize that "[m]ore than one ENEC may be necessary."[31] Accordingly, the guidelines make clear that "[u]pon request of the parties, the ENEC Judge may permit a short continuance — the 15 day period set forth in Rule 5.30(A) will not apply."[32]

Choice of Neutral and Cost of ENEC. Under Rule 5.30, the neutral conducting a State Bar ENEC shall be a State Bar Court hearing judge. Because the ENEC neutral is a State Bar Court hearing judge, the cost of providing a neutral is borne by the public, not by the parties to the proceeding.

The ENEC guidelines make clear that the potential parties "may not request a specific ENEC Judge."[33] In addition, Rule 5.30 mandates that "[u]nless otherwise stipulated by the parties, the Early Neutral Evaluation judge cannot be the trial judge in a later proceeding involving the same facts."[34] The ENEC guidelines note, however, that the ENEC judge "may serve as the Settlement Judge."[35]

Materials To Be Submitted or Exchanged Before ENEC. Rule 5.30 states that before a State Bar ENEC, the Office of the Chief Trial Counsel "*must* submit a copy of the draft notice of disciplinary charges, or other written summary" to the ENEC judge.[36] This documentation "*must* include the rules and statutes alleged to have been violated by a member, a summary of the facts supporting each

26. Rule 5.30(A).
27. *Id*.
28. See Exhibit p. 2; see also http://www.statebarcourt.ca.gov/Portals/2/documents/courtForms/ENEC_LA_20151101.pdf (Los Angeles ENEC Request Form); http://www. statebarcourt.ca.gov/Portals/2/documents/courtForms/ENEC_SF_20151101.pdf (San Francisco ENEC Request Form).
29. Rule 5.30(A).
30. Exhibit p. 3.
31. *Id*.
32. *Id*.
33. Exhibit p. 2.
34. See also Exhibit p. 3 ("the ENEC Judge will not be the Trial Judge unless both parties consent.").
35. *Id.*
36. Emphasis added.

violation, and the Office of Chief Trial Counsel's settlement position."[37]

Rule 5.30 further states that "[e]ach party *may* submit documents and information to support its position."[38] Although that language is permissive, it is clear that the court would strongly prefer to receive written materials from both parties before conducting an ENEC. That is apparent from the ENEC guidelines, which say that "[i]n addition to the required draft notice of disciplinary charges, the court *requests* the parties submit a brief statement of the case, including their settlement positions."[39]

The guidelines also direct the parties to submit their materials "as early as possible, but no later than three (3) court days in advance of the ENEC."[40] The court might reschedule the ENEC "if the ENEC Judge is not provided sufficient time to review the material."[41]

Neither the guidelines nor Rule 5.30 itself fully clarifies the extent to which a party providing written materials to an ENEC judge must also provide those materials to the other side. There are indications that such sharing of documentation is optional, not mandatory. For example, the guidelines state that "to increase productivity, the court *encourages* the parties to exchange documents prior to the ENEC."[42]

In addition, Rule 5.30 specifies that an ENEC "is confidential" and a party "may designate any document it submits for in camera inspection only." The guidelines warn that while *in camera* inspection "may be necessary in some cases, the final evaluation *may be based on information only available to one side* which may lessen the opportunity for settlement."[43] That statement implies that if a party submits a document to the ENEC judge "for in camera inspection only," the ENEC judge will not share that document with the other side and the party that submitted the document does not have to do so either.

Neutral Evaluation. Rule 5.30 requires the ENEC judge to provide an *oral* evaluation of "the facts and charges and the potential for imposing discipline." The rule does not say whether the judge may also provide a written evaluation, nor does it specify anything else about the evaluation, such as when it is to occur in the ENEC process (At the start of the ENEC session? After each side has presented its views on the dispute? At some other time during the ENEC?). The guidelines relating to *in camera* inspection

37. Emphasis added.
38. Emphasis added.
39. Exhibit p. 2 (emphasis added).
40. *Id.*
41. *Id.*
42. *Id.* (emphasis added).
43. *Id.* (emphasis added).

refer to a "final evaluation," suggesting that there might be more than one evaluation during an ENEC.

Presumably, the rule's silence on these points is intended to leave some flexibility for the ENEC judge and the disputants to adapt the ENEC procedure to the circumstances of the case at hand. The staff has contacted the State Bar to confirm as much and learn more about its ENEC procedure in general. We will keep the Commission posted on what we find out.

Other Content of the ENEC. As discussed above, it is clear that an ENEC entails an "oral evaluation" and settlement discussions. Consistent with those features, the ENEC guidelines state that the parties "should be prepared to discuss the facts, the proposed charges and the potential for the imposition of discipline."[44]

Rule 5.30 and the ENEC guidelines do not say more about the content of the ENEC session. Again, we presume this is intended to leave some flexibility to adapt to the circumstances of the case at hand.

Confidentiality of ENEC Discussions and Materials. Under Business and Professions Code Section 6086.1(b), a State Bar disciplinary proceeding generally is "confidential until the time that formal charges are filed …."[45] Because a State Bar ENEC precedes the filing of disciplinary charges, it falls within the scope of that section. In addition, Rule 5.30 specifically and explicitly guarantees the confidentiality of a State Bar ENEC; that protection logically encompasses any document submitted in connection with the proceeding.

The predecessor of Rule 5.30 (former Rule 75 of the State Bar Rules of Procedure) mandated that "[a]ll documents provided to the Early Neutral Evaluation judge shall be returned to the respective parties at the conclusion of the Conference." Rule 5.30 does not include such a requirement. The staff is not sure why the requirement was discontinued.

According to a 2009 article in the California Bar Journal, about 30% of State Bar ENECs result in a settlement.[46] The same article reported that "the bar's

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44. Exhibit p. 2.

45. See also State Bar R. Proc. 5.9. Although a disciplinary proceeding is usually confidential until the State Bar files formal charges, the attorney under investigation may waive that confidentiality, and the Chief Trial Counsel may also do so in specified circumstances. See Memorandum 2015-13, pp. 44-45 & sources cited therein. In addition, the Chief Trial Counsel is sometimes permitted or required to disclose information from a disciplinary investigation *in confidence* to an agency responsible for enforcing civil or criminal laws, an out-of-state disciplinary agency, an agency responsible for professional licensing, or the Judicial Nominees Evaluation Commission. See *id.*

This memorandum does not address whether the confidential nature of the pre-filing stage of a State Bar investigation is consistent with the First Amendment right of access. The staff could cover that point in a future memorandum if the Commission so requests.

46. *Tightening the Rules on Early Settlement Hearings,* Cal. Bar J. (Aug. 2009).

Office of Chief Trial Counsel has complained that some attorneys use the ENEC as a delaying tactic and a way to game the system."[47] One prosecutor commented, for example, that an ENEC is not productive when a lawyer has numerous priors or disbarment is a slam-dunk.[48] State Bar prosecutors thus "recommended that ENECs be permitted only when *both* sides" ask for one.[49] Under that approach, a State Bar prosecutor could refuse to allow an ENEC if there is "little chance of reaching a stipulated disposition."[50]

The prosecutors' proposal encountered "opposition by local bar associations and attorneys who defend lawyers charged with misconduct."[51] In particular, David Carr (then-president of the Association of Discipline Defense Counsel) "called the proposed change a bad idea because … early settlement conferences have resolved many cases and saved time and money for all parties."[52] He reportedly explained that the ENEC process "'works well, can work even better and should be expanded, not restricted ….'"[53] That perspective apparently prevailed; the prosecutors' proposal to reform the ENEC process was not adopted.

Early Neutral Evaluation ("ENE") in the U.S. District Court for the Northern District of California

The U.S. District Court for the Northern District of California, a pioneer in designing ADR programs, has one of the oldest and most highly-developed Early Neutral Evaluation ("ENE") programs in the country. Its ADR Local Rule 5-1 concisely describes the program as follows:

> In Early Neutral Evaluation (ENE) the parties and their counsel, in a confidential session, make compact presentations of their claims and defenses, including key evidence as developed at that juncture, and receive a non-binding evaluation by an experienced neutral lawyer with subject matter expertise. The Evaluator also helps identify areas of agreement, offers case-planning suggestions and, if requested by the parties, settlement assistance.

47. *Id.*
48. *Id.*
49. *Id.* (emphasis added).
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*

Examining the features of the Northern District's ENE program more closely might be helpful in determining how to structure a similar program for a legal malpractice case that alleges mediation misconduct.

For convenient reference, the pertinent ADR Local Rules are attached as an Exhibit,[54] as is the Northern District's online description of its ENE program.[55] The program has the following features:

> ***Purpose.*** According to the court's ADR Local Rule 5-10, "the principal values of ENE include affording litigants opportunities to articulate directly to other parties and a neutral their positions and interests and to hear, first hand, both their opponent's version of the matters in dispute and a neutral assessment of the merits of the case and the relative strengths of each party's legal positions."
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> The court's online description of the ENE program provides further detail on the goals of an ENE. It says that the goals are to:
>
> - enhance direct communication between the parties about their claims and supporting evidence,
> - provide an assessment of the merits of the case by a neutral expert,
> - provide a "reality check" for clients and lawyers,
> - identify and clarify the central issues in dispute,
> - assist with discovery and motion planning or with an informal exchange of key information, and
> - facilitate settlement discussions, when requested by the parties.[56]
>
> The online description also explains that "ENE *aims to position the case* for *early* resolution by settlement, dispositive motion or trial."[57] Thus, "settlement is not the major goal of ENE," but "the process can *lead to* settlement."[58] In a phone conversation with the staff, Howard Herman (the court's ADR Program Director) succinctly described ENE as a case management tool with settlement prospects; it helps the parties make a really early assessment of the *core* of their case by getting a neutral's view on it.
>
> ***Optional vs. Mandatory.*** The Northern District has an ADR Multi-Option Program, in which litigants in most civil cases "are presumptively required to participate in one non-binding ADR process offered by the Court (Early Neutral Evaluation, Mediation or a Settlement Conference with a Magistrate Judge) or, with the assigned judge's permission, may substitute an ADR process offered by a private provider."[59] If the parties cannot agree on an

54. Exhibit pp. 8-15.
55. Exhibit pp. 4-7.
56. Exhibit p. 4.
57. *Id.* (emphasis added).
58. *Id.* (emphasis added).
59. N.D. Cal. ADR Local R. 3-2.

ADR process, the court will assist them in selecting one, or the judge may in rare cases excuse such participation.[60]

Of the four ADR options offered, mediation is the most popular and ENE is the least-used.[61] The distribution "has remained remarkably stable" in recent years, with ENE being selected in about 6-8% of the cases (about 125 cases per year).[62]

Mr. Herman regularly assists parties in selecting an ADR process. In his experience, reasons for selecting ENE include: (1) when disputants do not want to discuss settlement and just want a neutral to tell the other side that its case lacks merit, (2) when a lawyer is having trouble convincing a client to consider settlement, but might be able to persuade the client to at least participate in ENE, (3) when sophisticated lawyers have a sincere difference of opinion and would find it helpful to hear a neutral's perspective on the matter, and (4) when an inexperienced lawyer needs guidance on the proper value of a case. He regards ENE in the Northern District as a riskier, less flexible option than mediation, because the ENE neutral will provide an evaluation of the case, which might make the case harder to settle in the manner a party desires.

The court's online description of its ENE program provides further insight on when ENE might be particularly appropriate. It identifies the following situations:

- When counsel or the parties are far apart on their view of the law and/or value of the case.
- When the case involves technical or specialized subject matter — and it is important to have a neutral with expertise in that subject.
- When case planning assistance would be useful.
- When communication across party lines (about merits or procedure) could be improved.
- When equitable relief is sought — if parties, with the aid of a neutral expert, might agree on the terms of an injunction or consent decree.[63]

The description further states that "[a]ll civil cases *in which the parties are represented by counsel* are eligible if the court has an available evaluator with the appropriate subject matter expertise."[64] The unstated implication is that a case involving a pro se litigant *is not* eligible for ENE.

Timing. Unlike a State Bar ENEC, an ENE in the Northern District occurs *after* a case is filed. Under ADR Local Rule 5-4,

60. See *id.*
61. See N.D. Cal., ADR Program Report - Fiscal Year 2015, *available at* http://www.cand. us courts.gov/adr/annualreports.
62. See *id.*
63. Exhibit p. 6.
64. *Id.* (emphasis added).

"[u]nless otherwise ordered, the ENE session must be held within 90 days after the entry of the order referring the case to ENE."

