Anti-Slapp Provision to Bridge the Divide Between California Absolute Mediation Confidentiality and Need for Information Regarding Intentional Misconduct During Mediation

Introduction

A hallmark of mediation is a promise of confidentiality of the proceedings.[1] Confidentiality is supposed to allow the parties to participate with boundless candor and open innumerable avenues to resolving the conflict without further litigation. While significant confidentiality is proper to further the goals of mediation, absolute confidentiality periodically allows participants to avoid the appropriate consequences for their detrimental acts to other parties, participants and clients in the mediation, as well as undermines confidence in the mediation process itself. At what point is the benefit of confidentiality in mediation outweighed by the interest in having the proceedings be lawful and fair to the clients, parties and participants and transparent as to intentional misconduct within the mediation? Is it proper for parties to a mediation to use the confidentiality provisions as a shield to protect themselves from disclosure in other

[1] In Dwight Golann & Jay Folberg, Mediation, The Roles of Advocate and Neutral 371 (2d ed. 2011), the authors' state that "[o]ne of the key attractions of mediation for both parties and lawyers is that the process is confidential." The California Dispute Resolution Council submitted a letter to the California Law Revision Commission which says, in part: "There is no question but that the mediation process as we know it in California is affected by our confidentiality statute in a positive way. Mediation's value in resolving and forestalling disputes would be severely impacted by any inroad into mediation confidentiality. The assurance … of strict confidentiality is crucial to cultivating participant trust in the mediation process and in the mediator as well. Beginning mediation with concern about the possibility of subpoenas and threats of more litigation stemming from what is said by participants in mediation is antithetical to and ultimately would be destructive of the candor that makes mediation in California so successful." Paul Dubow & James Madison, Mediation Confidentiality and the California Law Revision Commission, CDRC Blog (October 5, 2013), http://www.cdrc.net/2013/10/05/mediation-confidentiality-and-the-california-law-revision-commission/.

litigation based on their malpractice or fraud or other intentional misconduct during the mediation? I argue it is not.

The Uniform Mediation Act was created to offer states a model code based on input from numerous practitioners and commentators. The Act provides for confidentiality with certain limited exceptions for various situations including allowing parties to use mediation communications to the extent necessary in another proceeding.[2] I think the Uniform Mediation Act view is correct. California, however, has chosen absolute confidentiality for mediation and information prepared in anticipation of mediation, except information to be used in a criminal proceeding.[3] The California Supreme Court has been unwilling to permit any judicially created exceptions to the mediation confidentiality provisions despite several noteworthy cases where the confidentiality provisions permitted "bad actors" to evade the consequences of their

[2] Uniform Mediation Act, Section 4. Privilege Against Disclosure; Admissibility; Discovery. (a) Except as otherwise provided in Section 6, a mediation communication is privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by Section 5….Section 6. Exceptions to Privilege, "(a) There is no privilege under Section 4 for a mediation communication that is: . . . (6) except as otherwise provided in subsection (c), sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation, . . . (b) There is no privilege under Section 4 if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in: (1) a court proceeding involving a felony [or misdemeanor]; or (2) except as otherwise provided in subsection (c), a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation. (c) A mediator may not be compelled to provide evidence of a mediation communication referred to in subsection (a)(6) or (b)(2)."

[3] Cal. Evid. Code § 1119: "Except as otherwise proved in this chapter: (a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in an arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given. (b) No writing. . . that is prepared for the purpose of, in the course of, or pursuant to, a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given. (c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential."

actions and specifically invited the Legislature to take action.[4] The Legislature has only recently asked the California Law Revision Commission to look at potential changes to the mediation confidentiality provisions.[5]

The Uniform Mediation Act provisions regarding in camera review of the mediation information requested to be disclosed has made sense to the many states that have adopted the provisions. California has similar, but more demanding, procedures in place in its anti-SLAPP legislation that could easily be applied in the mediation confidentiality context if California finds the Uniform Mediation Act provisions would not adequately protect mediation confidentiality. [6] California's Anti-SLAPP law was meant to address lawsuits "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." [7] The statute continues: "[t]he legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance and that this participation should not be chilled through abuse of the judicial process."[8] Similarly, it is in the public interest to encourage continued participation in mediation that should

