Protecting against attorney malpractice and misconduct at mediation – at what cost?

Is the law revision commission throwing the baby out with the bath water? Or, if it isn't broken, don't fix it!

By Frederick J. Carr

In June of this year, the California Law Revision Commission (the "Commission") issued its Tentative Recommendation in connection with the "Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct." The thoroughness of the Commission's efforts must be applauded. It reviewed the history of California's statutory scheme as it pertains to mediation, California Supreme, Appellate and lower Court decisions, those of other states and federal jurisdictions, scholarly articles and empirical data. Its efforts resulted in a 156-page report, supported by nearly 800 footnotes.

In spite of those exhaustive efforts, it appears that in the face of *very* limited instances of attorney malpractice and misconduct in the mediation context, the Commission has erred on the side of eviscerating mediation confidentiality as California attorneys, mediators and mediation participants have come to know it.

The Commission recommends adding a new Section 1120.5 to the Evidence Code: A communication or a writing that is made or prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is *not* made inadmissible, or protected from disclosure … if all of the following requirements are satisfied: (1) the evidence is relevant to prove or disprove an allegation that a lawyer breached a professional requirement when representing a client in the context of mediation or mediation consultation; (2) the evidence is … used … in a disciplinary proceeding of the state bar, a cause of action for damages against the lawyer based upon a claim of malpractice, and/or a dispute between the attorney and client concerning fees, costs, or both.[1]

The new Evidence Code section will remove current legal protections in order to allow both a dissatisfied client, and her or his accused attorney, to later: a) subpoena *all* parties to produce their confidential mediation briefs, offers, admissions, potential resolutions and other electronic communications they sent to the mediator, and: b) subpoena all participants (not the mediator) to repeat later under oath what they and the mediator said in mediation, if the evidence is relevant to a disciplinary proceeding or their later malpractice claims or defenses.

This article summarizes the exhaustive research efforts by the Commission, explores its considerations, challenges its conclusions and invites public participation in the Commission's process before the comment period closes on September 1, 2017.

Background and scope of the commission's study

Pursuant to a Legislative directive in 2012, the Commission was to analyze "the relationship under current law between mediation confidentiality and attorney malpractice and other misconduct." Since that time, it has held twenty-two public meetings, heard testimony from more than seventy people, received written comments from hundreds of individuals and organizations, and considered over ninety staff memoranda on the subject (totaling thousands of pages of commentary). Based on the information received thus far, the Commission tentatively concluded that "existing California law does not place enough weight on the interest in holding an attorney accountable for malpractice or other professional misconduct in a mediation context.[2] [3]

Policy considerations[4]

The Commission noted that the main policy argument *for* mediation confidentiality rests on four key premises: (1) confidentiality promotes candor in mediation; (2) candid discussions lead to successful mediation; (3) successful mediation encourages future use of mediation to resolve disputes; and (4) the use of mediation to resolve disputes is beneficial to society, and further opined that mediation is "thought" to have multiple benefits: self-determination; party satisfaction; creativity that may result in a win-win solution for the disputants; cost reduction; delay reduction; conservation of judicial resources and alleviation of court congestion.

The Commission also stated that the policy analysis for *permitting disclosure of mediation communications* bearing on attorney misconduct has several key components: mediation confidentiality may

deprive a party of evidence that would help prove that an attorney committed malpractice or engaged in other misconduct; because mediation confidentiality may result in exclusion of relevant evidence, attorney misconduct may go unpunished; allowing attorney misconduct to go unpunished may chill future use of mediation and deprive the public of its benefits; allowing attorney misconduct to go unpunished may undermine attorney-client relations and the administration of justice.

The study recognized the "direct clash" between two strong policies: (1) attaining the societal benefits of mediation confidentiality; and (2) furthering public confidence in the justice system and the pursuit of justice for all.

Case Law Review

The Commission reviewed all relevant California Supreme and Appellate Court decisional law and expressly acknowledged Justice Chin's warning in his concurrence with the majority opinion in *Cassel v. Superior Court*: "the court's holding would effectively shield an attorney's actions during mediation, including advising the client, from a malpractice action even if those actions are incompetent or even deceptive. Attorneys participating in mediation will not be held accountable for any incompetent or fraudulent actions during that mediation unless the actions are so extreme as to engender a criminal prosecution against the attorney. This is a high price to pay to preserve total confidentiality in the mediation process."[5] Justice Chin expressly "urged the Legislature to reconsider the statutory scheme."