Choice of Neutral. The court maintains a panel of neutrals who serve in its ADR programs.[65] Each lawyer serving as a neutral must take an oath, be a member of the Northern District's bar or a faculty member of an accredited law school, and "must successfully complete initial and periodic training as required by the Court."[66]

Several additional requirements apply to an ENE Evaluator. "Evaluators must have been admitted to the practice of law for at least 15 years and have considerable experience with civil litigation in federal court."[67] They "must also have substantial expertise in the subject matter of the cases assigned to them and must have the temperament and training to listen well, facilitate communication across party lines and, if called upon, assist the parties with settlement negotiations."[68] The court may modify these requirements in individual circumstances for good cause.[69]

"After entry of an order referring a case to ENE, the ADR Unit will appoint from the Court's panel an Evaluator who has expertise in the subject matter of the lawsuit."[70] There are procedures for disqualification of neutrals and party input into the selection process.[71]

According to the court's online description of the ENE program, an ENE Evaluator "has no power to impose settlement and does not attempt to coerce a party to accept any proposed terms."[72]

Cost of ENE. Under ADR Local Rule 5-3, an ENE Evaluator must "volunteer up to two hours of preparation time and the first four hours in an ENE session." After the first four hours, an ENE session will continue only if the parties and the Evaluator agree to continue it and agree on compensation terms.[73] The rule expressly states that "[n]o party may offer or give the Evaluator any gift."

In addition, the rule says that

- All terms and conditions of payment must be clearly communicated to the parties.
- The parties may agree to pay the fee in other than equal portions.

65. N.D. Cal. ADR Local R. 2-5.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. N.D. Cal. ADR Local R. 5-3.
71. See N.D. Cal. ADR Local R. 2-5(d), 5-3(a); see also http://www.cand.uscourts.gov/pages/1019.
72. Exhibit p. 5.
73. N.D. Cal. ADR Local R. 5-3(b).

- The Evaluator shall promptly report to the ADR Unit the amount of any payment received.[74]

The court's online description of its ENE program points out that ENE "may serve as a cost-effective substitute for formal discovery and pretrial motions."[75]

Immunity. ADR Local Rule 2-5(e) expressly states that "[a]ll persons serving as neutrals in any of the Court's ADR programs are performing quasi-judicial functions and are entitled to the immunities and protections that the law accords to persons serving in such capacity."

Ex Parte Communications. During the initial phase of the ENE, the parties are forbidden from engaging in ex parte communications with the Evaluator: "Except with respect to scheduling matters, there shall be no *ex parte* communications between parties or counsel and the Evaluator, including private caucuses to discuss settlement, *until after* the Evaluator has committed his or her evaluation to writing and all parties have agreed that *ex parte* communications with the Evaluator may occur.[76]

Attendance Requirements. There are strict attendance requirements for an ENE in the Northern District. "All named parties and their counsel are required to attend the ENE session *in person* unless excused …."[77] Insurer representatives are also required to attend in person unless excused, "if they have accepted coverage, or the duty to defend, even if subject to a reservation of rights."[78] "Unless otherwise ordered, a person excused from appearing in person at an ENE session *must participate by telephone* for the duration of the session or until excused by the neutral."[79] ADR Local Rule 5-10 specifies further details regarding attendance, such as which lawyer must attend ("the lawyer who will be primarily responsible for handling the trial of the matter") and who must attend on behalf of governmental and non-governmental entities.

Materials To Be Submitted or Exchanged Before ENE. "No later than 7 days before the first ENE session …, each party must submit directly to the Evaluator, *and must serve on all other parties*, a written ENE Statement."[80] The statement "must be concise" and "may

74. N.D. Cal. ADR Local R. 5-3(cå).
75. Exhibit p. 4.
76. N.D. Cal. ADR Local R. 5-6.
77. N.D. Cal. ADR Local R. 5-10 (emphasis added).
78. *Id.*
79. *Id.*
80. N.D. Cal. ADR Local R. 5-8 (emphasis added).

include any information that may be useful to the Evaluator."[81] At a minimum, it must:

- Identify the people with decision-making authority who will attend the ENE session as the party's representatives.
- Identify persons connected with the opponent "whose presence might substantially improve the utility of the ENE session or the prospects for settlement.
- Briefly describe the substance of the suit, including the key evidence, key liability issues and damages.
- State whether there are any issues "whose early resolution would reduce significantly the scope of the dispute or contribute to settlement negotiations."
- List any discovery that is "necessary to equip the parties for meaningful settlement negotiations."
- "Include copies of documents out of which the suit arose (e.g., contracts), or whose availability would materially advance the purposes of the Evaluation session (e.g., medical reports or documents by which special damages might be determined)."[82]

Pre-ENE Phone Conference. "The Evaluator *shall* schedule a brief joint telephone conference *before* the ENE session with counsel who will attend the ENE session to discuss matters such as the scheduling of the ENE session, the procedures to be followed, compensation of the neutral, the nature of the case, the content of the written ENE statements, and which client representatives will attend."[83]

Party Presentations and Neutral Evaluation. During the initial phase of an ENE in the Northern District, the Evaluator convenes an informal meeting and permits each party "to present its claims or defenses and to describe the principal evidence on which they are based."[84] The rules of evidence do not apply, there is no formal examination or cross-examination of witnesses, and the presentations are not recorded.[85]

In light of those presentations, the Evaluator writes an evaluation of the case, which (1) assesses the relative strengths and weaknesses of the parties' contentions and evidence, (2) carefully explains the reasoning that supports those assessments, and (3) estimates, where feasible, the likelihood of liability and the dollar

81. *Id.*
82. *Id.*
83. N.D. Cal. ADR Local R. 5-7.
84. N.D. Cal. ADR Local R. 5-11.
85. *Id.*

range of damages.[86] According to the court's online description of the ENE process, the Evaluator writes this evaluation "in private."[87]

This evaluation is "non-binding."[88] It "must be presented orally on demand by any party."[89] At the Evaluator's discretion, copies of it may be provided to the parties.[90]

"If all parties agree, they may proceed to discuss settlement after the evaluation has been written but *before* it is presented."[91] "The parties also may agree to discuss settlement *after* the evaluation has been presented."[92]

Other Content of the ENE. In addition to permitting the parties to present their views and providing a written evaluation to the parties, the Evaluator shall:

- Help the parties identify areas of agreement, clarify and focus the issues, and, where feasible, enter into procedural and substantive stipulations.
- Help the parties devise a plan for sharing the important information and/or conducting key discovery that will expeditiously equip them to enter meaningful settlement discussions or to position the case for disposition by other motion or other means.
- Help the parties assess litigation costs realistically.
- If the parties are interested, help them, through private caucusing or otherwise, explore the possibility of settlement.
- Determine whether some form of follow-up to the ENE session would contribute to case development or settlement.[93]

Confidentiality of ENE Discussions and Materials. ADR Local Rule 5-12 mandates that all ENE participants "shall treat as 'confidential information' the contents of the written ENE Statements, anything that was said, any position taken, and any view of the merits of the case expressed by any participant in connection with any ENE session."[94] The rule further directs that "confidential information" shall not be disclosed to anyone not involved in the litigation, disclosed to the assigned judge, or used

86. N.D. Cal. ADR Local R. 5-11(a)(3), (4).
87. Exhibit p. 4.
88. N.D. Cal. ADR Local R. 5-1.
89. N.D. Cal. ADR Local R. 5-11.
90. *Id.*
91. *Id.* (emphasis added).
92. *Id.* (emphasis added).
93. *Id.*; see also N.D. Cal. ADR Local R. 5-13; Exhibit pp. 4-5.
94. See also N.D. Cal. ADR Local R. 5-8(b) (Written ENE Statements "constitute confidential information as defined in ADR L.R. 5-12, must not be filed and the assigned Judge shall not have access to them.").

for any purpose in any pending or future proceeding in the Northern District.

The confidentiality rule is subject to a number of exceptions. In particular, it does not prohibit:

- Disclosures as stipulated by all parties and the Evaluator.
- Disclosures made in a subsequent confidential ADR or settlement proceeding under the Northern District's ADR rules.
- A report to, or an inquiry by, the ADR Magistrate Judge regarding a possible violation of those rules.
- Discussions between the Evaluator and the court's ADR staff regarding an ENE session.
- Disclosures to authorized persons to facilitate monitoring or evaluation of the court's ADR program.
- Disclosures as are otherwise required by law.[95]

Multiple Sessions, Follow-Up, and End of ENE. At the end of an ENE session, "the Evaluator and the parties shall discuss whether it would be beneficial to schedule any follow up to the session.[96] The Evaluator with the parties' consent may schedule "one or more follow up ENE sessions that may include additional evaluation, settlement discussions, or case development planning."[97] The Evaluator may also order the following kinds of follow-up without the parties' consent: (1) responses to settlement offers or demands, (2) a focused telephone conference, (3) exchanges of letters between counsel addressing specified legal or factual issues, (4) written or telephonic reports to the Evaluator.[98]

ADR Local Rule 5-13 makes clear, however, that an Evaluator has "no authority to compel parties to conduct or respond to discovery or to file motions." The rule further states that an Evaluator does not have authority to "determine what the issues in any case are, to impose limits on parties' pretrial activities or to impose sanctions."

The court's online description of its ENE program provides the following concise summary of the limits applicable to an ENE:

> **Preservation of right to trial:**
>
> The evaluator has no power to impose settlement and does not attempt to coerce a party to accept any proposed terms. The parties' formal discovery, disclosure and motion practice rights are fully preserved. The confidential evaluation is non-binding and is not share with the trial

95. N.D. Cal. ADR Local R. 5-12 (b).
96. N.D. Cal. ADR Local R. 5-13.
97. *Id*.
98. N.D. Cal. ADR Local R. 5-13(b).

judge. The parties may agree to a binding settlement. If no settlement is reached, the case remains on the litigation track.[99]

"Within 14 days of the close of each ENE session, … the Evaluator must report to the ADR Unit the date of the session, whether any follow up is scheduled, and whether the case settled in whole or in part."[100]

According to the Northern District's *ADR Program Report* for fiscal year 2015, surveys of mediation and ENE participants "continue[d] to show that more than 90% of the participants [were] satisfied with the ADR process and that 84% report[ed] the benefits outweigh the costs."[101] The report does not include separate figures for mediation and ENE.

The same report states that "[s]ettlement rates for Mediation cases filed in calendar year 2014 were reported by the neutrals at 68%, and in ENE cases at 60%."[102] These rates were "generally consistent with the last several years of response."[103]

Purpose and Structure of an ENEC (or Similar Proceeding) in a Legal Malpractice Case Alleging Mediation Misconduct

There are many early neutral evaluation programs, not just the above-described programs offered by the State Bar and the U.S. District Court for the Northern District of California. For present purposes, however, it does not seem necessary to examine the features of other existing programs.

Rather, the Commission should focus on determining:

- Whether to propose such a program for legal malpractice cases that allege mediation misconduct, and
- How to structure such a program if it goes forward with the idea.

We address these points in reverse order, because attempting to structure an ENE program for this context may provide insight into the potential advantages and disadvantages of having such a program.

The State Bar's ENEC program and the Northern District's ENE program highlight the types of issues to consider in designing a similar program for legal

99. Exhibit p. 5.
100. N.D. Cal. ADR Local R. 5-14.
101. N.D. Cal., ADR Program Report - Fiscal Year 2015, *available at* http://www.cand.uscourts.gov/adr/annualreports.
102. *Id.*
103. *Id.*

malpractice cases that allege mediation misconduct. In the discussion that follows, we track through the same set of issues and consider which features should be required by statute and which should be addressed by court rule.

Purpose

Before figuring out the features of an ENEC program for legal malpractice cases that allege mediation misconduct, it is critical to determine the *purpose(s)* of the program. Once the Commission clearly identifies the purpose(s), it may become easier to determine the appropriate features of the program.

In previous discussions, the Commission said it was looking for "an early way to eliminate claims that have no basis and should not result in public disclosure of mediation communications."[104] In exploring the ENEC concept, the Commission has thus been focusing on avoiding unnecessary disclosure of mediation communications without inhibiting potentially meritorious claims of mediation-related legal malpractice. In other words, it has been seeking a way to provide some protection for the policy interest in mediation confidentiality while also ensuring accountability for legal malpractice in a mediation.

That overall objective applies *only* to legal malpractice cases that allege mediation misconduct, *not* to legal malpractice cases generally. Consistent with the scope of its overall objective, the Commission is only exploring the possibility of requiring an ENEC in legal malpractice cases that allege mediation misconduct, not in other legal malpractice cases.

It similarly follows that the Commission should structure these ENECs to *focus on achieving its overall objective relating to mediation confidentiality*, rather than other case management objectives (ones that are not unique to legal malpractice cases alleging mediation misconduct). Put differently, these ENECs should *primarily entail activities that are designed to provide some protection for the policy interest in mediation confidentiality while also ensuring accountability for legal malpractice in a mediation*.

What types of activities would fall within that rubric? The staff sees several possibilities.

First and foremost, an ENEC could serve as an opportunity for both sides to realistically explore settlement options with the assistance of a knowledgeable neutral *before* any mediation communications become public. If the parties reach a pre-filing settlement, there will be no need to publicly disclose mediation

104. Minutes (April 2016), p. 5.

communications and thereby undermine the policy interests underlying mediation confidentiality.

Second, even if an ENEC does not result in a pre-filing settlement, the ENEC may be a way to help position the parties so that they might later be able to settle at a relatively *early* stage of litigating their case. That would not completely prevent public disclosure of mediation communications, but it might help minimize the extent of such disclosure.

