

Memorandum 2015-23

**Relationship Between Mediation Confidentiality and Attorney Malpractice
and Other Misconduct: Scholarly Commentary**

In this study of the relationship between mediation confidentiality and attorney malpractice and other misconduct, the Legislature specifically directed the Commission¹ to consider certain matters, including “scholarly commentary.”² Consistent with that directive, previous staff memoranda contain numerous references to scholarly commentary (especially the memorandum on empirical data³). This memorandum continues the Commission’s background research, focusing specifically on scholarly commentary.

The volume of scholarly commentary potentially relevant to this study is vast. It would be overly time-consuming for the staff to attempt to review and summarize all of it for the Commission. In determining how to reduce the volume to a manageable level, we sought to identify information that is particularly likely to be of interest.

We have essentially completed our research, but this memorandum only covers the scholarly literature on a threshold issue: whether mediation communications warrant special protection. The memorandum begins by discussing the minority viewpoint that mediation communications *do not* need special protection. We then present the prevailing scholarly view that mediation communications *do* need special protection. These views on why to protect mediation communications, or deny such protection, are important not only in evaluating whether to have a mediation confidentiality statute, but also in determining the degree of protection such a statute should afford.

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

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

2. 2012 Cal. Stat. res. ch. 108 (ACR 98 (Wagner)).

3. Memorandum 2015-5.

A future memorandum will focus on the scholarly debates over the type and extent of protection needed, particularly with regard to the intersection of mediation and attorney malpractice and other misconduct. We plan to present that memorandum in conjunction with a memorandum compiling and discussing the full array of options suggested in the course of this study.

MEDIATION COMMUNICATIONS DO NOT NEED SPECIAL PROTECTION

In 1986, Prof. Eric Green (Boston University School of Law) took the “heretical view” that a mediation privilege was neither necessary nor desirable.⁴ He contended that the protection for settlement negotiations under Federal Rule of Evidence 408 (with some tweaks), coupled with the use of contractual confidentiality agreements, was sufficient.⁵ A few other scholars have since expressed similar views, most notably Prof. Brad Reich (Drake University School of Law)⁶ and Prof. Scott Hughes (University of Alabama School of Law).⁷

All three of these professors stressed the lack of empirical evidence on the value of a mediation privilege. The staff has previously discussed the empirical data (or lack thereof) and will not repeat that analysis here.⁸

In addition to making an empirical argument, Prof. Green said that creation of a new privilege warrants “a heavy dose” of skepticism.⁹ He cautioned that “[t]he benefits of a *blanket* confidentiality privilege are minimal at best, and do not outweigh the tremendous harm that will result from the public perception that a mediation that takes place behind a curtain of confidentiality may produce unfair results.”¹⁰ He said there should be confidentiality exceptions where there are “strong countervailing public interests” (such as “bad faith, illegal conduct, fraud, or ... other abuse of the mediation process”), but “if exceptions are to be

4. Eric Green, *A Heretical View of the Mediation Privilege*, 2 Ohio St. J. Disp. Resol. 1 (1986).

5. *Id.* at 36.

6. See J. Brad Reich, *Call for Intellectual Honesty: A Response to the Uniform Mediation Act's Privilege Against Disclosure*, 2001 J. Disp. Resol. 1 (2001).

For another negative view of mediation confidentiality, see Kevin Gibson, *Confidentiality in Mediation: A Moral Reassessment*, 1 J. Disp. Resol. 25 (1992) (contending that confidentiality should be breached in many cases and “[t]here is little evidence to suggest that mediation would be ineffective if it were not confidential.”).

7. See, e.g., Scott Hughes, *A Closer Look: The Case for a Mediation Confidentiality Privilege Still Has Not Been Made*, 5 Disp. Resol. Mag. 14 (Winter 1998).