The Commission was also expressly directed to consider two other California lower court cases, *Wimsatt v. Superior Court*[6] and *Porter v. Wyner*[7], both of which involved the intersection of California's mediation confidentiality statutes and allegations of attorney misconduct.

In spite of a paucity of cases being brought in connection with attorney malpractice or misconduct (see below), the Commission appeared to be especially persuaded by the *Wimsatt* decision, "Given the number of cases in which the fair and equitable administration of justice has been thwarted, *perhaps it is time for the Legislature to reconsider California's broad and expansive mediation confidentiality statutes and to craft ones that would permit countervailing public policies be considered."* (Emphasis added.)

Empirical data

In 2006, Profs. Coben and Thompson noted the lack of empirical data on mediation generally, but pointed out that "one extremely large database" had been largely overlooked thus far: "the reported decisions of state and federal judges forced to confront legal disputes about mediation." Through Westlaw searches of all federal and state opinions issued between 1999 and 2003, likely in the tens of thousands, they found 1,223 cases that implicated mediation issues, reviewed those cases and compiled various types of information about them. In spite of over 1,200 cases addressing mediation issues, Profs. Coben and Thompson admitted that "[o]nly the *rare* mediated dispute shows up in a reported opinion."

Profs. Coben and Thompson summarized their findings as follows: "the more significant finding is the large volume of opinions in which courts considered detailed evidence of what transpired in mediations *without a* confidentiality issue being raised – either by the parties, or *sua sponte* by the court." (Emphasis added.) In sum, it was concluded that "the walls of the mediation room are remarkably transparent."

The results of a second study that Profs. Coben and Thompson conducted were similar. In particular, they concluded that "if there is widespread overreaching and unfairness in the thousands of mediations throughout the country, *it is not showing up in great numbers in the reported cases. The two studies also show, however, that allegations of mediation misconduct occasionally occur and a few of them succeed."*

In a 2009 study, Prof. T. Noble Foster and Selden Prentice reviewed recently published Washington cases and found only *three* in which a court admitted mediation communications. The Washington researchers also surveyed local mediators, judges, and attorneys, who had handled a combined total of over *23,000* mediations. Out of all those mediations, the survey respondents were only aware of 65 breaches of confidentiality (much less than 1 percent).

In 2008, the Chief Judge of the U.S. District Court for the Southern District of Ohio sent a questionnaire to 290 lawyers that asked questions about their experiences with different types of settlement procedures. The results showed that the lawyers "thought that parties *could be much less candid with judges assigned to the case than with each of the other types of neutrals,*" and "thought that judges assigned to the case were much less "able to fully explore settlement without prejudice to ongoing litigation if the case is not settled, than other types of neutrals." The study also found that of the five procedural options, the lawyers thought *parties could be most candid with private mediators*. Court staff mediators and volunteer mediators for court programs ranked higher than judges not assigned to the case. The results were similar with regard to the ability to explore settlement fully without prejudice.

The Commission concluded that in sum, looking at the empirical data from across the country on the costs and benefits of mediation, the situation appears to be:

- It is unclear whether mediation results in significant cost savings, helps reduce court dockets, or shortens case disposition times.
- Empirical studies fairly consistently show that disputants like using the mediation process. Whether mediation is the *most* effective means, as opposed to an effective means, of promoting disputant satisfaction is not definitively resolved, but mediation is clearly very popular.

It is unclear whether mediation results in more durable or otherwise better settlements than unassisted negotiations.

It's no surprise that certain parameters are "unclear" as those issues were not being considered in the studies!

In the Commission's view, the empirical data discussed, while imperfect, tends to suggest: (1) Mediation, or at least court-connected mediation, serves valuable purposes in California; (2) mediation misconduct is relatively *infrequent*, but allegations of such misconduct do occur *occasionally* and at least a *few* of those allegations appear to have some merit.

