

SCMA TOWN HALL 2016

Mediation Confidentiality

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Today's Objectives:

- ▶ **Background – Mediation Confidentiality In California And Elsewhere**
- ▶ **Update On California Law Revision Commission Study K402 On Mediation Confidentiality And Attorney Malpractice**
- ▶ **CLRC Tentative Conclusions So Far**
- ▶ **Discussion Of Issues And Interchange Of Ideas, Interests, And Positions.**

California Evidence Code

Section 1119

- ▶ **Anything said or written or admitted “for the purpose of, in, or pursuant to, a mediation or mediation consultation” is NOT admissible or discoverable.**
- ▶ **“All communications, negotiations, or settlement discussions by and between participants during mediation or mediation consultation SHALL REMAIN confidential.”**

California Evidence Code

Section 703.5

- ▶ **No mediator shall be competent to testify, in any subsequent civil proceeding, as to any statement, or conduct occurring in conjunction with the prior proceeding.**
- ▶ Does not apply (a) in contempt proceedings, (b) to criminal conduct, (c) to conduct being investigated by the State Bar or Commission on Judicial Performance, (d) to disqualification proceedings, or (e) in certain Family Law mediations.

Cassel v. Superior Court (2011) (California's Strict Approach)

- ▶ **In California, mediation confidentiality covers ALL conversations that relate to the mediation – both pre-mediation and during the mediation – even if outside the presence of a mediator. No judicial exceptions allowed.**
- ▶ *By the Court: We must apply the plain terms of the mediation confidentiality statutes to the facts of this case unless such a result would violate due process, or would lead to absurd results that clearly undermine statutory purpose.*

Other Jurisdictions Have Different Rules

- ▶ Uniform Mediation Act -- General Rule:
 - ▶ Except as otherwise provided . . . a mediation communication is privileged . . . and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded”

Uniform Mediation Act

Exceptions

- ▶ No privilege for mediation communications that evidence physical threats, a plan to commit a crime, or show abuse or neglect of a child.
- ▶ **There is no privilege for mediation communications that are sought or offered to prove or disprove professional misconduct by a mediation participant (including lawyers and mediators).**

Uniform Mediation Act Exceptions (Cont.)

- ▶ **Where a party seeks to use mediation communications in a criminal proceeding or to avoid liability on a mediated settlement agreement, communications are privileged unless the court finds, after a hearing in camera, that the party seeking to use such communications has shown (1) that the evidence is not otherwise available and (2) that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality.**

Statutes In Other States

- ▶ **Other States Have Statutes That Honor Mediation Confidentiality In Varying Degrees.**
- ▶ **New York And Kentucky Are Exceptions, Offering Little Or No Protection.**

California Law Revision Commission Study

▶ Historical Underpinnings

▶ AB 2025 – Reaction to *Cassel*

▶ Legislative Referral To CLRC (2012):

To study “the relationship . . . between mediation confidentiality and attorney malpractice and other misconduct, and the purposes for, and impact of, those laws on public protection, professional ethics, attorney discipline, client rights, the willingness of parties to participate in voluntary and mandatory mediation, and the effectiveness of mediation, as well as any other issues the commission deems relevant.”

CLRC Tentative Recommendations

- ▶ **To Create An Exception To Mediation Confidentiality For Evidence Of Professional Misconduct Or Malpractice By Attorneys (But Not Mediators).**
- ▶ **To Require An *In Camera* Screening Process To Limit Disclosure. (Process Yet To Be Determined.)**
- ▶ **No Exception For Efforts To Unwind Mediated Settlement Agreements.**

CLRC Tentative Recommendations (cont.)

- ▶ **No Change To Mediator Protection Against Being Compelled To Testify.**
- ▶ **No Intent To Affect Any Current Mediator Immunity To Suits.**
- ▶ **Many Options Left To Be Considered.**

POTENTIAL PROCEDURAL PROTECTIONS IF EXCEPTION CREATED

► Background:

There Are Many Examples Of Rules And Procedures In California That Require Courts To Protect the Confidentiality Of Private, Sensitive, Personal, Financial, Trade Secret, Health, And Other Sensitive Information. For Example:

EXISTING CONFIDENTIALITY PROTECTIONS IN CALIFORNIA

- ▶ Special Rules For Discovery Of Financial Information In Cases Seeking Punitive Damages.
- ▶ Special Pleading Rules In Fraud Cases
- ▶ SLAPP Suits and Anti-SLAPP. Procedural Rules.
- ▶ Personnel Files
- ▶ Trade Secret Litigation.
- ▶ Judicial Protective Orders.

IN CAMERA PROCEDURES UNDER THE UMA

▶ **Uniform Mediation Act Prefatory Note:**

- ▶ *“As with other privileges, when it is necessary to consider evidence in order to determine if an exception applies, the Act contemplates that a court will hold an in camera proceeding at which the claim for exemption from the privilege can be confidentially asserted and defended.”*

***IN CAMERA* PROCEDURES TO PROTECT MEDIATION SECRETS USED BY COURTS IN CALIFORNIA**

- ▶ **State Case: *Rinaker v. Superior Court* (1998)**
- ▶ **Federal Case: *Olam v. Congress Mortgage* (1999)**

POTENTIAL STATUTORY PROTECTIVE PROCEDURES

– Option 1: Judicial Discretion

- ▶ If Exception Is Created, Protection Of Confidentiality Is Left To The Judge's Discretion. Burden Is On Party Seeking To Preserve Confidentiality To Convince Court That Disclosure Should Be Limited.