8. See Memorandum 2015-5.

9. Green, *supra* note 4, at 11.

10. *Id.* (emphasis added).

inferred on an ad hoc basis, what is the advantage of a statute that appears absolute but which, in fact, is subject to case-by-case determination?”¹¹

Having criticized the concept of a *blanket* confidentiality privilege, Prof. Green went on to argue that drafting a *properly nuanced* mediation confidentiality statute would be difficult and perilous:

[A]ttempting to draft an effective mediation statute that protects what should be protected and exempts what ought not to be protected, while well-intentioned, is extremely difficult. It is also dangerous to the practice of mediation because errors of omission can leave parties to mediation more exposed than before and errors of commission can frustrate important public interests and, eventually, lead to a backlash against mediation.¹²

In other words, he was concerned that any less-than-absolute mediation confidentiality statute would be both over-inclusive and under-inclusive, and the improper fit would cause problems that “may well be counterproductive to the goal of increased acceptance of private dispute resolution.”¹³

Prof. Green also analyzed the need for a mediation privilege using Dean Wigmore’s “utilitarian calculus,”¹⁴ which starts from the premise that “the public is entitled to every man’s evidence” and says that four conditions must be fulfilled to justify a privilege:

- (1) The communications must originate in a *confidence* that they will not be disclosed.
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
- (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
- (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of the litigation.¹⁵

Prof. Green said that a mediation privilege “would probably satisfy” the first condition, although “the circularity of this condition is obvious,” because the expectation of confidentiality will depend on what mediators tell parties and that

11. *Id.* at 29.

12. *Id.* at 30.

13. *Id.* at 2.

14. *Id.* at 31.

15. *Id.* (emphasis in original), citing 8 J. Wigmore, Evidence §§ 2191-2192, 2285 (McNaughten rev. 1961).

in turn will depend on whether a privilege exists.¹⁶ Prof. Green considered it “doubtful” that a mediation privilege would satisfy the remaining conditions.¹⁷ He explained:

- Although most mediators assert that confidentiality is needed, there is no empirical proof that confidentiality is essential to mediation and mediation has flourished without a mediation privilege.
- There is no consensus that the relationship between parties and a mediator should be sedulously fostered; in fact, “a substantial and respectable body of opinion ... holds that mediation and other informal methods of dispute resolution ought not be encouraged.”
- Balancing the costs and benefits of disclosure of mediation communications may vary with the particular circumstances at hand, but precedents involving the executive privilege and the reporter’s privilege make it “doubtful that courts will conclude that the balancing of interests called for by the fourth of the Wigmore conditions comes out in favor of a mediation privilege.”¹⁸

Like Prof. Green, Prof. Reich argued that a mediation privilege lacks empirical support and fails the Wigmore test.¹⁹ For those reasons, he concluded that the concept does not meet the “reason and experience” standard set forth in Federal Rule of Evidence 501 for recognition of a privilege, which he believes states should follow.²⁰ He specifically urged that there should be a “presumption against privileges,” because otherwise there would be a proliferation of privileges (such as a parent-child privilege, a sibling-sibling privilege, and a privilege between a guidance counselor and a minor student).²¹

Prof. Reich further argued that privileges “should only be applied to relationships of common interests,” not to “a relationship of competing interests” as in the mediation context.²² He gave the following reason:

A party to a mediation may reveal information to the other side that causes damage to the receiving party. This injury is most likely to happen when one side lies to or misleads the other and the party receiving the information believes the misrepresentation or does

16. *Id.* at 32.

17. *Id.*

18. *Id.* at 32-34.

19. Reich, *supra* note 6, at 251; see also *id.* at 209-20 (lack of empirical evidence), 221-30 (Wigmore analysis).

20. *Id.* at 201-09, 251.

21. *Id.* at 207-08.