Third, an ENEC could serve as an opportunity for the parties and the neutral to discuss, and perhaps develop ground rules on, "the proper use of mediation communications if the legal malpractice case proceeds."[105] If a private mediator served as the neutral (as the Commission discussed in June), any such ground rules would be subject to court approval. With regard to such matters as sealing of documents that disclose mediation communications, a stipulation between the parties could not bind the court.[106] Nonetheless, it might be helpful to develop a set of suggested ground rules in an ENEC and allow the parties to present it to the court for consideration at the outset of the litigation, perhaps before any pleadings are filed.

Fourth, an ENEC could serve as an opportunity to impart basic information to the parties that might influence their decisions regarding whether and how to proceed with the litigation, and particularly the extent to which they disclose mediation communications without being compelled to do so. For example, the ENEC neutral could distribute a form (perhaps developed by the Judicial Council) that provides both parties with basic information on (1) the mediation confidentiality statute and related provisions, (2) any special procedural rules for litigating a legal malpractice case alleging mediation misconduct, and (3) the provisions governing imposition of sanctions and reimbursement (or non-reimbursement) of costs, litigation expenses, and attorney's fees.

Does the Commission agree with these views on the overall purpose and proper subsidiary goals of an ENEC in a legal malpractice case alleging mediation misconduct? Are there other objectives to take into account?

105. Draft Minutes (June 2016), p. 4.
106. See generally Cal. R. Ct. 2.551(a) ("A record must not be filed under seal without a court order. The court must not permit a record to be filed under seal based solely on the agreement or stipulation of the parties.").

Optional vs. Mandatory

At the June meeting, the Commission was leaning towards making an ENEC mandatory, rather than optional, in a legal malpractice case alleging mediation misconduct (assuming that the Commission pursues an ENEC approach).[107] In contrast, an ENEC is semi-optional in a State Bar disciplinary proceeding (an ENEC is only required if one of the parties requests it, but upon request the court will conduct an ENEC regardless of whether the other party wants one).

That difference in treatment might be appropriate. In a State Bar disciplinary proceeding, the bar's investigation process already serves as a means to filter out complaints that are patently meritless and should not be filed. Such filtering can also occur in a legal malpractice case, if an attorney refuses to take a case on a contingency basis because chances of prevailing appear slim. But a client can shop a case to multiple attorneys, proceed pro se, or might be able to hire an attorney under a different type of fee arrangement. It might therefore be more important to have an ENEC filtering process in a legal malpractice case alleging mediation-related misconduct than it is in a State Bar disciplinary proceeding alleging such misconduct.

Assuming that the Commission decides to further pursue the ENEC concept in a legal malpractice case alleging mediation misconduct, **does it wish to stick with a mandatory approach?**

- If so, the Commission should also consider whether the current treatment of a State Bar disciplinary proceeding is appropriate for a complaint alleging mediation misconduct. **Would it be preferable to make an ENEC mandatory in a State Bar disciplinary proceeding that alleges mediation misconduct?**
- If the Commission decides not to require an ENEC in a legal malpractice case alleging mediation misconduct, the most obvious alternative approach would be to make an ENEC semi-optional in a legal malpractice case alleging mediation misconduct (as in a State Bar disciplinary proceeding). **Does the Commission wish to follow that approach? Would some other approach be better?**

Assuming that the Commission sticks with a mandatory approach, the staff recommends stating by statute that

(1) Participation in an ENEC is mandatory.
(2) During the mandatory portion of an ENEC, the parties will not be charged for the services of the ENEC neutral, and

107. See Draft Minutes (June 2016), p. 4.

(3) A party is not required to make any settlement offer during the ENEC, just to attend the ENEC session.

If the Commission decides to propose a mandatory ENEC, **does it agree with these points?**

Timing

At the June meeting, the Commission was inclined towards a pre-filing ENEC, as opposed to an ENEC conducted after commencement of a legal malpractice case that alleges mediation misconduct. That approach makes sense, because a pre-filing ENEC would provide the best opportunity to avoid unnecessary disclosure of mediation communications. Assuming that the Commission decides to further pursue the ENEC concept in a legal malpractice case alleging mediation misconduct, **should an ENEC be a pre-filing requirement?**

If so, then it appears appropriate to toll the statute of limitations during the ENEC process. That would have to be done by statute. **Does the Commission agree?**

The Commission should also consider how a plaintiff would commence the ENEC process. The staff suggests (1) directing the Judicial Council to develop a form that explains the ENEC process in a legal malpractice case alleging mediation misconduct, and (2) statutorily requiring the potential plaintiff to serve that form on the potential defendant, through the same means that would be required for service of a summons (this step could replace the summons requirement). **Would this be a reasonable approach? Does anyone have a better idea?**

Notice and Opportunity to Be Heard

At the June meeting, the Commission discussed "the possibility of providing notice to all mediation participants whose communications might be disclosed as the case progresses."[108] This came up with regard to the notion of preliminary filtering generally, not specifically with regard to the ENEC concept.

If the Commission were to propose a pre-filing ENEC, providing notice of the ENEC and an opportunity to participate to all mediation participants would pose some practical issues:

108. Draft Minutes (June 2016), p. 5.

- Who should be responsible for obtaining contact information for the mediation participants? What type of contact information should be required? How extensively would the responsible person have to search for such information before being excused from having to provide it?
- Who should be responsible for providing notice to the mediation participants? What type of notice would be provided? Who would pay for the cost of providing it?

It may be unfair to place the entire burden of providing such notice on the potential plaintiff.[109] Moreover, such notice and participation might be unnecessary in some legal malpractice cases that allege mediation misconduct (e.g., a case that appears to turn entirely on private discussions between an attorney and client during a mediation).

The staff encourages comment on these logistical issues. Some ideas to consider are (1) whether it would be helpful to statutorily require preparation of an attendance list with contact information at each California mediation (court-connected or otherwise), for use in the event of a later dispute in which an ENEC becomes necessary,[110] (2) whether an ENEC neutral, after examining materials submitted by the disputants, should have discretion to decide (perhaps in accordance with a particular standard) which mediation participants receive notice of an upcoming ENEC, and (3) whether to make the ENEC neutral responsible for providing such notice, with any costs to be split between the ENEC disputants (or perhaps borne by the court).

Choice of Neutral and Cost of ENEC

To conserve judicial resources, at the June meeting the Commission expressed interest in having private mediators, not judicial officers, conduct the ENECs for legal malpractice cases alleging mediation misconduct (assuming the Commission proposes an ENEC requirement).[111] **Perhaps the best means to accomplish this might be to establish a court panel of ENEC neutrals for this**

109. See generally Senate Committee on Judiciary Analysis of SB 1256 (May 3, 2016), p. 4 ("This bill places all burdens to comply with the Civility in Litigation Act on the plaintiff, even if the defendant does not make good faith efforts to respond.").

110. Such a requirement already exists with regard to court-connected mediations. See Cal. R. Ct. 3.860 ("In each mediation to which these rules apply under rule 3.851(a), the mediator must request that all participants in the mediation complete an attendance sheet stating their names, mailing addresses, and telephone numbers; retain the attendance sheet for at least two years; and submit it to the court on request.").

111. See Draft Minutes (June 2106), p. 4.

purpose, similar to the panel of ENE neutrals maintained by the U.S. District Court for the Northern District of California.

Significantly, California already has a set of court rules governing court-connected mediations,[112] including rules for establishing a court panel of mediators for courts that have a mediation program under the Civil Action Mediation Act.[113] To the best of the staff's knowledge, however, few such court mediation panels actually exist at this point.

Moreover, it might be appropriate to have different or special requirements for an ENEC neutral in a legal malpractice case alleging mediation misconduct. In particular, because these disputes would involve alleged legal malpractice, it may make sense to **statutorily require the ENEC neutral to be a member of the California Bar in good standing, with a certain amount of experience and some legal malpractice expertise.** Further qualifications, if any, could be addressed by court rule. **What does the Commission think of this type of approach?**

Rather than having each court establish and supervise a panel of such neutrals, it might be more cost-effective to have the Judicial Council establish a statewide panel. **Input on this point would be helpful.**

As for the cost of providing an ENEC neutral, it may again be advisable to follow an approach like the one used in the Northern District's ENE program, in which the neutrals must volunteer a certain amount of time and after that the ENEC either terminates or the costs are borne by the parties by agreement. Assuming that the Commission decides to further pursue the ENEC concept, **would it like to follow this type of funding approach?**

The Commission should also consider whether to provide further guidance on the selection of an ENEC neutral, such as the following possible statutory requirements:

- In a legal malpractice case alleging mediation misconduct, the ENEC neutral cannot serve as the trial judge.
- The ENEC neutral cannot be the mediator who conducted the mediation in which legal malpractice allegedly occurred.
- The entity administering the ENEC panel shall select the ENEC neutral unless the parties stipulate to a particular ENEC neutral within a certain time and that neutral is willing and able to conduct the ENEC.
- No party may offer or give the ENEC neutral any gift.

112. Cal. R. Ct. 3.835-3.898 (reproduced in Memorandum 2015-22, Exhibit pp. 1-27).
113. Code Civ. Proc. §§ 1775-1775.15.

- The ENEC neutral has no power to impose settlement or coerce a party to accept any proposed terms or forfeit any litigation rights.

Assuming that the Commission decides to further pursue the ENEC concept, **which, if any, of these requirements does it want to incorporate in its proposal? Would it like to incorporate any other requirements along these lines?**

In addition, if the Commission goes forward with the ENEC concept, it will eventually need to consider whether to provide guidance on:

- Conflicts of interest.
- Disqualification of an ENEC neutral.
- The extent to which a disputant or other mediation participant involved in a mediation-related legal malpractice ENEC can object to using a particular neutral.
- Any other issue relating to the selection of an ENEC neutral for a legal malpractice case alleging mediation misconduct.

It might be appropriate to leave some or all of these matters to regulation by court rule, instead of by statute. **It does not appear necessary to resolve them yet (if at all), but comments on them would be helpful.**

Finally, the Commission should consider the possibility that it might prove difficult to obtain a properly qualified ENEC neutral for a certain case, particularly if the case is pending in a remote, sparsely populated county. Should it be possible to excuse compliance with the contemplated requirement of a pre-filing ENEC in some circumstances? Would it help to make clear that the ENEC neutral need not reside in the county where the ENEC occurs? Would it help to (1) require the ENEC neutral to volunteer a certain amount of travel time, and (2) require the court system to bear any out-of-pocket travel costs? **Again, it does not appear necessary to resolve these points yet (if at all), but comments on them would be helpful.**

Immunity

In the U.S. District Court for the Northern District of California, ADR Local Rule 2-5(e) expressly states that all neutrals in the court's ADR programs are "performing quasi-judicial functions and are entitled to the immunities and protections that the law accords to persons serving in such capacity." Assuming that the Commission decides to further pursue the ENEC concept for a legal

malpractice case alleging mediation misconduct, it might want to consider including a similar provision in its proposed statute.

If so, however, that provision would have to be drafted extremely carefully, to avoid any possibility of inadvertently changing the law on the extent of immunity, if any.[114] The staff recommends **deferring even a tentative decision on this point** until after the Commission resolves whether to go forward with the ENEC concept.

Attendance Requirements

As discussed above, the Northern District's ADR Local Rules include strict and detailed attendance requirements for its ENE program. If the Commission decides to require an ENEC in a legal malpractice case alleging mediation misconduct, the staff recommends, *at a minimum,* that **each side be statutorily required to have the following people attend the ENEC in-person on its behalf:**

(1) An individual with settlement authority, and
(2) The lawyer (if any) who will be primarily responsible for handling the trial of the matter.

Further details regarding attendance could perhaps be addressed by court rule, rather than by statute.

Does the Commission agree with this approach to ENEC attendance?

Materials To Be Submitted or Exchanged Before ENEC

Another point to consider is what written materials, if any, the potential parties should have to submit to the neutral or exchange before an ENEC in a legal malpractice case alleging mediation misconduct. *For purposes of discussion,* the staff suggests the following statutory requirements:

- The potential plaintiff must provide a draft complaint to the ENEC neutral and serve it on the potential defendant together with the previously discussed Judicial Council form that explains the ENEC process for a legal malpractice case alleging mediation misconduct.
- The potential plaintiff must also provide the draft complaint to any other mediation participant who requests it after being notified of an upcoming ENEC.
- Each potential party shall submit to the ENEC neutral in confidence a document that includes:

114. See generally Memorandum 2015-22, pp. 34-42.

- A list of people who will attend the ENEC on behalf of the party.
- A summary of the party's case.
- A summary of the supporting evidence.
- A discussion of the extent to which evidence of mediation communications will be needed to resolve the case and how to minimize disclosure of such communications while also achieving justice in the case.
- A discussion of damages or other relief.
- A summary of the party's settlement position, including a list of any discovery that might be helpful in achieving settlement.
- A copy of any key documents, such as a governing contract.
- A list of any issues that would be helpful to resolve early and why it would be helpful to do so.

Other points regarding pre-ENEC submissions and exchange of materials (including any applicable deadlines) could perhaps be addressed by court rule, rather than by statute.