[4] These cases will be discussed in detail: Foxgate Homeowners' Association, Inc. v. Bramalea California, Inc., 26 Cal. 4th 1; 25 P.3d 1117; 108 Cal. Rptr. 2d 642 (2001); Rojas v. Superior Court of Los Angeles, 33 Cal. 4th 407; 93 P. 3d 260; 15 Cal. Rptr. 3d 643 (2004); Cassel v. Superior Court of Los Angeles, 51 Cal. 4th 113; 244 P.3d 1080; 119 Cal. Rptr. 3d 437 (2011).

[5] 2015 California Assembly Bill No. 2025, Amended May 10, 2012.

[6] See Cal. C.C.P. § 425.16 (b)(1) "A cause of action against a person arising from any act of that person in furtherance of that person's right of petition or free speech under the United States Constitution to the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim. (2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based. (3) If the court determines that the plaintiff has established a probability he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in an subsequent proceeding."

[7] Id at § 425.16 (a).

[8] Id.

neither be chilled through the fear of abusive and unwarranted follow on litigation, nor by the specter of being left without a civil remedy for civil assault and battery, fraud, dishonesty and attorney malpractice in mediation. Both should be discouraged through carefully crafted exceptions to the mediation privilege.

NOTABLE CASES

Foxgate

The first case generally cited in discussion of mediation privilege in California is *Foxgate Homeowners Association v. Bramalea*[9] decided in 2001 addressing disclosures of mediation communications which showed a failure to mediate in good faith. In *Foxgate,* the plaintiff homeowners association and defendant construction companies in a construction defect case were ordered to mediation by the trial court. Defendant Bramalea and his counsel, Ivan Stevenson, were alleged to have failed to arrive to mediation timely, failed to bring required expert consultants and witnesses and engaged in other actions that Plaintiff's memorandum of points and authorities in support of Plaintiff's motion for sanctions said "reflected a pattern of tactics pursued in bad faith and solely intended to cause unnecessary delay".[10] The recitation in the memorandum of Defendant Bramalea's actions to undermine the mediation is lengthy. A report of the mediator detailing statements made at the mediation was also attached to the motion for sanctions. The Court of Appeal held that the mediator could reveal information

[9] Foxgate, 26 Cal. 4th 1.
[10] Id at 5.

necessary to "place sanctionable conduct in context," but that in this instance more information than was necessary had been disclosed.[11]

The California Supreme Court declined to allow the mediator's report and concluded that even if the failure to allow such a report means there is no sanction for a party's refusal to cooperate during a mediation, the "Legislature has weighed and balanced the policy that promotes effective mediation by requiring confidentiality against a policy that might better encourage good faith participation in the mediation process."[12] There were no exceptions to the mediation confidentiality statutes and that the "judicially created exception . . . is inconsistent with the language and the legislative intent underlying sections 1119 and 1121."[13] The Court went on to say:

> The legislative intent underlying the mediation confidentiality provisions of the Evidence Code is clear. . . . the purpose of confidentiality is to promote a candid and informal exchange regarding events in the past. . . . This frank exchange is achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes . . . . confidentiality is essential to effective mediation. . . . [and[implementing alternatives to judicial dispute resolution has been a strong legislative policy since at least 1986.[14]

The Court specifically disagreed with the Court of Appeal exception for bad faith in mediation and refused to find doing so would lead to "an absurd result," basically opening the door for the Legislature to take action if appropriate.

[11] Id at 3.
[12] Id at 17.
[13] Id at 4.
[14] Id at 14.

