PART II. CONCLUSIONS

In the course of this study, the Commission held twenty-four public meetings, heard testimony from about seventy-five people (many of them repeatedly), received written comments from hundreds of individuals and about forty organizations, and considered almost a hundred staff memoranda on the subject (totaling thousands of pages). Based on the information received and the matters discussed in Part I of this report, the Commission has concluded that existing California law does not place enough weight on the interest in holding an attorney accountable for malpractice or other professional misconduct in a mediation context.

By precluding the use of mediation communications in a subsequent noncriminal proceeding, such as a legal malpractice case based on how an attorney handled a mediation, the mediation confidentiality provisions (particularly Evidence Code Section 1119) make it difficult and sometimes impossible for a client to provide any evidence in support of allegations of attorney misconduct during a mediation. Existing law may also prevent an attorney from proffering mediation communications to disprove such allegations.

The Commission believes that courts need to be able to effectively evaluate allegations that an attorney engaged in misconduct in the mediation process. In its view, public confidence in the administration of justice depends on providing such an opportunity to the citizens of this state.

Proposed New Exception to Mediation Confidentiality

To address this situation, the Commission recommends creating a new exception to Section 1119, which would focus on holding attorneys accountable for mediation misconduct, while also allowing attorneys to effectively rebut meritless misconduct claims.[743] The Commission considers this important not only for purposes of achieving justice, but also to ensure the appearance of justice.

In proposing this approach, the Commission recognizes that the policy interests underlying the mediation confidentiality statutes are significant and warrant protection. A careful balancing of the competing interests is necessary.

The proposed new exception would therefore be narrow, so as to help protect the confidentiality expectations of mediation participants. In particular, the proposed new exception would be subject to a number of important limitations, as explained below.

Limitations to Protect the Policies Underlying Mediation Confidentiality

Over a period of more than a year, the Commission considered the best means to draft a new exception to the mediation confidentiality statutes. The Commission

743. See proposed Evid. Code § 1120.5 & Comment *infra*.

recommends that the exception incorporate the following features to minimize harm to the policy interests served by those statutes.

No Undoing Settlements

The proposed new exception would not apply in resolving a claim relating to the enforcement of a mediated settlement agreement, such as a claim for rescission of such an agreement or a suit for specific performance.[744] This limitation is designed to preserve the finality of a mediated settlement agreement[745] and protect against claims based on buyer's remorse.[746] Once parties resolve a dispute through mediation and properly memorialize their agreement, they should be able to rely on that agreement and put the dispute behind them.[747]

The Exception Would Apply Only in a State Bar Disciplinary Proceeding, a Claim for Damages Due to Legal Malpractice, or an Attorney-Client Fee Dispute

The proposed new exception would only apply in the following types of claims:

(1) A disciplinary proceeding under the State Bar Act[748] or a rule or regulation promulgated pursuant to that Act. [749] Such a proceeding serves the critical function of protecting the public from attorney malfeasance.

(2) A cause of action seeking damages from a lawyer based on alleged malpractice (regardless of whether this cause of action is pending in court or in an arbitration).[750] This type of claim further promotes attorney accountability, while also providing a means of compensating a client for breach of an attorney's professional duties.

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744. See proposed Evid. Code § 1120.5 Comment *infra*.

745. See *id.*; see also CLRC Staff Memorandum 2015-46, Exhibit p. 218 (Guy Kornblum's comment that "There has to be closure."); CLRC Staff Memorandum 2015-45, Exhibit p. 12 (Paul Dubow's comment that "One of the major attractions to mediation is that a successful outcome will buy peace, i.e., the matter is ended permanently and the parties can go on with their lives.").

746. See proposed Evid. Code § 1120.5 Comment *infra*; see also CLRC Staff Memorandum 2015-46, Exhibit p. 107 (Timothy D. Martin's comment that "Settlor's (Buyer's) remorse is a common reaction to settling a case."); CLRC Staff Memorandum 2015-54, Exhibit p. 35 (Jessica Lee-Messer's comment to same effect).

747. Mediation participants can to some extent protect themselves against fraud by ensuring that a mediated settlement agreement incorporates any representations they are relying upon in agreeing to its terms (e.g., an opponent's assertion that he is bankrupt). Mediation participants also have some protection against coercion, because they are entitled to leave a mediation without settling. If a mediation participant is victimized by attorney misconduct despite these means of protection, the Commission's proposed new exception could help the participant obtain relief through a disciplinary proceeding, malpractice claim, or fee dispute against the errant attorney, rather than an attack on a mediated settlement agreement.