California Court programs

The Commission also reviewed data from five California early mediation pilot programs. In stark contrast to the empirical data, the results showed that the early mediation pilot programs were successful based on all of the criteria specified by the Legislature in the pilot program statute. "These benefits included *reductions in trial rates, case disposition time, and the courts' workload, increases in litigant satisfaction with the court's services, and decreases in litigant costs in cases that resolved at mediation in some or all of the participating courts*." The results thus tend to support one of the premises underlying mediation confidentiality: the notion that mediation is a beneficial process, which should be encouraged and therefore *governed by rules that promote its effectiveness*.

The Commission acknowledged that other California research reflects similarly positive results.

In an early study, the Judicial Council examined how ADR affected civil cases in Los Angeles, San Diego, and El Dorado Superior Courts, as well as several municipal courts. The study reported "a high level of satisfaction from the parties and attorneys involved" and "found significant savings to the court system in reducing motions, hearings, conferences, and trials." In addition, the study showed that "the program was associated with a reduction in the trial judgment rate, no change in median time to disposition, and possibly a reduction in relitigation compared to trial judgments.

The results of a mediation program in Division Two of the Fourth District Court of Appeal were also promising, leading to a two-year experimental mediation program. For the 217 cases mediated during the pilot period, the settlement rate was 43.3 percent and the time from notice of appeal to resolution "was reduced from approximately fourteen months to about four months …." The experimental mediation program also "achieved substantial savings for the parties as well as for the court, primarily by assisting the parties to settle before briefing." In addition, "evaluations by participants of the mediation process, the mediators, and program administration were generally quite positive." Because the experimental program was a success, the program was made permanent. Data from the permanent program are similarly favorable.

In San Mateo County Superior Court, virtually 100 percent of the ADR used in the court's civil/probate/complex litigation program from July 2007 to July 2008 was mediation, although the court offered other options. The "overwhelming majority" of attorneys surveyed said that ADR reduced court time. In addition, "85 percent of respondents believed that costs were reduced as a result of ADR." The court also found that "[m]ost respondents, regardless of their role, felt very satisfied with the process.

Northern District of California research

The NDCA has offered a multi-option ADR program for many years, and the "parties consistently have been choosing the least structured and the least rule-controlled of the Court's ADR process options [mediation]."

As Magistrate Judge Brazil puts it: "[t]here simply is *no evidence* that the substantially lower level and of regulation-based control of mediation and judicially hosted settlement conferences engenders greater fear that parties will try to take advantage, for improper purposes, of the freedom and flexibility that these procedures entail. *Nor is there evidence* that, in fact, there is a higher incidence of misbehavior by participants or neutrals in these more fluid processes. *The incidence of complaints about abuse of any of the Court's ADR processes is extremely small – and the complaints that do surface most often are based on alleged post-process breaches (by* parties, *not neutrals) of confidentiality rules, not on misbehavior during the events*.

State Bar and Judicial Council research

The Commission also sought information concerning attorney malpractice and misconduct in mediation from the State Bar and Judicial Council. Unfortunately, the State Bar has not collected any data on the point, and although the Judicial Council could not provide any data on attorney misconduct in the mediation context, it did provide some information suggesting that mediator misconduct in California's court-connected mediation programs is infrequent.

In spite of California's court system being the largest in the world, the Commission reiterated that "California's court-connected mediation programs are quite popular and studies consistently show high levels of satisfaction with those programs. From those facts, "*it seems reasonable to infer that there is not much misconduct during such mediations, whether by attorneys, mediators, or anyone else.*"

Not surprisingly, the Commission concluded that "from the data discussed above, it appears that court-connected mediation programs are having beneficial effects in the California jurisdictions studied. What can perhaps be said is that the results of studies conducted in various California jurisdictions at various times tend to *support*, rather than refute, the general notion that mediation has significant positive effects. That in turn suggests that the rules governing mediation, including any confidentiality requirements,

should be crafted to promote its effectiveness, absent other overriding policy considerations." (Emphasis added.)

Possible approaches

Notwithstanding the possibility of leaving existing law intact (if it's not broken, don't fix it), the Commission offered possible approaches at balancing these countervailing interests: create a confidentiality exception addressing attorney malpractice and other misconduct; revise the law on waiving mediation confidentiality or modifying it by agreement; add safeguards against attorney misconduct in the mediation process; and/or establish disclosure requirements.