Rojas

The next case in the line of mediation confidentiality decisions is *Rojas v. Superior Court* decided in 2004 involving materials provided in mediation that were not otherwise available to the plaintiffs in another action.[15] Procedurally, there were two cases occurring at the same time. In the first case, the owner of an apartment complex, Julie Coffin, sued the builders of the complex for construction defects which allowed water leaks that led to toxic mold throughout the three buildings and 192 units. Ms. Coffin remediated one of the buildings after identifying structural defects and mold. The litigation was settled through mediation in 1999. The settlement provided:

> throughout this resolution of the matter, consultants provided defect reports, repair reports, and photographs for informational purpose which are protected by the Case Management Order and Evidence Code Sections 1119 and 1152 and it is hereby agreed that such materials and information contained therein shall not be published or disclosed in any way without the prior consent of plaintiff or by court order.[16]

In the second case, several hundred tenants of the apartment complex sued the parties to the first case and others for construction defects that had allowed the water leaks and resulting mold and had caused them many health problems. These tenants further claimed that the defendants "conspired to conceal the defects."[17] The tenants sought to obtain the "entire files" from the first case and the defendants moved to quash and requested a protective order for the mediation materials. The Judge found that anything prepared after the case management order to mediate was signed (which provided for that information to be privileged) and the mediation process was begun

[15] Rojas, 33 Cal. 4th 407.
[16] Id at 412.
[17] Id.

was governed by Section 1119. In denying the tenants' motion to compel production of air sampling and other data and photographs of the mold, the Judge remarked:

> This is a very difficult decision . . . because it could well be that there's no other way for the plaintiffs to get this particular material. On the other hand, the mediation privilege is an important one, and if courts start dispensing with it by using the . . . [other tests] . . . you may have people less willing to mediate.[18]

The Court of Appeal majority in a split decision concluded that Section 1119 "does 'not protect pure evidence,' but protects only the 'substance of mediation, i.e., the negotiations, communication, admissions, and discussions designed to reach a resolution of the dispute at hand."[19] The majority held that work product such as raw test data was 'non-derivative' material outside of the protection of Section 1119 and ultimately discoverable. The majority also found the "material solely reflecting an attorney's '"impressions, conclusions, opinions, or legal research or theories"' is entitled to absolute protection."[20] The majority identified a qualified protection for derivative material including "attorney thoughts, impressions [and] conclusions" which would be "discoverable only upon a showing of good cause, which requires a determination of the need for the materials balanced against the benefit to the mediation privilege obtained by protecting those materials from disclosure."[21] Further, "purely factual information" such as the photographs and test data, if possible, needed to be removed from the confidential information and produced to the tenants. The majority ordered the trial

[18] Id.
[19] Id.
[20] Id.
[21] Id.

court to apply the above principles in an in camera review.[22] The California Supreme Court noted:

> In reaching its conclusion, the majority [of the Appellate Court] relied largely on Section 1120, subdivision (a), which provides that "[e]vidence otherwise admissible or subject to discovery outside of a mediation . . . shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation . . . . [23]

A contrary result would "render Section 1120 complete surplusage" and "permit the parties to use mediation as a shield to hide evidence."[24]

The California Supreme Court held that the Court of Appeal's "holding directly conflict[ed] with the plain language of [Section 1119]" as the actual air and mold samples are not "writing[s]" but the reports about the samples are "writing[s]" pursuant to Section 1119 and are not subject to disclosure.[25] The Court went on to say that "[c]ontrary to the Court of Appeal's conclusion, this construction does not render section 1120 "surplusage" or permit parties "to use mediation as a shield to hide evidence." Rather, consistent with the Legislature's intent, it applies section 1120 as a "limit[]" on "the scope of [s]ection 1119" that "prevents parties from using a mediation as a pretext to shield materials from disclosure."[26] After reviewing the legislative history in depth, the California Supreme Court found that there is no exception to mediation confidentiality for derivative material "upon showing of good cause" and comparison to work product rules with good cause exceptions are not appropriate since if the Legislature wanted

[22] Id at 415.
[23] Id.
[24] Id.
[25] Id at 416.
[26] Id at 417.

such an exception it has established "good cause" exceptions in other statutes. The California Supreme Court made clear that the Legislature would have to create any exceptions to mediation confidentiality and the California Supreme Court would not support any judicially created exceptions, regardless of the result on the parties.