748. Bus. & Prof. Code § 6000 *et seq.* For a brief description of the process used in a State Bar disciplinary proceeding, see CLRC Staff Memorandum 2015-22, pp. 42-48.

749. See proposed Evid. Code § 1120.5(a)(2)(A) & Comment *infra*.

750. See proposed Evid. Code § 1120.5(a)(2)(B) & Comment *infra*.

(3) An attorney-client fee dispute.[751] This would encompass a mandatory fee arbitration under the State Bar Act,[752] which is an effective, low-cost means to resolve fee issues in a confidential setting.

The proposed new exception would not apply in any other type of claim, because that does not appear necessary to accomplish the Commission's objectives.[753]

The Exception Would Apply Only to Attorney Misconduct in a Professional Capacity

The proposed new exception would only apply to a mediation communication bearing on an allegation that an attorney breached a *professional obligation*.[754] The exception is thus limited to an attorney's conduct in a professional capacity. More precisely, the exception would apply "when the merits of the claim will necessarily depend on proof that an attorney violated a professional obligation — that is, an obligation the attorney has *by virtue of* being an attorney — in the course of providing professional services."[755] Misconduct does not arise in the course of providing professional services merely because it occurs during a period of legal representation or because providing such representation brought an attorney and client together and thus gave the attorney an opportunity to engage in the misconduct.[756]

The Exception Would Only Apply to Alleged Misconduct in Representing a Client, Not in Serving as a Mediator

The proposed new exception would only apply to allegations that an attorney committed misconduct in *representing a client*, not in serving as a mediator.[757] The exception is thus focused specifically on the concern raised in the cases that were the impetus for this study.[758] Expanding the exception further would pose many questions and complications, which could hinder or delay achievement of the Commission's objectives.[759]

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751. See proposed Evid. Code § 1120.5(a)(2)(C) & Comment *infra*.

752. See *id.*

753. For further discussion of this point, see CLRC Staff Memorandum 2016-58, pp. 19-24.

754. See proposed Evid. Code § 1120.5(a)(1) & Comment *infra*.

755. Lee v. Hanley, 61 Cal. 4th 1225, 1229, 34 P.3d 334, 191 Cal. Rptr. 3d 536 (2015).

756. *Id.* at 1239. For further discussion of this point, see CLRC Staff Memorandum 2016-58, pp. 17-25; see also First Supplement to CLRC Staff Memorandum 2015-45, Exhibit pp. 2-3 (comments of Rachel Ehrlich).

757. See proposed Evid. Code § 1120.5(a)(1) & Comment *infra*.

758. See *supra* note 26 & accompanying text.

759. See CLRC Staff Memorandum 2015-45, pp. 9-17.

The Exception Would Apply Only to Alleged Misconduct That Occurs in a Mediation Context

The proposed new exception would only apply to misconduct that allegedly occurred *in the context of* a mediation or a mediation consultation.[760] This situation is most problematic under existing law, because much, if not all, of the relevant evidence for both sides might fall within the scope of Section 1119 and thus be unavailable in resolving whether misconduct actually occurred.[761]

Importantly, however, the exception would extend to alleged misconduct at *any* stage of the mediation process: during a mediation consultation, a face-to-face mediation session with the mediator and all parties present, a private caucus with or without the mediator, a mediation brief, a mediation-related phone call, or any other mediation-related activity.[762] The determinative factor is whether the misconduct allegedly occurred in a mediation context, not the time and date of the alleged misconduct.[763]

A Mediator Generally Could Not Testify or Provide Documentary Evidence Pursuant to the Exception

Subject to some exceptions and limitations, Evidence Code Section 703.5 makes a mediator incompetent to testify about a mediation in a subsequent civil proceeding:

> 703.5. No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure. However, this section does not apply to a mediator with regard to any mediation under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

Whether this restriction applies to a request for documentary evidence is not expressly stated. There does not appear to be any case law squarely resolving that point.

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760. See proposed Evid. Code § 1120.5(a)(1) & Comment *infra*.