Comments on this suggested approach would be helpful.

Pre-ENEC Phone Conference

Under the Northern District's ADR Local Rules, a pre-ENE phone conference is mandatory.[115] To provide flexibility in developing an effective ENEC program for legal malpractice cases alleging mediation misconduct (assuming the Commission decides to pursue this idea), **the staff recommends against requiring a pre-ENEC phone conference by statute.** We suggest leaving this point to the Judicial Council to address by court rule, if at all.

Party Presentations, Neutral Evaluation, and Ex Parte Communications

A key feature of the State Bar's ENEC program is the hearing judge's oral evaluation of the possible disciplinary charges. Similarly, a key feature of the Northern District's ENE program is the Evaluator's written evaluation of the case.

It is not clear to the staff whether a formal evaluation by the neutral would be desirable or necessary in the type of pre-filing proceeding that the Commission is considering. We are particularly concerned about whether a formal evaluation

115. See N.D. Cal. ADR Local R. 5-7.

process would work if the potential parties do not have equal access to the relevant evidence, which could be common where confidential mediation discussions are at the core of a dispute (in all likelihood, each mediation participant will only be privy to some of the mediation communications, not all of them).[116] **We encourage input on these points.**

If the Commission decides to propose an ENEC process and further decides that a formal evaluation by the neutral would be necessary or desirable (at least in some of the disputes in question), **a statute should expressly state that the neutral's evaluation is non-binding and cannot be provided to the trial judge.** In addition, the Commission will need to resolve a number of questions relating to such evaluations:

- Should the neutral's evaluation be mandatory in every ENEC covered by the Commission's proposal? Should it be optional or semi-optional instead? If so, must all parties and the neutral agree to have an evaluation? What if only one party wants the neutral to prepare an evaluation? What if the neutral believes an evaluation would be helpful, but the parties do not want one?
- Should there be any statutory guidance regarding the content of a neutral's evaluation?
- Should the neutral's evaluation be provided to the parties orally? In writing? If a written evaluation is required, should the neutral have to prepare it in private, outside of the presence of the parties and their representatives?
- When, and under what conditions, should the neutral present the evaluation to the parties?
- Should it be permissible for a neutral to prepare more than one evaluation during the ENEC process?

Again, input on these points would be helpful.

Regardless of what the Commission decides about the desirability of a formal evaluation in the pre-filing filtering process it is exploring, the staff presumes that the process will entail an opportunity for each party to make a presentation to the ENEC neutral. **It might thus be advisable to statutorily establish some rules for such presentations, such as:**

- The rules of evidence do not apply.

116. See generally the State Bar's ENEC guidelines, reproduced at Exhibit pp. 2-3 (warning that while *in camera* inspection of documents "may be necessary in some [disciplinary] cases, the final [ENEC] evaluation may be based on information only available to one side *which may lessen the opportunity for settlement*." (emphasis added)).

- There will not be any cross-examination of witnesses.
- The presentations will not be recorded.
- A presentation must be concise, within any time limits established by the neutral.

There probably should also be statutory guidance on whether a party may make all or part of its presentation to the neutral on an *ex parte* basis — i.e., outside the presence of its opponent. Because it might be necessary for a party to refer to mediation communications to which its opponent is not privy, it might be appropriate to permit some *ex parte* discussions to occur. **Comments on this point would be especially helpful.**

Finally, if the Commission decides to go forward with a pre-filing filtering process but concludes that the process should *not* entail a neutral's preparation of a formal evaluation, then it seems inappropriate to refer to that process as an Early Neutral Evaluation Conference ("ENEC"). **Under those circumstances, the Commission should select an alternative name for the process, such as a "pre-filing mediation."**

Other Content of the ENEC

The immediately preceding discussion addresses whether an ENEC in a legal malpractice case alleging mediation misconduct should include (1) party presentations to the ENEC neutral and (2) a neutral's preparation of a formal evaluation. Based on the earlier discussion of the purposes for conducting an ENEC in such a case, **the staff suggests that these ENECs (if proposed) should also include the following activities:**

- An opportunity for both sides to realistically explore settlement options with the assistance of a knowledgeable neutral *before* any mediation communications become public.
- Exploration of ways to help position the parties so that they might later be able to settle at a relatively *early* stage of litigating their case, thereby minimizing the extent of disclosure of mediation communications.
- An opportunity for the parties and the neutral to discuss, and perhaps develop suggested ground rules on, the proper use of mediation communications if the legal malpractice case proceeds.
- Imparting certain basic information to the parties that might influence their decisions regarding whether and how to proceed with the litigation, and particularly the extent to which they disclose mediation communications without being compelled to do so (e.g., distribution of a Judicial Council form with information

on (1) the mediation confidentiality statute and related provisions, (2) any special procedural rules for litigating a legal malpractice case alleging mediation misconduct, and (3) the provisions governing imposition of sanctions and reimbursement (or non-reimbursement) of costs, litigation expenses, and attorney's fees.)

Does the Commission agree with this list of ENEC activities? Are there other activities to include? To what extent should these activities and/or the underlying objectives be statutorily codified?

Confidentiality of ENEC Discussions and Materials

Confidentiality of the ENEC discussions and materials was covered near the beginning of this memorandum. See the discussion of "Precedent for Creating an 'Exception to the Exception' to Facilitate Certain Mediations."

There is, however, one additional point for the Commission to consider: Whether to require the ENEC neutral to return any documents that the parties submit in the ENEC process. Such a requirement would only be meaningful if the parties had to submit documents in a form that could be returned (e.g., hard copy format, rather than electronically). **Given the rapid pace of technological developments, perhaps it would be best to leave this point to court rule, rather than addressing it by statute.**

Multiple Sessions, Follow-Up, and End of ENEC

The rules governing the State Bar's ENEC program and the Northern District's ENE program expressly allow multiple sessions, at least with the consent of the parties. Assuming that the Commission decides to further pursue the ENEC concept**,** it might want to do the same for an ENEC in a legal malpractice case alleging mediation misconduct. Alternatively, the Commission could leave this point, and ENEC follow-up generally, to the Judicial Council to address by court rule, if at all. **Does the Commission have a preference on these matters?**

Regardless of what the Commission decides about multiple sessions and ENEC follow-up, there would have to be some statutory guidance about what happens after the ENEC process is completed. In particular, **a statute should make clear that when the ENEC process ends and does not result in a settlement, the plaintiff may file the complaint in the legal malpractice case alleging mediation misconduct.**

In addition, it might be useful to have the Judicial Council develop a mandatory cover sheet for this type of case, which would include a place to indicate that the plaintiff has complied with the ENEC requirement. Alternatively, perhaps it would be sufficient to require the plaintiff to indicate as much on the first page of the complaint. **Does the Commission have any thoughts on this point?**

Pros and Cons of Requiring an ENEC in a Legal Malpractice Case Alleging Mediation Misconduct

There would be a number of advantages to requiring a pre-filing ENEC, along the general lines discussed above, in a legal malpractice case that alleges mediation misconduct. Some key ones are:

- Such a process appears to comply with constitutional constraints, even though it would be confidential.[117]
- In several different ways, the ENEC process may prevent unnecessary disclosure of mediation communications and thus protect the interests served by mediation confidentiality. Specifically, an ENEC would:
  (1) Permit parties to realistically explore settlement options with the assistance of a knowledgeable neutral *before* any mediation communications become public, and perhaps reach a pre-filing settlement that makes disclosure of mediation communications unnecessary.
  (2) Afford an opportunity to help position parties so that they might later be able to settle at a relatively *early* stage of litigating their case, thereby minimizing the extent of disclosure of mediation communications.
  (3) Help parties develop a set of suggested ground rules for using mediation communications in a case, which a court could consider at the outset of the litigation and thereby prevent unwarranted intrusions into mediation confidentiality.
  (4) Be a means to impart basic information to the parties that might influence their decisions regarding whether and how to proceed with the litigation, and particularly the extent to which they disclose mediation communications without being compelled to do so.

117. See Memorandum 2016-27, p. 7.

- The ENEC process would be supervised by the court system but the burden on judicial resources would be relatively light, because an ENEC would not be conducted by a judicial officer.

There would also be disadvantages to following such an approach, such as:

- It may be challenging to assemble the necessary panel of ENEC neutrals, and perhaps especially hard to find qualified neutrals for ENECs in remote, sparsely populated counties.
- A person who has had a bad mediation experience may be reluctant to participate in another mediation-like experience, even with a different neutral.
- The ENEC process would delay the litigation, perhaps without offsetting benefits in some cases.
- The ENEC process may not weed out all patently unmeritorious claims, because the neutral has no coercive power and some plaintiffs may elect to proceed with litigation despite being advised that their case is groundless. In other words, the filtering process may be less than perfect in eliminating frivolous allegations of mediation-related attorney misconduct.

The Commission should consider these advantages and disadvantages in determining whether to proceed with the ENEC approach, as well as any other advantages and disadvantages that come to its attention. **Input on the merits of the approach would be helpful.**

APPROACH MODELED ON CIVIL CODE SECTION 1714.10

At the June meeting, the Commission also expressed interest in a second possible approach for preliminary *in camera* filtering of a legal malpractice case that alleges mediation misconduct:

> An approach modeled on Civil Code Section 1714.10 (alleged conspiracy between attorney and client), but conducted in a manner that would protect mediation communications from public disclosure.[118]

The Commission asked the staff to further investigate that possibility. We begin by describing and providing background information on Civil Code Section 1714.10.

118. *Id.*

Civil Code Section 1714.10

Civil Code Section 1714.10 was first enacted in 1988[119] and has been amended several times since then. It currently provides:

> 1714.10. (a) No cause of action against an attorney for a civil conspiracy with his or her client arising from any attempt to contest or compromise a claim or dispute, and which is based upon the attorney's representation of the client, shall be included in a complaint or other pleading *unless* the court enters an order allowing the pleading that includes the claim for civil conspiracy to be filed after the court determines that *the party seeking to file the pleading has established that there is a reasonable probability that the party will prevail in the action.* The court may allow the filing of a pleading claiming liability based upon such a civil conspiracy following the filing of a verified petition therefor accompanied by the proposed pleading and supporting affidavits stating the facts upon which the liability is based. The court shall order service of the petition upon the party against whom the action is proposed to be filed and permit that party to submit opposing affidavits prior to making its determination. The filing of the petition, proposed pleading, and accompanying affidavits shall toll the running of any applicable statute of limitations until the final determination of the matter, which ruling, if favorable to the petitioning party, shall permit the proposed pleading to be filed.
>
> (b) Failure to obtain a court order where required by subdivision (a) shall be a defense to any action for civil conspiracy filed in violation thereof. The defense shall be raised by the attorney charged with civil conspiracy upon that attorney's first appearance by demurrer, motion to strike, or such other motion or application as may be appropriate. Failure to timely raise the defense shall constitute a waiver thereof.
>
> (c) This section shall not apply to a cause of action against an attorney for a civil conspiracy with his or her client, where (1) the attorney has an independent legal duty to the plaintiff, or (2) the attorney's acts go beyond the performance of a professional duty to serve the client and involve a conspiracy to violate a legal duty in furtherance of the attorney's financial gain.
>
> (d) This section establishes a special proceeding of a civil nature. Any order made under subdivision (a), (b), or (c) which determines the rights of a petitioner or an attorney against whom a pleading has been or is proposed to be filed, shall be appealable as a final judgment in a civil action.
>
> (e) Subdivision (d) does not constitute a change in, but is declaratory of, the existing law.[120]

119. 1988 Cal. Stat. ch. 1052, § 1 (SB 2337 (Kopp)).
120. Emphasis added.