Cassel

The most recent California Supreme Court case is *Cassel,*[27] decided in 2011, involved claims of attorney malpractice during mediation. The Court held that there was no exception to mediation confidentiality even when the evidence is to be used in a separate legal malpractice action. Mr. Cassel had acquired a license to use the Von Dutch label and started a clothing company, Von Dutch Originals. Mr. Cassel lost an arbitration over the ownership of Von Dutch Originals but certain rights were not resolved in the arbitration. Wasserman, Comden, Casselman & Pearson, L.L.P. ("WCCP"), represented Mr. Cassell and advised him on how to continue operating his business. Mr. Cassel was sued for trademark infringement and WCCP failed to inform Mr. Cassel of a request for a preliminary injunction against Cassel's use of Von Dutch and failed to oppose the injunction which was granted. Based on WCCP advice, Cassel marketed Von Dutch clothing in Asia. About the same time, Mr. Wasserman convinced Cassel to sell Von Dutch hats through Mr. Wasserman's son's online business, which Cassel later learned was also selling counterfeit goods. Cassel was sued by Von Dutch and Mr. Wasserman was deposed about his son's merchandise creating a conflict of interest in Mr. Wasserman's and WCCP's representation of Cassel. Additionally, during pretrial mediation WCCP is alleged to have insisted Mr. Cassell remain at the

[27] Cassel, 51 Cal. 4th 113.

mediation even though he said he felt ill and also to have harassed and coerced him into taking an unacceptably low offer.

The majority of the Court of Appeal found that:

> The mediation confidentiality statutes do not extend to communications between a mediation participant and his or her own attorneys outside the presence of other participants in the mediation. The purpose of mediation confidentiality is to allow the *disputing parties in a mediation* to engage in candid discussions *with each other* about their respective positions, and the strengths and weaknesses of their respective cases, without fear that the matters thereby disclosed will later be used *against them.* This protection was not intended to prevent a client from proving, through private communications outside the presence of all other mediation participants, a case of legal malpractice against the client's own lawyers.[28]

The Court of Appeal also found that disputants and their attorneys are a single mediation participant for confidentiality purposes and an attorney cannot prohibit client disclosure of attorney-client communications by the attorney's refusal to waive confidentiality saying "[w]ere this not so, the mediation confidentiality statutes would unfairly hamper a malpractice action by overriding the waiver of the attorney-client privilege that occurs by operation of law when a client sues lawyers for malpractice."[29]

The Appellate Court dissent focused on the "forbidden judicial exception to the clear requirements of mediation confidentiality."[30] The dissent pointed to the words "for the purpose of mediation" in the Section 1119 to show that the statute was not intended to simply protect communication "in the course of mediation." Ultimately, the dissent acknowledged that proving legal malpractice is undermined by the protections of the

[28] Id at 121-122. Emphasis in original.
[29] Id.
[30] Id.

mediation communications, but "it is for the Legislature, not the courts, to balance the competing policy concerns."[31] Again, the courts issued an invitation to the Legislature to address unfortunate consequences of the absolute confidentiality provisions of the California Evidence Code.

In the ***Cassel*** opinion, the California Supreme Court reviewed its conclusions in ***Foxgate*** and ***Rojas***. In ***Foxgate***, the Court said "the Legislature has weighed and balanced the policy that promotes effective mediation by requiring confidentiality against a policy that might better encourage good faith participation in the [mediation] process."[32] In ***Rojas***, the Court confirmed "all writings prepared for the purpose of, or in the course of, or pursuant to, a mediation are confidential and protected from discovery."[33] The ***Rojas*** Court "further made clear that the non-discoverability of writings prepared for mediation, unlike the shield otherwise provided for certain attorney work product, is not subject to a "good cause" exception, based on "prejudice" or "injustice" to the party seeking discovery.'[34] The plain language of the confidentiality statute applicable to mediation forbids disclosure of any communication made *in the course of the mediation.*[35]

The Court of Appeal indicated the confidentiality statutes for mediation did not overrule the inapplicability of confidentiality protections of the attorney client privilege of California Evidence Code Section 950, et seq. in malpractice suits. The California Supreme Court disagreed and said these statutes serve different purposes and the

[31] Id at 122.
[32] Id at 125.
[33] Id.
[34] Id.
[35] Ca. Evid. Code §1119.

exception to the attorney client privilege for malpractice actions was aimed at evidence supporting the lawyer's claim or undermining the client's claim so the client cannot claim the privilege to withhold evidence that might aid the attorney's defense.[36] The Court continued to say:

> The instant Court of Appeal's . . . conclusion is nothing more or less than a judicially crafted exception to the unambiguous language of the mediation confidentiality statues in order to accommodate a competing policy concern—here protection of a client's right to sue his or her attorney. We and the Courts of Appeal have consistently disallowed such exceptions, even where the equities appeared to favor them. . . . We further emphasize that application of the mediation confidentiality statutes to legal malpractice actions does not implicate due process concerns so fundamental that they might warrant an exception on constitutional grounds. Implicit in our decisions in ***Foxgate*** [and] ***Rojas*** *. . .* is the premise that the mere loss of evidence pertinent to the prosecution of a lawsuit for civil damages does not implicate such a fundamental interest.[37]

But then the Court chides the Legislature saying:

> We express no view about whether the statutory language, thus applied, ideally balances the competing concerns or represents the soundest public policy. Such is not our responsibility or province. We simply conclude, as a matter of statutory construction, that application of the statutes' plain terms to the circumstances of this case does not produce absurd results that are clearly contrary to the Legislature's intent. Of course, the Legislature is free to reconsider whether the mediation confidentiality statutes should preclude the use of mediation-related attorney-client discussions to support a client's civil claims or malpractice against his or her attorneys.[38]

> The reluctant concurrence by Justice Chin said it eloquently:

> Th[e] holding will effectively shield an attorney's actions during mediation, including advising the client, from a malpractice action even if those

[36] Id at 132.
[37] Id at 133-135.
[38] Id at 136.

> actions are incompetent or even deceptive. Attorneys participating in mediation will not be held accountable for any incompetent or fraudulent actions during 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.[39]

Justin Chin goes on to say that the result just barely fails to qualify for an absurd consequence not intended by the Legislature and there may be better ways to balance the interests than the simplistic 'everything is privileged.' His proposal is quite similar to the Uniform Mediation Act – use the statement solely for the malpractice action and not for any other purpose.

Lappe

The most recent California case heard by the Court of Appeals in 2014 dealt with a claim that misinformation provided in mediation was relied upon by the injured party in entering the settlement agreement ,[40] but given the clear message from the California Supreme Court that it will not condone judicially created exceptions to mediation confidentiality, it may well be overturned. Ms. Lappe and her husband agreed to settle support and property issues through mediation without counsel. As a part of the mediation, Ms. Lappe and her husband both submitted financial disclosure declarations required by the Family Code. Shortly after judgment was entered, Ms. Lappe discovered Mr. Lappe had sold a company for $75 million for which Ms. Lappe had accepted $10 million for her community property interest. Their agreement also provided that the financial disclosure documents would be inadmissible and protected

[39] Id at 139.
[40] Gilda Lappe v. Superior Court of Los Angeles County, 181 Cal. Rptr. 3d 510 (Cal. Ct. App., 2d Dist., Div. 3, 2014).

from disclosure as prepared for mediation. She then sued her former husband because she claimed that he had made misrepresentations in the financial disclosure declaration required by the Family Code (her action alleges she never received a copy).

The Court said "[o]ur Supreme Court has broadly applied the mediation confidentiality statutes and all but categorically prohibited judicially crafted exceptions, even in situations where justice seems to call for a different result."[41] But the Court said the question presented in this case is whether mediation confidentiality statutes apply to statutorily mandated disclosures required whether or not the parties participate in mediation. The Court said the statutorily mandated disclosures control. If the declarations were exchanged during mediation they are still not privileged as they fall under Section 1120(a) because they are subject to discovery outside of mediation and do not become inadmissible solely because they were used in a mediation. These declarations would have been exchanged without a mediation as required by the Family Code so they could not have been prepared "for the purpose of, in the course of, or pursuant to, a mediation" as required by Evidence Code Section 1119(b).[42] The Court said it is "not crafting an exception . . .[but] simply recogniz[ing] that the confidentiality statutes do not apply in the first instance, because these statutorily mandated declarations do not fall within any category delineated by Evidence Code Section 1119.[43] What the Court fails to address and what is at the center of the problem with

[41] Lappe at 517.
[42] There are a few statutory exemptions to the declaration of disclosure provisions of the Family Code which make the declarations excusable in certain situations and such laxity in the requirement may be the opening the California Supreme Court will use to overrule the Court of Appeal decision. Family Code § 2105(a) court has discretion to excuse party from serving a final declaration of disclosure upon a showing of "good cause." Also the parties may stipulate to a mutual waiver of the final declaration requirement under specified conditions.
[43] Lappe at 520.

absolute mediation confidentiality is that the financial disclosures made in mediation may be completely different from and even contradict the required statutory disclosures when actually made. The mediation disclosures may even be false and fraudulent without consequence or recourse.