22. *Id.* at 199.

not have the resources to examine the veracity of the statement. *In this context, the Privilege Against Disclosure may actually encourage parties to lie during mediation.* Their false statements cannot be used against them, for any purpose, at trial or in a similar forum because the privilege would prevent mediation communications from being introduced at subsequent adversarial proceedings.²³

In short, he warned that a mediation privilege “allows parties in mediation to use privilege protection to injure other parties”²⁴

Prof. Hughes raised similar concerns, describing various hypotheticals in which a mediation privilege would impede accountability for misconduct.²⁵ One of his examples focuses on attorney misconduct: During mediation, an attorney admits having asked for the mediation solely for purposes of delaying trial.²⁶ Prof. Hughes questioned whether “mediation create[s] so much goodness that it overcomes the need of the bench and bar to regulate the courts and police its practitioners.”²⁷ He cautioned that “[u]nfortunately, mediation privileges hide misconduct such as this behind closed doors, forever, and preven[t] victimized third parties from obtaining evidence that would otherwise be available to them.”²⁸

Like Prof. Green, Prof. Hughes was dubious about the prospect of drafting a properly tailored mediation privilege. He wrote:

Privileges sacrifice potentially important evidence for subsequent legal proceedings and restrict public access to information that may be necessary to a democratic society. Of course, finely detailed exceptions to a mediation privilege could be crafted that would help overcome many problems. However, *numerous exceptions could well lead to an unpredictable privilege that would be more detrimental than no privilege at all.* Privileges containing many exceptions may generate false expectations which could be dashed during subsequent litigation, whereas mediation without privileges establishes a clear rule discouraging expectations and subsequent litigation.²⁹

Prof. Hughes thus cautioned that until empirical data shows a connection between successful mediation and the existence of a mediation privilege, “the

23. *Id.* at 239 (emphasis added).

24. *Id.* at 240.

25. See Hughes, *supra* note 7.

26. *Id.* at 15-16.

27. *Id.* at 16.

28. *Id.*

29. *Id.* at 15 (emphasis added, footnote omitted).

arguments in favor of mediation privileges should not overcome the historical presumption favoring the availability of ‘every person’s evidence.’”³⁰

MEDIATION COMMUNICATIONS NEED SPECIAL PROTECTION

In contrast to Profs. Green, Reich, and Hughes, the prevailing scholarly view is that mediation communications need special protection to some degree.³¹ In the course of this study, the Commission has already heard much about the reasons for taking that approach. We will not belabor the point here, but will just mention a few remarks that appear noteworthy.

A 1986 article in the *Journal on Dispute Resolution* gave five reasons for protecting mediation confidentiality:

Effective mediation requires candor.... Mediators must be able to draw out baseline positions and interests which would be impossible if the parties were constantly looking over their shoulders....

Fairness to the disputants requires confidentiality.... Mediation ... could be used as a discovery device against legally naive persons if the mediation communications were not inadmissible in subsequent judicial actions....

The mediator must remain neutral in fact and in perception.... Court testimony by a mediator, no matter how carefully presented, will inevitably be characterized so as to favor one side or the other. This would destroy a mediator’s efficacy as an impartial broker.

Privacy is an incentive for many to choose mediation. Whether it be protection of trade secrets or simply a disinclination to “air one’s dirty laundry” in the neighborhood, the option presented by the mediator to settle disputes quietly and informally is often a primary motivator for parties choosing this process.

Mediators, and mediation programs, need protection against distraction and harassment. Fledgling community programs need all of their limited resources for the “business at hand.” Frequent subpoenas can encumber staff time, and dissuade volunteers from participating as mediators. Proper evaluation of programs requires

30. *Id.* at 16.

31. See, e.g., Sarah Rudolph Cole, *Secrecy and Transparency in Dispute Resolution, Protecting Confidentiality in Mediation: A Promise Unfulfilled?*, 54 Kan. 1. Rev. 1419, 1426-28; Phyllis Bernard, *Reply: Only Nixon Could Go To China: Third Thoughts on the Uniform Mediation Act*, 85 Marq. L. Rev. 113, 118-19 (2001); Ellen Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability*, 85 Marq. L. Rev. 79, 80-84 (2001) (hereafter, “Deason (2001: Quest for Uniformity)”); Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 19976 B.Y.U. L. Rev. 715, 722-23 (1997); Kirtley, *The Mediation Privilege’s Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, J. Disp. Resol. 1, 8-10 (1995); Note, *Protecting Confidentiality in Mediation*, 98 Harv. L. Rev. 441, 444-46 (1984).

