Statutory Exceptions to Mediation Confidentiality Moving Forward – Draft Legislation re Proposed Evidence Code § 1120.5

California has long favored private negotiation and settlement of civil disputes. The state legislature has expressly stated that "[t]he peaceful resolution of disputes in a fair, timely, appropriate, and cost-effective manner is an essential function of the judicial branch of state government." Cal. C. Civ. Proc. § 1775(a). To effectuate this policy, the state legislature has expressly validated mediation as a process that "provides parties with a simplified and economical procedure for obtaining prompt and equitable resolution of their disputes and a great opportunity to participate directly in resolving those disputes." Cal. C. Civ. Proc. § 1775(c). Because mediation provides a simple, quick, and economical means of resolving disputes, and because it may also help reduce the court system's backlog of cases, California has recognized that the public has an interest in protecting not only the mediation participants, but the mediation process itself. *Rojas v. Superior Court*, 33 Cal. 4th 407, 415 (2004).

The starting point for California's mediation confidentiality scheme is Evidence Code section 1115 which defines the processes that qualify for confidentiality protection. That protection extends to "mediations" and "mediation consultations." A "mediation consultation" is defined a "a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator." Cal. Evid. C. § 1115(c). A "mediation" is defined as a process in which "a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement." Cal. Evid. C. § 1115(a). The comments to Section 1115 make it clear that what qualifies as a mediation is to be determined by "the nature of a proceeding, not its label," and that a proceeding might qualify as a mediation for purposes of the confidentiality protections "even though it is denominated differently." The fact that a court may use the terms "mediation" and "settlement" interchangeably when referring to the process taking place or that a judicial officer might be assigned to preside over the talks will not transform the proceeding into a mandatory settlement conference without a clear record that such a conference was ordered. *Doe I v. Superior Court*, 132 Cal. App. 4th 1160, 1166-1167 (2005) (the "*Archdiocese Case*") ("Except where the parties have expressly agreed otherwise, appellate courts should not seize on an occasional reference to 'settlement' as a means to frustrate the mediation confidentiality statutes." This is an important distinction because Evidence Code Section 1117(b)(2) provides that the confidentiality protections afforded communications in mediation do <u>not</u> apply to communications had during a

mandatory settlement conference convened pursuant to Rule 3.1380 of the California Rules of Court.

Under California law, confidentiality protection is provided in the form of an evidence exclusion provision. It does not provide for an evidentiary privilege. Evidence Code section 1119 bars – as evidence in a court or other adjudicatory proceeding – disclosures of (a) anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or mediation consultation (Cal. Evid. C. § 1119(a)); (b) any writing prepared for the purpose of, in the course of, or pursuant to, a mediation or mediation consultation (Cal. Evid. C. § 1119(b)); and (c) all "communications, negotiations, or settlement discussions" by and between participants in the course of a mediation or mediation consultation. Cal. Evid. C. § 1119(c). The California Supreme Court has confirmed on several occasions that the "any" and "all" provisions of Section 1119 are to be interpreted quite literally and made it clear that the scope of protection intended by the statute is unqualified, clear and absolute, and is not subject to judicially crafted exceptions or limitations. See, *Foxgate Homeowners Ass'n v. Bramalea Calif., Inc.*, 26 Cal. 4th 1, 14 (2001); *Rojas*, supra, 33 Cal. 4th at 424; *Fair v. Bakhtiari*, 40 Cal. 4th 189, 197 (2006); *Simmons v. Ghaderi*, 44 Cal. 4th 570, 588 (2008); *Cassel v. Superior Court*, 51 Cal. 4th 113, 124 (2011).

The fact circumstances of the cases in which the California Supreme Court has been called upon to rule about the scope of protection afforded by Section 1119 have been somewhat extreme and serve to illustrate the breadth of what will be held as confidential if the communications occurred during a mediation. However, it is the Court's decision in *Cassel* that has served as the catalyst for the campaign to enact statutory exceptions to California's broad confidentiality protections largely because it involved the special, fiduciary relationship between attorney and client.