PROPOSAL

As noted in "Mediation, The Role of Advocate and Neutral"[44] "[o]ne of the key attractions of mediation for both parties and lawyers is that the process is confidential." State and federal government code sections have opted to grant different degrees of confidentiality to mediation communications and materials. However, the need for strict confidentiality has not been shown and there are commentators on both sides of the issue.[45]

The repeated invitation by the California Supreme Court to the legislature to take action on the mediation confidentiality provisions seems to have started at least a

[44] Dwight Golann & Jay Folberg, Mediation, The Roles of Advocate and Neutral, Chapter 14, (2d ed. 2011)

[45] Rebecca Callahan, Mediation Confidentiality: For California Litigants, Why Should Mediation Confidentiality be a Function of the Court in Which Litigation is Pending? 12 Pepp. Disp. Resol. L.J. 96 (2012) said: "[C]onfidentiality is an essential and integral part of mediation. It encourages the exchange of information between the parties and promotes problem-solving and interest-based negotiations, which can yield more durable settlements. Doubt about the existence or scope of confidentiality protections cannot help but lead to less sharing, less willingness to develop information for use in mediation, less work in joint sessions, more work in private caucuses, and more indirect communications through the mediator so as to preserve deniability. As this area of the law continues to develop, it will require a balancing of interests between mediation participants, courts charged with overseeing these disputes, third party litigants, and the public." See also, Scott H. Hughes, A Closer Look: The Case for a Mediation Confidentiality Privilege Still Has Not Been Made, 5 Disp. Resol. Mag. 14 (Winter 1998). "While considering all of these questions, it is important to remember that no empirical data exists that connects the success of mediation with the availability of a confidentiality privilege. There has been no showing that the parties come to mediation with an expectation of privacy or that it is necessary for mediation to work at its fullest potential … the central justification for a privilege is merely an assumption. Until such an empirical connection can be made, the arguments in favor of mediation privileges should not overcome the historical presumption favoring the availability of "every person's evidence."" And see, Eric D. Green, A Heretical View of the Mediation Privilege, 2 Ohio St. J. on Disp. Resol. 1 (Fall 1986), said: "I take the heretical position among mediators in arguing that the current campaign to obtain a blanket mediation privilege rests on faulty logic, inadequate data, and short-sighted professional self-interest."

review of the provisions. The California legislature has instructed the California Law Revision Commission to study mediation confidentiality as it relates to attorney malpractice and other misconduct as well as other relevant issues and instructed the Commission to consider the law in other jurisdictions and the Uniform Mediation Act.[46] The Commission has taken comments as well as studied the reports regarding the Early Mediation Pilot Programs from 2004.[47] Although more than 10 years old, the Commission has found no more recent studies. Studies of that time period found that in determining procedural justice, the parties cared more about their opportunity to be heard, to have their views considered and to be treated in a respectful way than about the particular outcome.[48] One must wonder what the respondents would have said if there was further questioning about inappropriateness during the process because of malpractice, fraud or other instances of poor behavior. At some point, the Legislature must acknowledge the inequitable results of the absolute confidentiality privilege. For anyone aware of the results for the parties in the California cases, it must cross their mind that the absolute confidentiality provisions undermine not only the justice afforded by mediation but also the confidence in the fairness of the process and the result. The California Law Revision Commission review is a potential starting point and there is hope that changes will be enacted.

[46] 2015 California Assembly Bill No. 2025, Amended May 10, 2012.
[47] Judicial Council, Evaluation of the Early Mediation Pilot Programs (Feb. 27, 2004).
[48] Nancy A. Welsh, Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?, 70 Wash U. L.Q. 787 (2001).