Purpose

Section 1714.10 "had its genesis in"[121] a court of appeal decision (*Wolfrich Corp. v. United Services Automobile Association*[122]) in which an insured sued an insurance company and the company's attorneys. The insured contended that the insurer and its attorneys had conspired to violate Insurance Code Section 790.03, which specifies unfair and deceptive acts in the insurance business (including "[n]ot attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear"[123]). The court of appeal "held that the attorneys were not in the insurance business and *could not* be sued for violating the Insurance Code but *could* be sued for conspiring with their clients to violated the Insurance Code."[124]

A few years after *Wolfrich,* Section 1714.10 was enacted "[a]t the behest of the California Defense Counsel" to "protect attorneys from 'civil conspiracy claims' arising from the attorney's representation of his or her client in a dispute."[125] The provision was intended to "combat 'the use of frivolous conspiracy claims that were brought as a tactical ploy against attorneys and the clients and that were designed to disrupt the attorney-client relationship ….'"[126] Prior to its enactment, "defense counsel were routinely being threatened with claims that they were conspiring with their insurance company clients in refusing to settle tort claims."[127] The provision was crafted to serve a gatekeeping function[128] and thereby "cur[b] such 'abuses' while not 'unfairly depriv[ing] plaintiffs of legitimate conspiracy claims."[129]

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121. Pavicich v. Santucci, 85 Cal. App. 4th 382, 390, 102 Cal. Rptr. 2d 125 (2000).
122. 149 Cal. App. 3d 1206, 197 Cal. Rptr. 446 (1983).
123. Ins. Code § 790.03(h)(5).
124. *Pavicich,* 85 Cal. App. 4th at 390 (emphasis added); see *Wolfrich,* 149 Cal. App. 3d 1209-12.
125. Senate Committee on Judiciary Analysis of AB 2069 (Aug. 8, 2000), p. 6.
126. Stueve v. Berger Kahn, 222 Cal. App. 4th 327, 329, 165 Cal. Rptr. 3d 877 (2013), *quoting* Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc., 131 Cal. App. 4th 802, 816, 132 Cal. Rptr. 3d 325 (2005). See also Rickley v. Goodfriend, 212 Cal. App. 4th 1136, 1148, 151 Cal. Rptr. 3d 683 (2013) (intent of Section 1714.10 is to weed out harassing claim of conspiracy that is so lacking in reasonable foundation as to verge on frivolous).
127. Senate Committee on Judiciary Analysis of AB 2069 (Aug. 8, 2000), p. 6.
128. *Stueve,* 222 Cal. App. 4th at 329.
129. College Hospital, Inc. v. Superior Court, 8 Cal. 4th 704, 718, 882 P.2d 894, 34 Cal. Rptr. 2d 898 (1994), *quoting* Senate Floor Analysis of SB 2337 (1987-1988), p. 2; see also *Stueve,* 222 Cal. App. 4th at 330 (Section 1714.10 "does not impede a plaintiff's pursuit of the type of claims we have here — potentially meritorious claims against a law firm that allegedly conspired to abscond with its clients' assets.").

General Procedure

Under Section 1714.10(a), a plaintiff generally "must obtain a prior court order *before* filing an action against an attorney that includes a claim for civil conspiracy with a client arising from any attempt to contest or settle a claim while representing the client."[130] To obtain such an order, the plaintiff must present a *verified* petition accompanied by (1) a copy of the proposed pleading and (2) supporting affidavits stating the facts upon which the liability is based.[131] The court then requires service of the petition on the potential defendant and permits the potential defendant to submit opposing affidavits.[132]

The plaintiff cannot file the proposed pleading unless the court determines that "there is a reasonable probability" that the plaintiff will prevail in the action.[133] "If the petition is granted, the plaintiff is permitted to file the complaint …, subject to the attorney's right to appeal the order."[134] "If, on the other hand, the petition is denied, the plaintiff is foreclosed from filing the complaint, likewise subject to his or her right to appeal that determination."[135]

"Reasonable Probability" of Prevailing

In this context, showing that there is a "reasonable probability" of prevailing is *less demanding* than showing that prevailing is "more probable than not."[136] As one court of appeal explained,

> The motion required by such statutes as section 1714.10 operates like a demurrer or motion for summary judgment in reverse. Rather than requiring the defendant to defeat the plaintiff's pleading by showing it is legally or factually meritless, the motion requires the plaintiff to demonstrate that he possesses a legally sufficient claim which is substantiated, that is, supported by competent, admissible evidence.
>
> The procedure under section 1714.10 is similar to the procedure employed in the determination of a motion for summary judgment, with a single material difference: under section 1714.10, the burden of proof is shifted to the plaintiff. In this way, the statutory requirement is similar to the showing required of a plaintiff who responds to a motion for summary judgment under the Federal Rules of Civil Procedure.

130. Klotz v. Milbank, Tweed, Hadley & McCloy, 238 Cal. App. 4th 1339, 1350, 190 Cal. Rptr. 3d 379 (2015) (emphasis added).
131. Civ. Code § 1714.10(a).
132. See *id.*
133. *Id.*
134. *Berg & Berg*, 131 Cal. App. 4th at 815.
135. *Id.*
136. See generally *College Hospital*, 8 Cal. 4th at 714-21.

> Under federal law, summary judgment will not lie if the dispute about a material fact is genuine, that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. At the summary judgment stage the judge's function is *not to weigh the evidence* and determine the truth of the matter but to determine whether there is a genuine issue for trial. Thus, to the extent the parties' evidence is in conflict, the facts and inferences supported by the plaintiff's evidence must be accepted as true.[137]

The key point is that the court "does not weigh the evidence but instead merely assesses whether the plaintiff has stated and substantiated his or her claim."[138] "This requires both stating a viable cause of action and presenting competent, admissible evidence to establish the elements of the claim."[139] The court's gatekeeping determination "does not contemplate a minitrial in which witness testimony is introduced," but instead is "decided entirely on an 'affidavit' showing."[140]

Constitutionality

Because the gatekeeping step merely requires a judge to examine the facial sufficiency of the plaintiff's case, as opposed to weighing the evidence, Section 1714.10 does not contravene the constitutional right to a jury trial.[141] The statute has also survived an equal protection challenge[142] and an argument that it violated a plaintiff's "meaningful opportunity to be heard by an impartial decisionmaker, guaranteed by the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and by California Constitution, article I, section 7."[143]

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137. Shafer v. Berger, Kahn, et al., 107 Cal. App. 4th 54, 56-57, 131 Cal. Rptr. 2d 777 (2003) (emphasis in original; brackets, quotation marks, ellipses, and citations omitted).
138. *Berg & Berg,* 131 Cal. App. 4th at 817 n.7.
139. *Id.* at 817.
140. *College Hospital,* 8 Cal. 4th at 717 (construing Code Civ. Proc. § 425.13(a), which the California Supreme Court viewed as "closely related" to Section 1714.10).
141. See, e.g., *Berg & Berg,* 131 Cal. App. 4th at 817 n.7; Hung v. Wang, 8 Cal. App. 4th 908, 929-33, 11 Cal. Rptr. 2d 113 (1992); see generally *College Hospital,* 8 Cal. 4th at 717-21 (noting that Code of Civil Procedure Section 425.13 is similar to Civil Code Section 1714.10, and concluding that because Section 425.13 "does not alter the traditional role of the trier of fact with respect to punitive damage claims against health care providers," it "does not implicate any jury trial concerns.").
142. See *Hung*, 8 Cal. App. 4th at 915, 925-26 (Section 1714.10 "does not violate appellant's right to equal protection of the law;" it is "rationally related to the Legislature's goal of relieving a perceived increase in legal malpractice insurance premiums and recusal of counsel resulting from claims that attorneys tortiously conspired with their clients.").
143. *Id.* at 921; see also *id.* at 923-25 (Section 1714.10 "is within the Legislature's plenary power to prescribe procedures defining and limiting tort litigation.").

In all likelihood, Section 1714.10 also complies with the First Amendment right of access. It would be hard to argue otherwise, because the statute does not impose any limitation on public access to judicial records or proceedings.

Limited Utility

As originally enacted, Section 1714.10 applied to any "cause of action against an attorney based upon a civil conspiracy with his or her client."[144] Soon afterwards, the California Supreme Court decided *Doctors' Co. v. Superior Court*,[145] which prompted the Legislature to narrow the statute in a manner that appears to have sharply undercut its utility.

More specifically, the Court held in *Doctors' Co.* that a claim for civil conspiracy between an attorney and client *is not viable* if the attorney "was not personally bound by the duty violated … and was acting only as the agent or employee of the party who did have that duty."[146] Thus, if a duty "is created by a statute which imposes [the duty] *only* on persons in the insurance business" (such as a statutory duty to settle in good faith), an attorney acting solely as an insurer's agent or employee cannot be held liable "for a conspiracy to violate that duty or cause its violation by the insurer."[147] To the extent it held to the contrary, the Court disapproved *Wolfrich,* the lower court decision that prompted the enactment of Section 1714.10.

The Court explained, however, that an attorney could be held liable for conspiring with a client in the following situations:

- If the attorney conspires with a client and violates "the attorney's *own* duty to the plaintiff."[148]
- If the attorney conspires with a client to violate a legal duty owed by the client *and* does so in furtherance of the attorney's financial gain.[149]

After the Court's decision in *Doctors' Co.*, "the Legislature debated whether the need for section 1714.10 had been eliminated."[150] Ultimately, the Legislature amended the statute to apply only when a plaintiff alleges that an attorney and client engaged in a conspiracy "arising from any attempt to contest or

144. 1988 Cal. Stat. ch. 1052, § 1.
145. 49 Cal. 3d 39, 44, 775 P.2d 508, 260 Cal. Rptr. 183 (1989).
146. *Id.* at 44.
147. *Id.* at 46 (emphasis in original).
148. *Id.* at 47 (emphasis added).
149. *Id.* at 46.
150. Favila v. Katten Muchin Rosenman LLP, 188 Cal. App. 4th 189, 208, 115 Cal. Rptr. 3d 274 (2010).

compromise a claim."[151] At the same time, the Legislature "create[d], in a new subdivision (c), exceptions from the procedural requirements of section 1714.10 for the two situations described in *Doctors' Co.*: 'where (1) the attorney has an independent legal duty to the plaintiff, or (2) the attorney's acts go beyond the performance of a professional duty to serve the client and involve a conspiracy to violate a legal duty in furtherance of the attorney's financial gain.'"[152]

"The net effect of the agent's immunity rule as articulated in *Doctors' Co.*, and the statutory exceptions to the section 1714.10 procedural requirements now contained in subdivision (c) is to *render that section practically meaningless.*"[153] As one court explained,

> [s]ince the exceptions now remove from section 1714.10's scope the two circumstances in which a valid attorney-client conspiracy claim may be asserted, section 1714.10's gatekeeping function applies only to attorney-client conspiracy claims that are not viable as a matter of law. Thus, a plaintiff who can plead a viable claim for conspiracy against an attorney need not follow the petition procedure outlined in section 1714.10 as such a claim necessarily falls within the stated exceptions to its application.[154]

Put differently,

> [i]f the plaintiff seeks to assert a conspiracy claim against an attorney based on the violation of a duty owed by the client, but not the attorney, and the attorney was acting within the scope of his or her professional responsibilities, the claim has no merit. The petition under section 1714.10 will be denied; but, in the absence of the statute, a demurrer would properly be sustained without leave to amend. *Section 1714.10, at best, provides the attorney with only an additional procedural safeguard against meritless claims.*[155]

Several courts of appeal have thus concluded that the impact of the 1991 amendment to Section 1714.10 "is anomalous."[156]

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151. Civ. Code § 1714(a); see *Favila*, 188 Cal. App. 4th at 209.
152. *Favila*, 188 Cal. App. 4th at 209, *quoting* Civ. Code § 1714(c).
153. *Favila*, 188 Cal. App. 4th at 209 (emphasis added; citation omitted).
154. Central Concrete Supply Co., Inc. v. Bursak, 182 Cal. App. 4th 1092, 1100, 105 Cal. Rptr. 3d 909 (2010) (citation, quotation marks, ellipses, and brackets omitted); see also *Pavicich*, 85 Cal. App. 4th at 396 ("In sum, given the rules of the law of conspiracy, the wording of section 1714.10, and its legislative history, it appears that there are no viable conspiracy actions to which section 1714.10's pleading hurdle might apply.").
155. *Favila,* 212 Cal. App. 4th at 1151 (emphasis added).
156. *Rickley,* 212 Cal. App. 4th at 1151 (Second Appellate District); *Berg & Berg,* 131 Cal. App. 4th at 818 (Sixth Appellate District). See also Panoutsopoulos v. Chambliss, 157 Cal. App. 4th 297, 304-05, 68 Cal. Rptr. 3d 647 (2007) (First Appellate District explaining in detail that Section 1714.10 has limited impact).

Implications of Section 1714.10's Limited Utility

The above-described developments reducing the practical significance of Section 1714.10 do not affect its potential utility as a model for the Commission to follow in crafting a preliminary filtering process for a legal malpractice case. The statute still provides a possible blueprint that the Commission could adapt to the legal malpractice context.

In reading about the current "anomalous" nature of Section 1714.10, however, the staff started to wonder whether it would be appropriate for the Commission to propose its repeal. The Commission does not have specific authority to study Section 1714.10, but it does have general authority to "study and recommend revisions to correct technical or *minor* substantive defects in the statutes of the state without a prior concurrent resolution of the Legislature referring the matter to it for study."[157]

On reflection, the staff urges the Commission to be cautious about relying on that authority as a basis for proposing to repeal Section 1714.10. The Legislature specifically considered repealing the provision in 1991,[158] but decided to amend it in response to *Doctors' Co.* instead.[159] A clarification of the provision, proposed by the California Defense Counsel, was enacted as recently as 2000.[160]

The provision might remain of interest to that organization (perhaps as a backstop in case *Doctors' Co.* is overturned), while other major stakeholder groups might view the situation differently. It is possible that an attempt to repeal Section 1714.10 could turn into a battle between such groups, requiring extensive resources to pursue.

We could further investigate this matter if the Commission is interested. Our *preliminary* advice would be to **focus on the study at hand and leave the proper fate of Section 1714.10 for others to consider.**

Suggested Language from Commissioner King

At the June meeting, it was Commissioner Victor King who first raised the possibility of using Section 1714.10 as a model for a provision that would help filter out meritless legal malpractice cases that allege mediation misconduct.