The Commission acknowledged that there are many possible methods for such preliminary filtering, or other special treatment at the inception of a case alleging mediation misconduct: a party may satisfy the statute of limitations by serving a complaint, without filing the complaint in court, and require a pre-filing "meet and confer," an Early Neutral Evaluation Conference ("ENEC") or similar procedure; an early case management conference, conducted in camera; a summary jury trial, conducted in camera at an early stage of the case; a specialist certification requirement; and/or a self-certification requirement.

Much to this writer's surprise and disappointment, "[t]he Commission took a hard look at such ideas, but decided not to incorporate any of them into this tentative recommendation."

Other possible safeguards against attorney misconduct in the mediation process include: establishing a mandatory cooling-off period after a mediation, during which the parties could reconsider and then rescind the agreement; place a time limit on each day's mediation session; require each party to consult with independent counsel before signing a mediated settlement agreement (MSA); require the mediator to confirm the lack of coercion; ensure that key representations, ones that are critical in convincing a disputant to settle, are memorialized in an admissible manner.

Lastly, the Commission acknowledged that many sources have raised the possibility of statutorily requiring that certain information be provided to a party before the party decides whether to mediate. Disclose that: "California's mediation confidentiality statute could prevent introduction of evidence that an attorney engaged in misconduct in a mediation, including evidence of private discussions between an attorney and a client relating to a mediation; any modification of an attorney-client fee agreement during a mediation must be memorialized in a signed writing to be enforceable; any resolution of the dispute in mediation requires a voluntary agreement of the parties and any party may withdraw from the mediation process at any time for any reason."

Although acknowledged, the Commission concluded that "it is debatable whether a disclosure requirement would sufficiently address the concerns that prompted this study." (Query: wouldn't it be worth a try as opposed to making all communications discoverable?)

The Commission chose a different approach for purposes of its tentative recommendation.

Commission conclusions

In spite of *extremely* limited evidence of attorney malpractice or misconduct in mediation, the Commission tentatively concludes that existing California law does not place enough weight on the interest in holding an attorney accountable for malpractice or other professional misconduct in a mediation context. Instead, it believes that courts need to be able to effectively evaluate allegations that an attorney engaged in misconduct in the mediation process. In its view, "public confidence in the administration of justice depends on providing such an opportunity to the citizens of this state."

Even though the proposed new exception would allow nearly complete discovery of all communications and writings produced in connection with mediation, the Commission characterized it as "narrow, so as to help protect the confidentiality expectations of mediation participants" and would also provide various safeguards, expressly permitting a court to "use a sealing order, a protective order, a redaction requirement, an in-camera hearing, or a similar judicial technique to prevent *public* disclosure of mediation evidence, asserting that "the use of such procedural mechanisms would help to preserve the confidentiality expectations of mediation participants."

The Commission finds solace in its proposal that mediation participants would receive notice and could thus take steps to prevent improper disclosure of mediation communications: if a plaintiff files a complaint that includes a cause of action for damages against an attorney based on alleged malpractice in the context of a mediation or a mediation consultation, the plaintiff would be required to serve the complaint on "*all of the mediation participants whose identities and addresses are reasonably ascertainable*." Arguably, this notice requirement would certainly alert mediation participants who would not otherwise be involved in the malpractice case to the possibility of disclosure of mediation communications in connection with that case, thus providing them an opportunity to speak up and guard against any improper disclosure, *but at additional personal cost and at the expense of the emotional and economic finality of the dispute!*

In addition to the above, the Commission asserts that the exception would apply "evenhandedly." It would permit use of mediation communications in specified circumstances to both prove or disprove allegations against an attorney; the exception would apply to *all types of mediation communications and writings*, not just to a particular category (such as communications made in a private caucus between an attorney and a client); the exception would apply across-the-board, there would not be any carveouts for particular types of cases; it would expressly state that "[n]othing in this section is intended to affect the extent to which a mediator is, or is not, immune from liability under existing law," and it would therefore be clear that existing law governing

mediator immunity would remain unchanged; it would not include any sanctions provisions; and the exception would only apply to evidence relating to a mediation or mediation consultation that commences on or after the exception becomes operative, not retroactively.