adequate record keeping. Many programs, uncertain as to whether records would be protected absent statutory protection, routinely destroy them as a confidentiality device.³²

In a later article, Prof. Alan Kirtley (University of Washington School of Law) made some of the same points, but expressed them perhaps more vividly:

Having no coercive power, a mediator is dependent upon increasing communication, if not trust, between disputants. The willingness of mediation parties to “open up” is essential to the success of the process.

The mediation process is purposefully informal to encourage a broad ranging discussion of facts, feelings, issues, underlying interests, and possible solutions to the parties’ conflict....

Under such circumstances, mediation parties often reveal personal and business secrets, share deep-seated feelings about others, and make admissions of fact and law. Without adequate legal protection, a party’s candor in mediation might well be “rewarded” by a discovery request or the revelation of mediation information at trial. A principal purpose of the mediation privilege is to provide mediation parties protection against these downside risks of a failed mediation. Participation will diminish if perceptions of confidentiality are not matched by reality. Another critical purpose of the privilege is to maintain the public’s perception that individual mediators and the mediation process are neutral and unbiased.³³

Prof. Kirtley also contended that a mediation privilege satisfies the four-part Wigmore test. He wrote:

As to the first factor, we have seen that mediation predominately occurs in private settings and under circumstances in which the participants have agreed not to disclose their communications. Moreover, it is likely the mediator will have told the parties their discussions are confidential....

As to the second factor, the overwhelming weight of scholarly authority supports the proposition that confidentiality is essential to the functioning of mediation. When asked to protect mediation communications in the absence of a privilege statute, nearly all courts have done so based upon a recognition of the critical role confidentiality plays in the functioning of the mediation process....

For those states considering a mediation privilege, the best evidence of public opinion as to whether mediation relationships ought to be fostered is the flurry of legislative and court rule

32. Lawrence Freedman & Michael Prigoff, *Confidentiality in Mediation: The Need for Protection*, J. Disp. Resol. 37, 38 (1986).

33. Kirtley, *supra* note 31, at 9-10 (footnotes omitted).

activity creating mediation privileges in sister states.... *Condition three* of Wigmore's test is met.

The fourth condition requires a cost/benefit analysis....

... The fourth condition can be met with a narrow rule of mediation privilege which reduces the loss of evidence to the justice system while maintaining the benefits of confidentiality for mediation where most appropriate.³⁴

Prof. Ellen Deason (University of Illinois College of Law) has also written extensively about mediation confidentiality, noting its importance in fostering candid communications, maintaining the neutrality of the mediator, and "keeping the judging function separate from the mediation function" (by prohibiting disclosures from a mediator to a decision-maker).³⁵ She especially emphasizes the importance of confidentiality in building "institutional trust" — convincing mediation participants to trust in the mediation process enough to yield positive results, even though they do not trust each other.³⁶ In particular, she maintains that "legal requirements that protect confidentiality provide institutional trust by reducing the risk that one's adversary will expose sensitive information revealed in the course of mediation."³⁷ As another author put it,

[C]onfidentiality facilitates mediation in the same way trust facilitates friendship. Confidentiality deprives the disputants of the ability to use the information they gain from the mediation to the detriment of the other party thus paving the way for meaningful interaction between the parties in a relatively non-threatening environment.³⁸

According to Prof. Eric van Ginkel (Pepperdine University School of Law), the need for trust and therefore confidentiality is most acute with respect to the mediated dispute, and becomes more attenuated once that dispute is settled.³⁹

34. *Id.* at 15-18 (emphasis added, footnotes omitted).