A simple solution would be for the California legislature to adopt the provisions of the Uniform Mediation Act relating to admission of mediation information in other litigation. The Uniform Mediation Act provides as Exceptions to Privilege:

> (a) There is no privilege under Section 4 for a mediation communication that is: . . . (6) except as otherwise provided in subsection (c), sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation, . . . (b) There is no privilege under Section 4 if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in: (1) a court proceeding involving a felony [or misdemeanor]; or (2) except as otherwise provided in subsection (c), a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation. (c) A mediator may not be compelled to provide evidence of a mediation communication referred to in subsection (a)(6) or (b)(2).

The provisions address the malpractice action from ***Cassel*** and provide for an in camera review of evidence that is not otherwise available to address the situation in ***Rojas***. The provision also provides for an exception where the need for the evidence substantially outweighs the interest in protecting confidentiality, the issue in ***Foxgate***.

If the Legislature is not comfortable accepting the Uniform Mediation Act exceptions to confidentiality, then as an alternative, California could add a new Evidence Code Section 1119.1 that is tailored after the Anti-SLAPP statute embodied in California Code of Civil Procedure Section 425.16. Using a modified Anti-SLAPP statute could require a much stronger showing to proceed with litigation than the

Uniform Mediation Act type of statute, but it would loosen the existing absolute confidentiality in limited circumstances. The parties to the mediation would at least have the opportunity to present their evidence to the court and perhaps be able to pursue their separate litigation.

In enacting C.C.P. § 425.16, the Legislature sought to address the perceived "disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances."[49] These provisions could also be tailored for lawsuits that might be construed to have been brought to "chill the valid exercise" of the mediation confidentiality provisions of the Evidence Code or conversely motions to quash use of mediation information that are designed to "chill the valid exercise" of a lawful and meaningful mediation. C.C.P. Section 425.16 could be modified into a new Evidence Code Section 1119.1 to read as set forth below (**added language is in bold** and deleted language is represented by strikethrough, a clean version of the proposed language is set forth in Appendix A*)*:

California Evidence Code Section 1119.1:

(a) The Legislature **is concerned** ~~finds and declares~~ that there has been a**n** *disturbing* increase in lawsuits **seeking use of materials prepared in the course of mediation which may** ~~brought primarily to~~ chill the **strong legislative policy of implementing alternatives to judicial dispute resolution through mediation** ~~valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.~~ The Legislature finds and declares that is in the public interest to encourage continued participation in **mediation** ~~matters of public significance~~, and that this participation should not be chilled through abuse of **either the mediation process or** the judicial process. To this end, this section shall be construed broadly:

[49] C.C.P. § 425.15(a).

(b) (1) A cause of action **for intentional misconduct, insurance bad faith or legal malpractice** against a person arising from any **writing as defined in Section 250 of the California Evidence Code, or any conduct or conversations in the course of mediation otherwise privileged under Section 1119, et seq., of the California Evidence Code** ~~act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue~~ **must be pleaded with specificity and** shall be subject to a special motion to strike, unless the court determines that the plaintiff has established **by clear and convincing evidence** ~~that there is a probability~~ that the plaintiff ~~will~~ **is likely to** prevail on the claim.

(2) In making its determination, the court shall consider **in camera** the pleadings, and supporting and opposing affidavits**, including the evidence sought to be excluded pursuant to Section 1119, et seq., of the California Evidence Code,** stating the facts upon which the liability or defense is based. **The court shall also consider whether the evidence sought to be excluded pursuant to Section 1119, et seq., may be obtained through other means or is needed in the prosecution of a malpractice or intentional misconduct claim, or to show the falsity of any information supplied during the mediation.**

(3) If the court determines that the plaintiff has established **by clear and convincing evidence the likelihood** ~~a probability~~ that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case of in any subsequent proceeding….

(~~f~~**c**) The special motion may be filed within 60 days of the service of the complaint, or, in the court's discretion, at any later time upon terms it deems property. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(~~g~~**d**) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause

shown, may order that specified discovery be conducted notwithstanding this subdivision.