If empirical studies conclude that:

• if there is widespread overreaching and unfairness in the thousands of mediations throughout the country, "*it is not showing up in great numbers in the reported cases*" and that *"allegations of mediation misconduct occasionally occur"* [but only] *"a **few** of them succeed";* and

• if in the Commission's view, the empirical data tends to suggest: (1) mediation serves valuable purposes in California; (2) mediation misconduct is "*relatively infrequent*"; and

• if Washington mediators, judges, and attorneys, "who have handled a combined total of over 23,000 mediations were only aware of a mere 65 breaches of confidentiality (*much less than 1 percent*)"; and

• if a Southern District of Ohio study determined that lawyers thought that "parties *could be much less candid with judges assigned to the case than with each of the other types of neutrals*," and that "judges assigned to the case were much less 'able to fully explore settlement without prejudice to ongoing litigation if the case is not settled than other types of neutrals," and, the "*parties could be most candid with private mediators;"* and

• if early mediation pilot programs showed that program benefits included *reductions in trial rates, case disposition time, and the courts' workload, increases in litigant satisfaction with the court's services, and decreases in litigant costs in cases that resolved at mediation in some or all of the participating courts;*" and

• if virtually 100 percent of the ADR used in the San Mateo County Superior Court's civil/probate/complex litigation program was mediation, and the "overwhelming majority" of attorneys surveyed said that ADR reduced court time, and "85 percent of respondents believed that costs were reduced as a result of ADR;" and

• if in the NDCA "parties consistently have been choosing the least structured and the least rule-controlled of the Court's ADR process options [mediation]"; and

• if as Magistrate Judge Brazil puts it: "there simply is *no evidence* that the substantially lower level of regulation-based control of mediation and judicially hosted settlement conferences engenders greater fear that parties will try to take advantage, for improper purposes;" and

• if the incidence of complaints about abuse of any of the [NDCA] Court's ADR processes is extremely small – and the complaints that do surface most often are based on alleged post-process breaches (by *parties*) of confidentiality rules, not on misbehavior during the events;" and

• if information provided by the California Judicial Council suggests that mediator misconduct in California's court-connected mediation programs is infrequent; then, *"It seems reasonable to rely on the commonsense notions that people will speak more freely if they are confident their words will not be used to their detriment, and negotiations are more likely to succeed if the participants are able to speak freely."*[8]

Author's conclusions

This author agrees with erudite commentators in the mediation field such as Ron Kelly and others who strongly recommend that if a new exception to mediation confidentiality is to be adopted, it should be very narrowly tailored and limited to communications between a client and his/her own attorney, as described in the original Conference of California Bar Associations' 2011 Proposal, Resolution 10-6-2011. [The addition of E.C. Sec. 1120(b)(4): (b) This chapter does not limit any of the following: (4) The admissibility, in a State Bar disciplinary action, an action for legal malpractice, and/or an action for breach of fiduciary duty, of communications directly between the client and his or her attorney, only, where professional negligence or misconduct form the basis of the client's allegations against the client's attorney." An additional suggested provision: Admission or disclosure of evidence under this subdivision does not render the evidence, or any other mediation communication or writing, admissible or discoverable, for any other purpose."

The Commission is accepting comment until September 1, 2017. It is therefore *strongly* recommended that all attorneys in California who participate in mediation review the Commission's Tentative Recommendation and weigh in with their opinions.


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Endnotes:

[1] Commission Rept. at pg. 145.
[2] The Commission's full 156-page Tentative Recommendation can be found at <http://www.clrc.ca.gov/ pub/Misc-Report/TR-K402.pdf>.
[3] Comm. Rept. pg. 133.
[4] The Commission gave "special considerations relating to mediator testimony." The concern is that no one will want to use a mediator who appears to be biased against them. As such, the Commission largely carved mediators out of their proposed statutory amendments.
[5] *Cassel v. Superior Court,* 51 Cal.4th 113 (2011) holding that the action was not subject to judicially crafted exceptions to California's mediation confidentiality statutes.
[6] *Wimsatt v. Superior Court*, 152 Cal.App.4th 137 (2007)
[7] *Porter v. Wyner* 183 Cal.App.4th 949 (2010)
[8] Comm. Rept.pg. 106.