In 2011, the California Supreme Court decided *Cassel v. Superior Court*, 51 Cal. 4th 113 (2011), in which it upheld the broad, unconditional scope of the mediation confidentiality protections afforded by Evidence Code § 1119. In an underlying litigation dispute, Cassel was the plaintiff and, during a mediation, agreed to settle his claims. He then sued his attorneys for malpractice and related claims, asserted that they provided bad advice during the mediation and were both deceptive and coercive towards him during the mediation. All of the alleged wrongdoing occurred when Cassel and his attorneys were alone, and not in the presence of the mediator or other mediation participants. The Supreme Court held that the trial court properly granted motions in limine precluding Cassel

from introducing any evidence which arose during the mediation, leaving Cassel with no evidence to prove his case. [*It is interesting to note that while Cassel was precluded from introducing evidence at trial of what was said during or in connection with the mediation, he was not precluded from developing that evidence in the form of detailed deposition testimony or asserting his version of what happened during mediation in numerous pleadings.*]

The attorney-client context in which the scope of mediation confidentiality was tested not surprisingly invited a firestorm of negative publicity and public opinion. In response, Assemblyman Gorell introduced AB 2025 in 2012, which proposed to create an exception under Evidence Code § 1124 for "evidence of legal malpractice, breach of fiduciary duty or State Bar disciplinary action." As proposed, the bill still barred the attorney from introducing testimony by other participants (such as the adverse party and the mediator) to defend against the malpractice claims. As such, the attorney could not show that the ultimate settlement was the result of information obtained from the mediator or the adverse party because these communications remained inadmissible. AB 2025 passed the Assembly in 2012, but then stalled in the Senate Rules Committee. When Gorell was unsuccessful in negotiating a compromise bill in the Senate, the matter was referred to the California Law Revision Commission (CLRC) to analyze the issue and make a recommendation.

The CLRC conducted a study, commonly referred to as "Study K-402 – Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Conduct." In each of its public meetings held in and after August 2016, the CLRC has recommended that legislation providing for an exception to mediation confidentiality protection be enacted to address attorney misconduct while representing a client in mediation. In November 2016, draft legislation was proposed as set forth in what is commonly referred to as "Memorandum 2016-58," and provides for new Section 1120.5 to be added to the Evidence Code. As currently drafted, the CLRC's proposed draft legislation would create an exception to mediation confidentiality that would allow disclosure / introduction of (1) evidence relevant to prove or disprove an allegation that a lawyer committed malpractice during a mediation, *and* (2) the evidence is sought or proffered in connection with resolving (a) a complaint against the lawyer under the State Bar Act (Business & Professions Code §§ 6000 et seq.) or (b) a claim of malpractice.

Proposed Section 1120.5 includes specific language allowing a court to use a variety of tools to limit the publication of what would otherwise be a confidential mediation communication – e.g., sealing order, protective order, redaction, in cameral hearing, etc. Proposed Section 1120.5 also requires that a notice of complaint must be reasonably provided to all mediation participants (regardless of their status as parties to the complaint or action) so as to allow them to protect themselves from disclosures. Proposed Section 1120.5 does not change or affect Evidence Code Section 703.5, which provides that mediators are incompetent to testify as witness.

If proposed Section 1120.5 moves forward as is, parties will be required to produce in later discovery all confidential briefs, documents, emails and other communications with the mediator when a claim of attorney misconduct during the mediation is asserted, *and* will make all of these mediation communications admissible later if relevant to legal malpractice claims or defenses of any of the participants to the mediation. So what does that mean?

1. Mediators would no longer be able to open their mediations with the statement that "what happens in mediation, stays in mediation," and might even be duty bound to explain what confidentiality protections do not exist or at least caution the participants that if confidentiality is a concern, they should consult with their attorney (who has a conflict in the matter).