When compared to the Uniform Mediation Act and the Anti-SLAPP statute the above proposal requires a much stronger showing of proof to continue. The UMA requires a showing that the evidence is otherwise not available, the need for the evidence substantially outweighs the need to protect confidentiality, or the evidence is needed in connection with a contract arising out of mediation to prove a claim to rescind or reform or a defense to avoid liability. The Anti-SLAPP statute requires only that the plaintiff establish a prima facie case that he or she would prevail on the claim.[50] The burden set forth above is much greater since the plaintiff can only avoid the otherwise absolute protection of the mediation privilege by pleading with specificity and establishing his or her case by clear and convincing evidence, the same requirements to plead fraud[51] and to obtain punitive damages.[52] Thus, if the California Legislature is unwilling to adopt the Uniform Mediation Act exceptions to confidentiality, at least plaintiffs would have some method to attempt to redress intentional misconduct and attorney malpractice that have occurred during mediation. At a minimum, the notion of fairness in mediation must include truthfulness in the information presented and a knowing and willingly entered agreement by the parties based upon competent advice of counsel. This notion of fairness is not served by fraud or other intentional misconduct or legal malpractice during the mediation process. The ability to tell one's story and be heard in a mediation is of significant importance to the satisfaction of the parties with the

[50] Robinzine v. Vikory, 143 Cal.App. 4th 1416, 50 Cal.Rptr. 3d 65 (Cal. Ct. App., 1st Dist., Div., 3 2006).
[51] Goldrich v. Natural Y Surgical Specialities, 25 Cal.App. 4th 772, 782, 31 Cal.Rptr. 2d 162 (Cal. Ct. App., 2d Dist., Div. 1, 1994).
[52] Cal. Civil Code §3294.

process,[53] so the ability to be heard in an action arising out of the mediation should only help to increase satisfaction with the process. Isn't that what the proponents of mediation all want? To claim that mediation would be inhibited by a fear of disclosure of information is the flip side of the claim that mediation would be inhibited by fear of non-actionable fraud or malpractice in the inducement of the settlement. Neither of these theories of the role of mediation confidentiality has any empirical evidence to support the claims, so why not err on the side of protecting the rights of the parties to mediation to be competently represented, to have all the facts before making a decision and to have the time necessary to calmly review the settlement terms. If the only way a party can be convinced to settle is to make sure they are tired, hungry, harassed, improperly advised by counsel, or tricked, that is a very poor settlement indeed. It is long past time to balance the strict confidentiality of California mediations with fairness and integrity in the process.

[53] Welsh supra.

APPENDIX A

California Evidence Code Section 1119.1:

(c) The Legislature is concerned that there has been an increase in lawsuits seeking use of materials prepared in the course of mediation which may chill the strong legislative policy of implementing alternatives to judicial dispute resolution through mediation. The Legislature finds and declares that is in the public interest to encourage continued participation in mediation, and that this participation should not be chilled through abuse of either the mediation process or the judicial process. To this end, this section shall be construed broadly:

(d) (1) A cause of action for intentional misconduct, insurance bad faith or legal malpractice against a person arising from any writing as defined in Section 250 of the California Evidence Code, or any conduct or conversations in the course of mediation otherwise privileged under Section 1119, et seq., of the California Evidence Code must be pleaded with specificity and shall be subject to a special motion to strike, unless the court determines that the plaintiff has established by clear and convincing evidence that the plaintiff is likely to prevail on the claim.

(2) In making its determination, the court shall consider in camera the pleadings, and supporting and opposing affidavits, including the evidence sought to be excluded pursuant to Section 1119, et seq., of the California Evidence Code, stating the facts upon which the liability or defense is based. The court shall also consider whether the evidence sought to be excluded pursuant to Section 1119, et seq., may be obtained through other means or is needed in the prosecution of a malpractice or intentional misconduct claim, or to show the falsity of any information supplied during the mediation.

(3) If the court determines that the plaintiff has established by clear and convincing evidence the likelihood that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case of in any subsequent proceeding….

(c) The special motion may be filed within 60 days of the service of the complaint, or, in the court's discretion, at any later time upon terms it deems property. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(d) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.