157. Gov't Code § 8298 (emphasis added).
158. See AB 2010 (Isenberg), as amended March 8, 1991.
159. See 1991 Cal. Stat. ch. 916, § 1 (SB 820 (Thompson)).
160. See 2000 Cal. Stat. ch. 472, § 2 (AB 2069 (Corbett)); see Senate Committee on Judiciary Analysis of AB 2069 (Aug. 8, 2000), p. 6.

After the meeting, he suggested the following possible language for discussion purposes:

> No cause of action against an attorney for misconduct or professional negligence in the context of a mediation shall be included in a complaint or other pleading unless the court enters an order allowing the pleading that includes the claim for attorney misconduct or professional negligence to be filed after the court determines that the party seeking to file the pleading has established that there is a reasonable probability that the party will prevail in the action. The court may allow the filing of a pleading alleging attorney misconduct or professional negligence in the context of mediation, and the necessity to introduce evidence not otherwise admissible from a confidential mediation, following the filing of a verified petition therefor accompanied by the lodging of the proposed pleading and supporting affidavits stating the facts upon which the liability is based. The court shall order service of the petition and lodged proposed pleading and supporting affidavits upon the party against whom the action is proposed to be filed and permit that party to lodge opposing affidavits prior to making its determination. The filing of the petition, and lodging of the proposed pleading and accompanying affidavits, shall toll the running of any applicable statute of limitations until the final determination of the matter, which ruling, if favorable to the petitioning party, shall permit the proposed pleading to be filed. This section shall not be applicable to State Bar disciplinary action.[161]

In offering this language, Commissioner King was just trying to be helpful and was "not trying to say that [it] is the best language or route for the Commission's recommendation."[162]

In evaluating Commissioner King's suggested language, the Commission might want to see how it compares with Section 1714.10. Here is mark-up of subdivision (a) of that section, with revisions shown in strikeout and underscore:

> 1714.10. (a) No cause of action against an attorney for ~~a civil conspiracy with his or her client arising from any attempt to contest or compromise a claim or dispute, and which is based upon the attorney's representation of the client,~~ misconduct or professional negligence in the context of a mediation shall be included in a complaint or other pleading unless the court enters an order allowing the pleading that includes the claim for ~~civil conspiracy~~ attorney misconduct or professional negligence to be filed after the court determines that the party seeking to file the pleading has established that there is a reasonable probability that the party will

161. Email from V. King to B. Gaal (6/18/16, #2).
162. Email from V. King to B. Gaal (6/17/16, #3).

prevail in the action. The court may allow the filing of a pleading ~~claiming liability based upon such a civil conspiracy~~ alleging attorney misconduct or professional negligence in the context of mediation, and the necessity to introduce evidence not otherwise admissible from a confidential mediation, following the filing of a verified petition therefor accompanied by the lodging of the proposed pleading and supporting affidavits stating the facts upon which the liability is based. The court shall order service of the petition and lodged proposed pleading and supporting affidavits upon the party against whom the action is proposed to be filed and permit that party to ~~submit~~ lodge opposing affidavits prior to making its determination. The filing of the petition, ~~proposed pleading, and accompanying affidavits~~ and lodging of the proposed pleading and accompanying affidavits, shall toll the running of any applicable statute of limitations until the final determination of the matter, which ruling, if favorable to the petitioning party, shall permit the proposed pleading to be filed. This section shall not be applicable to State Bar disciplinary action.

Commissioner King's suggested language does not track subdivisions (b) through (e) of Section 1714.10, which provide:

> (b) Failure to obtain a court order where required by subdivision (a) shall be a defense to any action for civil conspiracy filed in violation thereof. The defense shall be raised by the attorney charged with civil conspiracy upon that attorney's first appearance by demurrer, motion to strike, or such other motion or application as may be appropriate. Failure to timely raise the defense shall constitute a waiver thereof.
>
> (c) This section shall not apply to a cause of action against an attorney for a civil conspiracy with his or her client, where (1) the attorney has an independent legal duty to the plaintiff, or (2) the attorney's acts go beyond the performance of a professional duty to serve the client and involve a conspiracy to violate a legal duty in furtherance of the attorney's financial gain.
>
> (d) This section establishes a special proceeding of a civil nature. Any order made under subdivision (a), (b), or (c) which determines the rights of a petitioner or an attorney against whom a pleading has been or is proposed to be filed, shall be appealable as a final judgment in a civil action.
>
> (e) Subdivision (d) does not constitute a change in, but is declaratory of, the existing law.[163]

Confidentiality and Constitutionality

From a constitutional standpoint, there is an important distinction between (1) Section 1714.10 and (2) Commissioner King's suggested language for a similar

163. Emphasis added.

provision relating to a legal malpractice case alleging mediation misconduct. Under Section 1714.10, if a plaintiff wants to pursue a civil conspiracy claim within the scope of the statute, the plaintiff must file "a verified petition therefor *accompanied by* the proposed pleading and supporting affidavits stating the facts upon which the liability is based."[164] The proposed pleading and supporting affidavits presumably become part of the publicly available record along with the verified petition; there is nothing to suggest otherwise.

Under Commissioner King's suggested provision, in contrast, if a plaintiff wanted to pursue a claim against an attorney for misconduct or professional negligence in the context of a mediation, the plaintiff would have to file "a verified petition therefor *accompanied by the lodging of* the proposed pleading and supporting affidavits stating the facts upon which the liability is based."[165] Because the proposed pleading and supporting affidavits would only be lodged, they would only become a part of the public record if the court subsequently permits the plaintiff to file them.

From a mediation confidentiality standpoint, that treatment would be advantageous. If a court were to determine that a legal malpractice case alleging mediation misconduct lacks sufficient merit to proceed, the court would return the lodged documents (the proposed pleading and supporting affidavits) to the would-be plaintiff. Any mediation communications in those documents would remain out of the public eye, thus protecting the policy interests served by mediation confidentiality. The same would be true of any opposing affidavits that were lodged with the court; they would be returned to the party submitting them and would thus remain nonpublic.

From a constitutional standpoint, however, this treatment seems potentially problematic. It would mean that the court could reject a plaintiff's case on the merits yet the key documents underlying that conclusion would not be accessible to the public. Under the First Amendment right of access, "the presence of the exercise of a court's coercive powers … is the touchstone of the recognized right to access."[166] When a court exercises its adjudicatory powers, the public ordinarily should have access to the judicial records and court proceedings that

164. Emphasis added.
165. Emphasis added.
166. Cincinnati Gas & Electric Co. v. General Electric Co., 854 F.2d 900, 905 (6th Cir. 1988).

reveal the court's reasoning.[167] "An adjudication is a formal act of government, *the basis of which* should, absent exceptional circumstances, be subject to public scrutiny."[168] This is crucial to further the public interest in "observing and assessing the performance of its public judicial system …."[169]

It is important to remember, however, that the First Amendment right of access is not absolute.[170] In an ordinary civil case, a trial court may uphold a limitation on public access if (1) it is supported by an overriding interest, (2) there is a substantial probability that the overriding interest will be prejudiced absent the limitation on public access, (3) the limitation on public access is narrowly tailored to serve the overriding interest, and (4) there is no less restrictive means of achieving the overriding interest.[171]

Here, there seems to be a good chance that courts will say that mediation confidentiality is an "overriding interest" that "will be prejudiced" absent the limitation on access that Commissioner King suggests.[172] It is likely to be more difficult to establish, however, that "the limitation on public access is narrowly tailored to serve the overriding interest," and "there is no less restrictive means of achieving the overriding interest." In particular, *there is a serious risk* that courts might require use of a redaction approach similar to the one discussed in Memorandum 2016-18 (redacting references to mediation communications, but affording public access to other content), rather than permitting wholesale exclusion of documents lodged in connection with a petition to file a legal malpractice claim alleging mediation misconduct.[173]

Implications of the Foregoing Analysis for the Commission's Study

There are thus some potentially significant downsides to following an approach that would be modeled on Civil Code Section 1714.10 but designed to protect mediation communications from public disclosure. In particular,

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167. See Cuadra v. Univision Communications, Inc., 2012 U.S. Dist. LEXIS 48431, at *37 (D. N.J. 2012) (noting that "the legal and factual bases embodied in this Opinion" largely protect "[t]he public's interst — i.e., access to the Court's reasoning on this matter ….").

168. Joy v. North, 692 F.2d 880, 893 (2d Cir. 1982) (emphasis added).

169. NBC Subsidiary (KNBC-TV) v. Superior Court, 20 Cal. 4th 1178, 1210, 980 P.2d 330, 86 Cal. Rptr. 2d 778 (1999).

170. See, e.g., Butterworth v. Smith, 494 U.S. 624, 630 (1990); Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 10 (1986) (*"Press-Enterprise II"*).

171. See, e.g., *NBC Subsidiary*, 20 Cal. 4th at 1218. In general, a trial court must also provide advance notice to the public regarding a limitation on access, provide an opportunity to be heard on whether the limitation is justified, and enter specific, express findings justifying the limitation. See *id.* at 1217-18, 1226.

172. See generally Memorandum 2016-18, pp. 45-49.

173. See generally *id.* at 49-80.

- In determining whether to allow a plaintiff to file a legal malpractice case alleging mediation misconduct, a court could only assess whether the plaintiff has stated a claim and provided supporting evidence. The court could not weigh the competing evidence, because that is the province of the trier of fact and protected by the constitutional right to a jury trial. The preliminary filtering process may thus be less rigorous than the Commission envisioned when it discussed Section 1714.10 at the June meeting.
- To comply with the First Amendment right of access, it might be necessary to follow a labor-intensive redaction approach like the one described in Memorandum 2016-18, which the Commission expressed reservations about earlier this year.
- The approach would require substantial attention from a judicial officer, and thus would be a significant burden on judicial resources.

In light of these potential downsides, the staff decided to defer further analysis of this type of approach pending confirmation that the Commission would like to invest further resources in this direction.

Should the staff further pursue an approach modeled on Section 1714.10? If so, how does the Commission want to handle the First Amendment right of access issue? Possibilities include:

(1) Take no steps to protect the confidentiality of mediation communications in the filtering process — i.e., follow an approach that is essentially the same as the one used in Section 1714.10.
(2) The approach suggested by Commissioner King, in which the proposed pleading and supporting affidavits would only be lodged, and would only become a part of the public record if the court subsequently permits the plaintiff to file them.
(3) A redaction approach similar to the one described in Memorandum 2016-18.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

EMAIL FROM RON KELLY (6/22/16)

Ms. Barbara Gaal
Chief Deputy Counsel
California Law Revision Commission

Re: Study K-402 - Precedent for "Exception to the Exception"

Dear Ms. Gaal,

At their last meeting on June 1, 2016, several Commissioners seemed interested in the idea of allowing a client and attorney to maintain mediation confidentiality when they attempted to voluntarily resolve alleged mediation malpractice claims through a subsequent mediation. This was informally characterized as an exception to the exception.

This general idea was originally suggested by an attorney who has specialized for decades in bringing legal malpractice actions. This attorney said he wished the state of the law could return to what it was before the Supreme Court's Cassel decision. He also regularly mediates malpractice cases. He stated that confidentiality is an important element in his being able to resolve these cases voluntarily and advocated an exception to the exception for malpractice mediations.

If the Commission wishes to further develop this option, it might want to refer to a similar concept in the Uniform Mediation Act.

The drafters of the UMA decided to craft an exception to their general rule of confidentiality, for communications evidencing alleged child or elder abuse. They decided, however, that they wanted to retain the benefits of confidentiality for those mediations where the purpose was specifically to address alleged child or elder abuse.

They drafted UMA section 6(a)(7), which reads:

"There is no privilege under Section 4 for a mediation communication that is:
… (7) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party, unless the

[Alternative A: [State to insert, for example, child or adult protection] case is referred by a court to mediation and a public agency participates.]

[Alternative B: public agency participates in the [State to insert, for example, child or adult protection] mediation].

Respectfully submitted,

Ron Kelly
2731 Webster St.
Berkeley, CA 94705

STATE BAR COURT HEARING DEPARTMENT
GUIDELINES FOR SCHEDULING AND CONDUCTING
EARLY NEUTRAL EVALUATION CONFERENCES (ENEC)
RULE 5.30, RULES OF PROCEDURE
Effective November 1, 2015

Scheduling:

- Use court-approved form and submit to proper venue by facsimile or mail. All requests must be on the latest version of the form dated November 1, 2015. Requests on any other form will be returned and accompanied by a request to resubmit the new form.
- Supply multiple dates agreed to by opposing counsel. In order to schedule the ENEC within 15 days, the court may not be able to accommodate requested dates.
- Case Administrators will notify requestor of the assigned ENEC Judge and ENEC date.
- Requestor to notify opposing counsel - no written notice will be given by the court.
- The parties may not request a specific ENEC Judge.

Preparation for the conference:

- In addition to the required draft notice of disciplinary charges, the court requests the parties submit a brief statement of the case, including their settlement positions.
- Documents should be submitted as early as possible, but no later than three (3) court days in advance of the ENEC. The ENEC may be rescheduled if the ENEC Judge is not provided sufficient time to review the material.
- In order to increase productivity, the court encourages the parties to exchange documents prior to the ENEC.