35. Deason (2001: *Quest for Uniformity*), *supra* note 31, at 80-84.

36. Deason, *Secrecy and Transparency in Dispute Resolution: The Need for Trust as a Justification for Confidentiality in Mediation: A Cross-Disciplinary Approach*, 54 Kan. L. Rev. 1387, 1414 (2006).

37. *Id.* at 1416-17.

38. Kent Brown, *Comment, Confidentiality in Mediation: Status and Implications*, 1991 J. Disp. Resol. 307 (1999); see also Cole, *supra* note 31, at 1427 (Mediation confidentiality "works as a trust substitute — prohibiting parties from using mediation communications in subsequent proceedings dramatically reduces the likelihood and chilling potential of party disclosures."); Joseph Paulk, *So You Want to be a Mediator? Realistic Considerations for Attorneys Considering Becoming Mediators*, 35 Tulsa L.J. 325, 328 (2000) ("The cornerstone of a successful mediator in the eyes of the parties can best be summarized as trust.... The linchpin of parties' trust is that a neutral mediator will maintain the confidentiality of the parties both before, during, and after the mediation proceeding.").

39. See Memorandum 2014-46, pp. 4-7 & Exhibit pp. 4-9.

Prof. Sarah Cole (Ohio State University) appears to take a similar view,⁴⁰ but she says that “mediation communications are important to parties even when they are not the central focus of the litigated case” and courts should retain discretion to sanction improper disclosures even “in peripherally related proceedings.”⁴¹

Prof. Phyllis Bernard (Oklahoma City University School of Law) made a different point about the importance of mediation confidentiality. She argued that unless there is empirical proof that mediation confidentiality is unnecessary, laws should continue to protect mediation communications, because “the expectation of confidentiality constitutes a single feature that distinguishes negotiated settlement and its corollary, mediation, from litigation.”⁴² In her view, if confidentiality were “lost or significantly compromised, a serious question would arise as to whether these ADR processes can continue to offer a genuine alternative to the court room.”⁴³

Prof. Bernard explained that if mediation communications could later be used against a participant, mediation would be “a setting where parties undertook the risks of litigation without the protections of the judge’s presence and applicable court rules, as well as perhaps without the protections of the substantive law and legal counsel.”⁴⁴ In other words, she feared that “mediation without the presumption of confidentiality might produce precisely the type of ‘second-class justice’ that is so vigorously argued against by [ADR] critics.”⁴⁵ She questioned whether people would continue to voluntarily use mediation if it was coercive and disempowering, a “pale imitation of trial” or “non-binding arbitration in disguise.”⁴⁶

DEGREE OF CONFIDENTIALITY

Much of the scholarly literature on mediation confidentiality concerns what type and extent of protection to provide. For example, scholars have commented on issues such as:

- How important is it to have a mediation confidentiality provision that allows mediation participants to predict whether their

40. Cole, *supra* note 31, at 1450-51.

41. *Id.* at 1450 n.142.

42. Bernard, *supra* note 31, at 118.

43. *Id.*

44. *Id.* at 118-19.

45. *Id.* at 118.

46. *Id.* at 120.

communications will remain confidential? How can predictability be achieved?

- Should the protection for mediation communications be absolute? If not, what exceptions or limitations should there be?
- In particular, should there be some type of exception with regard to attorney misconduct, or perhaps professional misconduct more generally? If so, how should that exception be structured?
- Should mediation communications be admissible for purposes of proving that a party failed to participate in a court-ordered mediation in good faith?
- To what extent should it be possible to use mediation communications in a criminal case?
- What information should mediation participants receive about the extent of protection for mediation communications? Why?
- Are there possible means of preventing and remedying mediation misconduct other than weakening existing protections for mediation communications? If so, what are the merits of these approaches?
- What is good and bad about the Uniform Mediation Act?
- What are the effects of the current California approach?

When the staff presents the scholarly literature on these matters in a future memorandum, and as the Commission begins shaping a tentative recommendation, it might be helpful to bear in mind the underlying reasons for protecting mediation communications, as well as the contrary arguments discussed above.

Respectfully submitted,

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