POTENTIAL STATUTORY *PROTECTIVE PROCEDURES* – Option 2: Bold Protections

- ▶ **Require Judicial Protection of Mediation Communications As Follows:**
 - ▶ **Plaintiff Must File Case Under Seal.**
 - ▶ **Discovery Of Mediation Communications Is Barred Until Judge Decides, After An *In Camera* Proceeding, That Case Has Substantial Merit.**
 - ▶ **Plaintiff Must Demonstrate – In An “*In Camera*” Proceeding – That The Evidence Sought Is Not Otherwise Available And That Need For The Evidence Outweighs Interest In Protecting Confidentiality.**
 - ▶ **Discovery Is Limited To Relevant And Admissible Evidence (No Fishing Expeditions).**
 - ▶ **Court Must Enter Protective Order Barring Disclosure Of Confidential Matters To Third Parties.**

Questions for Discussion:

- ▶ **Should Exception Be Created For Medication Communications That Prove Or Disprove Lawyer Malpractice Or Misconduct?**
- ▶ **If Exception Is Created, Should An *In Camera* Hearing Br Required Before Confidential Mediation Information Is Discovered Or Used?**
- ▶ **If Exception Is Created, Should There Be Additional Protections Such As Filing Under Seal, A Preliminary Determination Of Case Merit Before Discovery Is Allowed, Limits On Discovery, And/Or Protective Orders Limiting Disclosure To Those Who Need To Know?**

ADDITIONAL BACKGROUND MATERIALS AND RESOURCES

- ▶ **SCMA Mediation Confidentiality Webpages:**
- ▶ **Mediation Confidentiality Home:**
<https://www.scmmediation.org/mediation-confidentiality/>
- ▶ **Mediation Confidentiality Resources:**
<http://www.scmmediation.org/mediation-confidentiality-debate-resources/>
- ▶ **Mediation Confidentiality Articles:**
<http://www.scmmediation.org/category/mediation-confidentiality/>
- ▶ **CLRC Study Website:** <http://www.clrc.ca.gov/K402.html>
- ▶ **Address For Comments To The CLRC:** Barbara Gaal, Chief Deputy Counsel, bgaal@clrc.ca.gov.
- ▶ **This PowerPoint Presentation:**
<https://www.scmmediation.org/wp-content/uploads/2016/03/Mediation-Confidentiality-Town-Hall-PowerPoint-Presentation--March-19,-2016.pdf>

POSSIBLE COMPREHENSIVE PROCEDURE TO PROTECT MEDIATION COMMUNICATIONS FROM UNNECESSARY DISCLOSURE IN LITIGATION

- ▶ (a) Any complaint that discloses private mediation communications shall be filed or submitted under seal or under procedures to assure confidentiality.
- ▶ (b) No order allowing discovery of private mediation communications may be entered before the court finds, after a hearing *in camera*, that the party seeking discovery has shown [by clear and convincing evidence] (1) that the proponent has a substantial likelihood of prevailing on the complaint, (2) that the evidence is not otherwise available, and (3) that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality.

COMPREHENSIVE PROCEDURE (Cont.)

- ▶ (c) If the court determines that the required showing has been made under subsection (b), the proponent of disclosure may seek only relevant and admissible evidence that has a substantial tendency to prove or disprove one or more elements of the complaint. Mediation communications and conduct that are not relevant and admissible may not be sought or compelled. Mediation communications and conduct disclosed in discovery shall be protected from third party disclosure as provided in subsection (e).

COMPREHENSIVE PROCEDURE (Cont.)

- ▶ (d) Only the portion of mediation communication necessary to the determination of the complaint may be admitted. Admission of evidence under this section does not render the evidence, or any other mediation communications or conduct, discoverable or admissible for any other purpose.
- ▶ (e) Mediation communications revealed in discovery or admitted into evidence shall be kept confidential by the parties and the court, which shall enter an appropriate protective order assuring continuing confidentiality. Such orders shall require all individuals and entities to whom confidential mediation communications are disclosed to refrain from disclosing such material to individuals or entities not entitled to access. The court shall have authority to enforce compliance with its protective orders as the court deems appropriate to maintain the confidentiality of mediation communications and remedy unauthorized disclosures.

COMPREHENSIVE PROCEDURE (Cont.)

- ▶ (f) The allowance of discovery or the admission of mediation communications into evidence does not affect privileges or immunities that may be available to a party or to a mediator. In particular, but only by way of example:
 - ▶ (1) Nothing in this Section [or in the pertinent Chapter of the Evidence Code] is intended to affect the extent to which a mediator is, or is not, immune from liability under existing law.
 - ▶ (2) A mediator may not be compelled to provide evidence of mediation communications or conduct except as allowed by Evidence Code Section 703.5.