Conduct of the Conference:

- The parties should be prepared to discuss the facts, the proposed charges and the potential for the imposition of discipline.
- The ENEC Judge will address settlement of the case, and therefore, the parties should be prepared to discuss settlement positions and should have settlement authority.
- In camera inspection of documents is permissible. While this may be necessary in some cases, the final evaluation may be based on information only available to one side which may lessen the opportunity for settlement.

Conclusion:

- If a settlement is reached, all material terms should be agreed upon at the ENEC. If a stipulation is to be filed, it should be directed to the ENEC Judge. If the stipulation is not filed by an agreed upon date, the ENEC Judge may schedule a continued ENEC prior to the filing of the notice of disciplinary charges.
- If no settlement is reached, the Office of Chief Trial Counsel may file a notice of disciplinary charges and should advise the opposing counsel when it will be filed.
- More than one ENEC may be necessary. Upon request of the parties, the ENEC Judge may permit a short continuance - the 15 day period set forth in Rule 5.30(A) will not apply.
- The ENEC Judge will not be the Trial Judge unless both parties consent. The ENEC Judge may serve as the Settlement Judge.

U.S. District Court, Northern District of California
Description of Early Neutral Evaluation Program
(from the court's website at www.cand.uscourts.gov/ene)

Early Neutral Evaluation (ENE)

Governing rule: ADR Local Rule 5.

Goals:

The goals of Early Neutral Evaluation (ENE) are to:

- enhance direct communication between the parties about their claims and supporting evidence,
- provide an assessment of the merits of the case by a neutral expert,
- provide a "reality check" for clients and lawyers,
- identify and clarify the central issues in dispute,
- assist with discovery and motion planning or with an informal exchange of key information, and
- facilitate settlement discussions, when requested by the parties.

ENE aims to position the case for early resolution by settlement, dispositive motion or trial. It may serve as a cost-effective substitute for formal discovery and pretrial motions. Although settlement is not the major goal of ENE, the process can lead to settlement.

See ADR LR 5-1.

Process:

The evaluator, an experienced attorney with expertise in the case's subject matter, hosts an informal meeting of clients and counsel at which the following occurs:

1. each side — through counsel, clients or witnesses -- presents the evidence and arguments supporting its case (without regard to the rules of evidence and without direct or cross-examination of witnesses),
2. the evaluator identifies areas of agreement, clarifies and focuses the issues and encourages the parties to enter procedural and substantive stipulations.
3. the evaluator writes an evaluation in private that includes:
    - an estimate, where feasible, of the likelihood of liability and the dollar range of damages;
    - an assessment of the relative strengths and weaknesses of each party's case; and
    - the reasoning that supports these assessments.

4. The evaluator offers to present the evaluation to the parties, who may then ask either to hear the evaluation (which must be presented if any party requests it), or postpone hearing the evaluation to:
    - engage in settlement discussions facilitated by the evaluator, often in separate meetings with e ach side, or
    - conduct focused discovery or make additional disclosures.

5. If settlement discussions do not occur or do not resolve the case, the evaluator may:
    - help the parties devise a plan for sharing additional information and/or conducting the key discovery that will expeditiously equip them to enter meaningful settlement discussions or position the case for resolution by motion or trial,
    - help the parties realistically assess litigation costs, and/or
    - determine whether some form of follow up to the session would contribute to case development or settlement.

See ADR LR 5-11.

Preservation of right to trial:

The evaluator has no power to impose settlement and does not attempt to coerce a party to accept any proposed terms. The parties' formal discovery, disclosure and motion practice rights are fully preserved. The confidential evaluation is non-binding and is not shared with the trial judge. The parties may agree to a binding settlement. If no settlement is reached, the case remains on the litigation track.

The neutral:

The court's ADR staff appoints an ENE evaluator with expertise in the substantive legal area of the lawsuit, who is available and has no apparent conflict of interest. The parties may object to the evaluator if they perceive a conflict of interest.

All evaluators on the court's panel have the following qualifications:

- admission to the practice of law for at least 15 years
- experience with civil litigation in federal court
- expertise in the substantive law of the case
- training by the court
- Some evaluators also have received the court's mediation training.

See ADR LR 2-5(b).

Attendance:

The following individuals are required to attend in person:

- clients with settlement authority and knowledge of the facts
- the lead trial attorney for each party
- insurers of parties, if their agreement would be necessary to achieve a settlement

Requests to permit attendance by phone rather than in person, which will be granted only under extraordinary circumstances, may be made to the ADR Magistrate Judge. Clients are strongly encouraged to participate actively in the ENE session.

See ADR LR-5-10.

Confidentiality:

Communications made in connection with an ENE session ordinarily may not be disclosed to the assigned judge or to anyone else not involved in the litigation, unless otherwise agreed.

See ADR LR 5-4, ADR LR 5-5 and ADR LR 5-7.

Written submissions:

Counsel exchange and submit written statements to the evaluator at least 10 days before the ENE session. ADR Local Rule 5-9 lists special requirements for intellectual property cases. The statements are not filed with the court.

See ADR LR 5-8.

Appropriate cases/circumstances:

All civil cases in which the parties are represented by counsel are eligible if the court has an available evaluator with the appropriate subject matter expertise. Cases with the following characteristics may be particularly appropriate:

- counsel or the parties are far apart on their view of the law and/or value of the case
- the case involves technical or specialized subject matter — and it is important to have a neutral with expertise in that subject
- case planning assistance would be useful
- communication across party lines (about merits or procedure) could be improved
- equitable relief is sought — if parties, with the aid of a neutral expert, might agree on the terms of an injunction or consent decree.

See ADR LR 5-2.

Cost:

ENE Evaluators shall volunteer up to two hours of preparation time and the first four hours in an ENE session. After four hours in an ENE session, the Evaluator may (1) continue to volunteer his or her time or (2) give the parties the option of either concluding the proceeding or paying the Evaluator. The ENE proceeding will continue only if all parties and the Evaluator agree. If all parties agree to continue, the Evaluator may then charge his or her hourly rate or such other rate that all parties agree to pay. If more substantial preparation by the Evaluator is desired, the parties may discuss appropriate alternative payment arrangements with the Evaluator.

See ADR LR 5-3(b) and 5-3(c).

U.S. District Court, Northern District of California
Excerpts from ADR Local Rules
(available at https://www.cand.uscourts.gov/localrules/ADR)

2-5. Neutrals

(a) Panel. The ADR Unit shall maintain a panel of neutrals serving in the Court's ADR programs. Neutrals will be selected from time to time by the Court from applications submitted by lawyers willing to serve or by other persons as set forth in section (b)(3) below. Neutrals will be appointed to renewable terms of 4 years. The legal staff of the ADR Unit may serve as neutrals.

(b) Qualifications and Training. Each lawyer serving as a neutral in a Court ADR program must be a member of the bar of this Court or a member of the faculty of an accredited law school and must successfully complete initial and periodic training as required by the Court. Additional minimum requirements for serving on the Court's panel of neutrals, which the Court may modify in individual circumstances for good cause, are as follows:

(1) ENE Evaluators. Evaluators must have been admitted to the practice of law for at least 15 years and have considerable experience with civil litigation in federal court. Evaluators must also have substantial expertise in the subject matter of the cases assigned to them and must have the temperament and training to listen well, facilitate communication across party lines and, if called upon, assist the parties with settlement negotiations.

(2) Mediators. Lawyer mediators must have been admitted to the practice of law for at least 7 years and must be knowledgeable about civil litigation in federal court. Mediators shall have strong Mediation process skills and the temperament and training to listen well, facilitate communication across party lines and assist the parties with settlement negotiations. Mediators who are not lawyers may also be selected to serve on the Court's panel of mediators if they have appropriate professional credentials in another discipline and are knowledgeable about civil litigation in federal court. A non-lawyer mediator may be appointed to a case only with the consent of the parties.

(c) Oath. Persons serving as neutrals in any of the Court's ADR programs must take the oath or affirmation prescribed in 28 U.S.C. § 453.

(d) Disqualification of Neutrals

(1) Applicable Standards. No person may serve as a neutral in a case in a Court ADR program in violation of:

(A) the standards set forth in 28 U.S.C. § 455, or

(B) any applicable standard of professional responsibility or rule of professional conduct, or

(C) other guidelines adopted by the Court concerning disqualification of neutrals.

(2) Mandatory Disqualification and Notice of Recusal. A prospective neutral who discovers a circumstance requiring disqualification must immediately notify the parties and the ADR Unit in writing. The parties may not waive a basis for disqualification that is described in 28 U.S.C. Section 455 (b).

(3) **Disclosure and Waiver of Non-Mandatory Grounds for Disqualification**. If a prospective neutral discovers a circumstance that would not compel disqualification under an applicable standard of professional responsibility or rule of professional conduct or other guideline, or under § 455(b), but that might be covered by § 455 (a), the neutral shall promptly disclose that circumstance to all counsel in writing, as well as the ADR Unit. A party who has an objection to the neutral based upon an allegation that the neutral has a conflict of interest must present this objection in writing to the ADR Unit and all counsel within 7 days of learning the source of the potential conflict or shall be deemed to have waived objection.

(4) **Objections Not Based on Disclosures by Neutral**. Within 7 days of learning the identity of a proposed neutral, a party who objects to service by that neutral must deliver to the ADR Unit and to all other counsel a writing that specifies the bases for the objection. The ADR Director shall determine whether the proposed neutral will serve or whether another neutral should be appointed. Appeal from such a determination must be made directly to the ADR Magistrate Judge within 7 days of the notice of the ADR Director's determination.

(e) **Immunities.** All persons serving as neutrals in any of the Court's ADR programs are performing quasi-judicial functions and are entitled to the immunities and protections that the law accords to persons serving in such capacity.

5. EARLY NEUTRAL EVALUATION

5-1. Description

In Early Neutral Evaluation (ENE) the parties and their counsel, in a confidential session, make compact presentations of their claims and defenses, including key evidence as developed at that juncture, and receive a non-binding evaluation by an experienced neutral lawyer with subject matter expertise. The Evaluator also helps identify areas of agreement, offers case-planning suggestions and, if requested by the parties, settlement assistance.

5-2. Eligible Cases

Subject to the availability of administrative resources and of an Evaluator with subject matter expertise, appropriate civil cases may be referred to ENE by order of the assigned Judge following a stipulation by all parties, on motion by a party under Civil L.R. 7, or on the Judge's initiative.

5-3. Evaluators

(a) **Appointment**. After entry of an order referring a case to ENE, the ADR Unit will appoint from the Court's panel an Evaluator who has expertise in the subject matter of the lawsuit, is available during the appropriate period and has no apparent conflict of interest. The Court will notify the parties of the appointment. The rules governing conflicts of interest and the procedure for objecting to an Evaluator are set forth in ADR L.R. 2-5(d). The procedures for party input into the selection process are posted on the ADR website at cand.uscourts.gov/adr.

(b) **Compensation**. ENE Evaluators shall volunteer up to two hours of preparation time and the first four hours in an ENE session. After four hours in an ENE session, the Evaluator may (1) continue to volunteer his or her time or (2) give the parties the option of either concluding the proceeding or paying the Evaluator. The ENE proceeding will continue only if all parties and the Evaluator agree. If all parties agree to continue, the Evaluator may then charge his or her hourly rate or such other rate that all parties agree to pay. If more substantial preparation by the Evaluator is desired, the parties may discuss appropriate alternative payment arrangements with the Evaluator. Alternative arrangements must be approved by the ADR Legal Staff. No party may offer or give the Evaluator any gift.

(c) **Payment**. All terms and conditions of payment must be clearly communicated to the parties. The parties may agree to pay the fee in other than equal portions. The parties must pay the Evaluator directly, or the Evaluator's law firm or employer, as directed by the Evaluator. On a questionnaire form provided by the Court, the Evaluator shall promptly report to the ADR Unit the amount of any payment received.

5-4. Timing and Scheduling the ENE Session

(a) **Scheduling by Evaluator**. Promptly after being appointed to a case, the Evaluator must arrange for the pre-session phone conference under ADR L.R. 5-7 and, after consulting with all parties, must fix the date and place of the ENE session within the deadlines set by paragraph (c) below, or the order referring the case to ENE.

(b) **Cooperating with the Evaluator**. Counsel must respond promptly to and cooperate fully with the Evaluator with respect to scheduling the pre-session phone conference and the ENE session.

(c) **Deadline for Conducting Session**. Unless otherwise ordered, the ENE session must be held within 90 days after the entry of the order referring the case to ENE.

Commentary

If the parties believe that the deadline for conducting an ENE is not appropriate, they should promptly seek an extension of time in accordance with the procedures set forth in ADR L.R. 5-5.

5-5. Requests to Extend Deadline

(a) **Motion Required**. Requests for extension of the deadline for conducting an ENE session must be made by the parties no later than 14 days before the session is to be held and must be directed to the assigned Judge, in a motion or stipulation and proposed order under Civil L.R. 7, with a copy to the other parties, the Evaluator (if appointed) and the ADR Unit.