2. The level of pre-mediation sharing and exchange or information would most likely going to be curtailed. Why take the risk?

3. Parties' willingness to participate in joint session would be discouraged because caucus mediation affords them the excuse of deniability – i.e., the mediator got it wrong and did not carry my message accurately.

4. How attorneys and clients interact during or in preparation for mediation would be affected and might invite / necessitate the need for additional lawyering involvement in the form of "conflict" counsel for the party.

5. Worst of all, the exception would invite parties who have "buyer's remorse" after agreeing to settle a case to sue their attorney after settling with their adversary, and thereby encourage open-ended litigation rather than providing the closure promised by a mediated settlement agreement.

Some Discussion Points:

Pros of broad mediation confidentiality protection – no exception legislation:

- Promotes candor
- Encourages the exchange of information and discussion about information
- Facilitates greater freedom in discussing possible settlement frameworks and terms
- Encourages parties to speak to each other directly in joint session
- Promotes finality / closure; exception legislation potentially invites more litigation, including claims against mediators
- Discourages "buyer's remorse"

Cons of broad mediation confidentiality protection – exception legislation needed:

- Encourages better behavior by all during mediation
- Promotes public confidence in process integrity
- Encourages greater decision making responsibility on the part of the client
- Attorneys should not be able to hide their incompetence or misconduct under the cloak of mediation confidentiality
- Mediated settlements should not be "super contracts" immune from attack on grounds of fraud, duress or coercion

Text of Proposed Evidence Code Section 1120.5

Evid. Code § 1120.5 (added). Alleged misconduct of lawyer when representing client in mediation context

SEC. ____. Section 1120.5 is added to the Evidence Code to read:

1120.5. (a) A communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if both 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 a mediation or a mediation consultation.

(2) The evidence is sought or proffered in connection with, and is used solely in resolving, one of the following:

(A) A complaint against the lawyer under the State Bar Act, Chapter 4 (commencing with Section 6000) of the Business and Professions Code, or a rule or regulation promulgated pursuant to the State Bar Act.

(B) A cause of action for damages against the lawyer based upon alleged malpractice.

(b) If a mediation communication or writing satisfies the requirements of subdivision (a), only the portion of it necessary for the application of subdivision (a) may be admitted or disclosed. Admission or disclosure of evidence under subdivision (a) does not render the evidence, or any other mediation communication or writing, admissible or discoverable for any other purpose.

(c) In applying this section, a court may, but is not required to, sue 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, consistent with the requirements of the First Amendment to the United States Constitution, Sections 2 and 3 of Article I of the California Constitution, Section 124 of the Code of Civil Procedure, and other provisions of law.

(d) Upon filing a complaint or cross-complaint that includes a cause of action for damages against a lawyer based on alleged malpractice in the context of a mediation or a mediation consultation, the plaintiff or cross-complainant shall serve the complaint or cross-complaint by mail, in compliance with Sections 1013 and 1013a of the Code of Civil Procedure, on all of the mediation participants whose identities and addresses are reasonably ascertainable. This requirement is in addition to, not in lieu of, other requirements relating to service of the complaint or cross-complaint.

(e) Nothing in this section is intended to affect the extent to which a mediator is, or is not, immune from liability under existing law.

Rebecca Callahan, Esq. is a recognized expert in the field of dispute resolution. She teaches Arbitration and Mediation as an adjunct professor at Pepperdine School of Law / Straus Institute, and is also on the Faculty of the American Arbitration Association University where she presents skills training courses on various arbitration and mediation topics. Ms. Callahan received her JD from the Cal Berkeley (Boalt Hall) and her undergraduate degree from USC. In 2007, she earned an LLM in Dispute Resolution from Pepperdine University School of Law / Straus Institute. Ms. Callahan is available to serve as a mediator, arbitrator or consultant on a statewide basis. Engagements can be booked directly through her office.