(b) **Content of Motion**. Such motion must:

(1) Detail the considerations that support the request;

(2) Indicate whether the other parties concur in or object to the request; and

(3) Be accompanied by a proposed order setting forth a new deadline by which the ENE session shall be held.

5-6. Ex Parte Contact Prohibited

Except with respect to scheduling matters, there shall be no *ex parte* communications between parties or counsel and the Evaluator, including private caucuses to discuss settlement, until after the Evaluator has committed his or her evaluation to writing and all parties have agreed that *ex parte* communications with the Evaluator may occur.

5-7. Telephone Conference Before ENE Session

The Evaluator shall schedule a brief joint telephone conference before the ENE session with counsel who will attend the ENE session to discuss matters such as the scheduling of the ENE session, the procedures to be followed, compensation of the neutral, the nature of the case, the content of the written ENE statements, and which client representatives will attend. The Evaluator may schedule additional joint pre-session calls as appropriate.

Commentary

If more than one pre-session phone conference is conducted, all counsel do not necessarily need to participate in every call but the lead counsel who will attend the ENE session must participate in at least one pre-session phone conference. See ADR L.R. 5-10(b).

5-8. Written ENE Statements

(a) **Time for Submission**. No later than 7 days before the first ENE session unless otherwise directed by the Evaluator, each party must submit directly to the Evaluator, and must serve on all other parties, a written ENE Statement.

(b) **Prohibition Against Filing**. The statements constitute confidential information as defined in ADR L.R. 5-12, must not be filed and the assigned Judge shall not have access to them.

(c) **Content of Statement**. The statements must be concise, may include any information that may be useful to the Evaluator, and must, unless otherwise directed by the Evaluator:

(1) Identify, by name and title or status:

(A) The person(s) with decision-making authority, who, in addition to counsel, will attend the ENE session as representative(s) of the party, and

(B) Persons connected with a party opponent (including an insurer representative) whose presence might substantially improve the utility of the ENE session or the prospects for settlement;

(2) Describe briefly the substance of the suit, addressing the party's views of the key liability issues and damages and discussing the key evidence;

(3) Address whether there are legal or factual issues whose early resolution would reduce significantly the scope of the dispute or contribute to settlement negotiations;

(4) Identify the discovery that is necessary to equip the parties for meaningful settlement negotiations; and

(5) Include copies of documents out of which the suit arose (e.g., contracts), or whose availability would materially advance the purposes of the Evaluation session, (e.g., medical reports or documents by which special damages might be determined).

5-10. Attendance at Session

(a) **Parties**. All named parties and their counsel are required to attend the ENE session in person unless excused under paragraph (d) below. This requirement reflects the Court's view that the principal values of ENE include affording litigants opportunities to articulate directly to other parties and a neutral their positions and interests and to hear, first hand, both their opponent's version of the matters in dispute and a neutral assessment of the merits of the case and the relative strengths of each party's legal positions.

(1) **Corporation or Other Non-Governmental Entity.** A party other than a natural person (e.g., a corporation or an association) satisfies this attendance requirement if represented by a person (other than outside counsel) who has final authority to settle and who is knowledgeable about the facts of the case. If final authority to settle is vested only in a governing board, claims committee, or equivalent body and cannot be delegated to a representative, an entity must disclose (in writing or electronically) this fact to all other parties and the Evaluator at least 14 days before the ENE session will occur. This required disclosure must identify the board, committee, body, or persons in whom final settlement authority is vested. In this instance the party must send the person (in addition to counsel of record) who has, to the greatest extent feasible, authority to recommend a settlement, and who is knowledgeable about the facts of the case, the entity's position, and the procedures and policies under which the entity decides whether to accept proposed settlements.

(2) **Government Entity.** A unit or agency of government satisfies this attendance requirement if represented by a person (in addition to counsel of record) who has, to the greatest extent feasible, authority to settle, and who is knowledgeable about the facts of the case, the governmental unit's position, and the procedures and policies under which the governmental unit decides whether to accept proposed settlements. If the action is brought by the government on behalf of one or more individuals, at least one such individual also must attend.

(b) Counsel. Each party must be accompanied at the ENE session by the lawyer who will be primarily responsible for handling the trial of the matter.

(c) Insurers. Insurer representatives are required to attend in person unless excused under paragraph (d) below, if they have accepted coverage, or the duty to defend, even if subject to a reservation of rights.

(d) Request to be Excused. A person who is required to attend an ENE session may be excused from attending in person only after a showing that personal attendance would impose an extraordinary or otherwise unjustifiable hardship. A person seeking to be excused must submit, no fewer than 14 days before the date set for the session, a letter to the ADR Magistrate Judge in care of the ADR Unit at the address listed in ADR L.R. 2-1(c), or emailed to ADR_Attendance@cand.uscourts.gov, simultaneously copying all counsel and the Evaluator. The letter must:

(1) Set forth all considerations that support the request;

(2) State realistically the amount in controversy in the case;

(3) Identify by name and title or status the individual(s) seeking to be excused;

(4) Identify by name and title or status all those persons who will attend;

(5) Identify by name and title or status the person(s) with decision-making authority, and

(6) Indicate whether the other party or parties and the Evaluator join in or object to the request.

The request may not be filed or disclosed to the assigned judge.

(e) Opposing a Request to be Excused or Seeking to Compel Attendance by an Appropriate Party Representative.

(1) A party who opposes another party's request to be excused from attending in person an ENE session may submit to the ADR Magistrate Judge in care of the ADR Unit at the address listed in ADR L.R. 2-1(c), or emailed to ADR_Attendance@cand.uscourts.gov, within 4 days of receiving a copy of the request, a letter setting forth all grounds for the opposition. Such a letter must be served simultaneously on all parties and the Evaluator– and may not be filed or disclosed to the assigned judge.

(2) A party who alleges that another party will not be represented at an ENE session by an appropriate representative may submit to the ADR Magistrate Judge in care of the ADR Unit at the address listed in ADR L.R. 2-1(c), or emailed to ADR_Attendance@cand.uscourts.gov, as far in advance of the session as practicable, a letter setting forth the bases for this allegation, along with a proposed order. Within 4 days of receiving a copy of such a letter, the party so challenged may submit to the ADR Magistrate Judge a responsive letter. Such letters must be sent to the ADR Magistrate Judge in care of the ADR Unit at the address listed in ADR L.R. 2-1(c), or emailed to ADR_Attendance@cand.uscourts.govand served simultaneously on all other parties and the Evaluator – and may not be filed or disclosed to the assigned judge.

(f) **Participation by Telephone**. Unless otherwise ordered, a person excused from appearing in person at an ENE session must participate by telephone for the duration of the session or until excused by the neutral.

Commentary

Ordinarily, a corporation or other entity, including a governmental entity or an insurer, satisfies the attendance requirement by sending a person or persons who can agree to a settlement without the necessity of gaining approval from anyone else. Exceptions to this general practice must be disclosed and addressed in advance of the session.

5-11. Procedure at ENE Session

(a) **Components of ENE Session**. The Evaluator shall:

(1) Permit each party (through counsel or otherwise), orally and through documents or other media, to present its claims or defenses and to describe the principal evidence on which they are based;

(2) Help the parties identify areas of agreement and, where feasible, enter stipulations;

(3) Assess the relative strengths and weaknesses of the parties' contentions and evidence, and explain carefully the reasoning that supports these assessments;

(4) Estimate, where feasible, the likelihood of liability and the dollar range of damages;

(5) Help the parties devise a plan for sharing the important information and/or conducting the key discovery that will equip them as expeditiously as possible to enter meaningful settlement discussions or to position the case for disposition by other means;

(6) Help the parties assess litigation costs realistically;

(7) If the parties are interested, help them, through private caucusing or otherwise, explore the possibility of settling the case; and

(8) Determine whether some form of follow up to the session would contribute to the case development process or to settlement.

(b) **Process Rules**. The session shall be informal. Rules of evidence shall not apply. There shall be no formal examination or cross-examination of witnesses and no recording of the presentations or discussion shall be made.

(c) **Evaluation and Settlement Discussions**. If all parties agree, they may proceed to discuss settlement after the evaluation has been written but before it is presented. The evaluation must be presented orally on demand by any party. Copies of the written evaluation may be provided to the parties at the discretion of the Evaluator. The parties also may agree to discuss settlement after the evaluation has been presented.

5-12. Confidentiality

(a) Confidential Treatment. Except as provided in subdivision (b) of this local rule, this Court, the Evaluator, all counsel and parties, and any other persons attending the ENE session shall treat as "confidential information" the contents of the written ENE Statements, anything that was said, any position taken, and any view of the merits of the case expressed by any participant in connection with any ENE session. "Confidential information" shall not be:

(1) Disclosed to anyone not involved in the litigation;

(2) Disclosed to the assigned judge; or

(3) Used for any purpose, including impeachment, in any pending or future proceeding in this Court.

(b) Limited Exceptions to Confidentiality. This rule does not prohibit:

(1) Disclosures as may be stipulated by all parties and the Evaluator;

(2) Disclosures made in a subsequent confidential ADR or settlement proceeding under these Rules;

(3) A report to or an inquiry by the ADR Magistrate Judge pursuant to ADR L.R. 2-4 regarding a possible violation of the ADR Local Rules;

(4) The Evaluator from discussing the ENE session with the Court's ADR staff, who shall maintain the confidentiality of the ENE session;

(5) Any participant or the Evaluator from responding to an appropriate request for information duly made by persons authorized by the Court to monitor or evaluate the Court's ADR program in accordance with ADR L.R. 2-6; or

(6) Disclosures as are otherwise required by law.

(c) Confidentiality Agreement. The Evaluator may ask the parties and all persons attending the ENE session to sign a confidentiality agreement on a form provided by the Court.

Commentary

Ordinarily, anything that was said in connection with an ENE session is to be treated as confidential in the same manner and for the same reasons as with Mediation. Please see the legal authorities cited in the commentary to ADR Local Rule 6-12(c).

Commentary (to Rule 6-12(c))

Ordinarily, anything that was said in connection with a Mediation is confidential. *See, e.g.*, Fed. R. Evid. 408; *Folb v. Motion Picture Industry Pension & Health Plans*, 16 F. Supp. 2d 1164 (C.D. Cal. 1998); Cal. Evid. Code §§ 703.5 and 1115-28; *Simmons v. Ghaderi*, 44 Cal.4th 570 (2008); *Rojas v. Superior Court*, 33 Cal. 4th 407 (2004); *Foxgate Homeowner's Assn. v. Bramalea California, Inc.*, 26 Cal.4th 1 (2001). The law may provide some limited circumstances in which the need for disclosure outweighs the importance of protecting the confidentiality of a Mediation. *E.g.*, threats of death or substantial bodily injury (*see* Or. Rev. Stat. § 36.220(6)); use of Mediation to commit a felony (*see* Colo. Rev. Stat. § 13-22-307); right to effective cross examination in a quasi-criminal proceeding (*see Rinaker v. Superior Court*, 62 Cal.App.4th 155 (3d Dist. 1998); lawyer duty to report misconduct (*see In re Waller*, 573 A.2d 780 (D.C. App. 1990); need to prevent manifest injustice (*see* Ohio Rev. Code § 2317.023(c)(4); *see also* Uniform Mediation Act, § 6 (2001). Accordingly, after application of legal tests which are appropriately sensitive to the policies supporting the confidentiality of Mediation proceedings, the Court may consider whether the interest in Mediation confidentiality outweighs the asserted need for disclosure. *See* amended opinion in *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110 (N.D. Cal. 1999). Nothing in this commentary is intended to imply that, absent truly exigent circumstances, confidential matters may be disclosed without prior approval by the Court.

5-13. Follow Up

(a) **Discussion at Close of ENE**. At the close of the ENE session, the Evaluator and the parties shall discuss whether it would be beneficial to schedule any follow up to the session.

(b) **Follow Up the Evaluator May Order**. The Evaluator may order these kinds of follow up without stipulation:

(1) Responses to settlement offers or demands;

(2) A focused telephone conference;

(3) Exchanges of letters between counsel addressing specified legal or factual issues; or

(4) Written or telephonic reports to the Evaluator, e.g., describing how discovery or other events occurring after the ENE session have affected a party's analysis of the case or position with respect to settlement.

(c) **Stipulation to Follow Up Session**. With the consent of all parties, the Evaluator may schedule one or more follow up ENE sessions that may include additional evaluation, settlement discussions, or case development planning.

(d) **Limitations on Authority of Evaluator**. Evaluators have no authority to compel parties to conduct or respond to discovery or to file motions. Nor do Evaluators have authority to determine what the issues in any case are, to impose limits on parties' pretrial activities, or to impose sanctions.

5-14. Certification of Session

Within 14 days of the close of each ENE session, and on the form Certification of Session provided by the Court, the Evaluator must report to the ADR Unit: the date of the session, whether any follow up is scheduled, and whether the case settled in whole or in part. The ADR Unit will enter this information on the docket.