A similar limitation applies under the UMA's exception for professional misconduct, as well as in Florida, Maine, New Mexico, Texas, and Virginia. See UMA § 6(a)(6); Fla. Stat. § 44.405(4)(a)(4) & (6); Maine R. Evid. 514(c)(5); N.M. Stat. Ann. § 44-7B-5(a)(8); Va. Code Ann. §§ 8.01-576.10(vii), 8.01-581.22(vii); see also *Alford*, 137 S.W. 3d at 922; *Avary*, 72 S.W. 3d at 802-03.

761. See discussion of "Loss of Evidence May Mean Culpable Conduct Goes Unpunished or Another Inequitable Result Occurs" *supra*.

762. See proposed Evid. Code § 1120.5 Comment *infra*.

763. See *id*. For further discussion of the requirement that the alleged misconduct be in a mediation context, see CLRC Staff Memorandum 2015-45, pp. 17-21.

Section 703.5 serves to safeguard perceptions of mediator impartiality and protects a mediator from burdensome requests for testimony.[764] Rather than simply relying on Section 703.5 to provide those important benefits in the context of its proposed new exception, the Commission proposes to include some language protecting a mediator in the exception itself.[765] The proposed language on this point is similar to Section 703.5,[766] but it makes explicit that a mediator is precluded from providing documentary evidence pursuant to the exception, not just oral testimony.[767]

In proposing this approach, the Commission takes no position on whether Section 703.5 also precludes a mediator from providing documentary evidence about a mediation. The proposed legislation is not intended to have any impact on that or any other aspect of Section 703.5. The new provision would expressly state as much.[768]

A Litigant Could Not Go to Another Source to Obtain or Learn the Content of a Mediator's Writing or Oral Communication

To bolster the above-described restrictions on obtaining evidence from a mediator, the proposed new exception would be subject to another important limitation: In general, it would not extend to any evidence that constitutes or discloses a writing[769] or oral communication of the mediator relating to a

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764. See discussion of "Special Considerations Relating to Mediator Testimony" *supra*.

765. For further discussion of this point, see Memorandum 2017-19, pp. 8-10; First Supplement to Memorandum 2017-9, pp. 3-8; CLRC Staff Memorandum 2017-8, pp. 5-8; see also CLRC Staff Memorandum 2015-45, pp. 41-43.

766. Like Section 703.5, the proposed new provision would generally preclude a mediator from providing evidence, whether voluntarily or under compulsion of process, regarding a mediation that the mediator conducted. That general rule would be subject to the same exceptions stated in the first sentence of Section 703.5. See proposed Evid. Code § 1120.5(e) *infra*. There would not be any language comparable to the second sentence of Section 703.5, because the entire chapter on mediation confidentiality is inapplicable to a mediation under Chapter 11 of Part 2 of Division 8 of the Family Code. See Evid. Code § 1117(b)(1).

767. See proposed Evid. Code § 1120.5(e) *infra*. For a court decision recognizing the need for both types of protection, see *Macaluso*, 618 F.2d at 55 (explaining that if conciliators could testify about their activities, or be compelled to produce notes or reports of their activities, not even strictest adherence to purely factual matters would prevent evidence from favoring or seeming to favor one side).

The Commission considered but rejected the possibility of revising Section 703.5 to expressly address documentary evidence. That section pertains not only to a mediator, but also to an arbitrator and a person who presides at a judicial or quasi-judicial proceeding. The section thus reaches beyond the scope of this study. To avoid possible unintended effects, the Commission decided to leave Section 703.5 alone.

768. See proposed Evid. Code § 1120.5(f) *infra*.

769. "Writing" is defined in Evidence Code Section 250 to include:

> handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.

mediation conducted by the mediator.[770] Thus, a litigant generally[771] could not compel disclosure (from the mediator or anyone else) of what a mediator said during a mediation. Similarly, a litigant could not obtain a mediator's writing directly from the mediator,[772] nor circumvent that restriction by obtaining such a writing from another source.[773]

Further, unless an exception applies, a litigant could not learn the content of such a writing through other materials in the custody of another source. For instance, if the *response* to a mediator's email message reflects the content of that message, the response generally would not be discoverable under the proposed new exception unless the portion of it reflecting the content of the mediator's message could be effectively redacted.[774] Otherwise, the response would impermissibly "disclose a writing of the mediator relating to a mediation conducted by the mediator."[775]

The Same Standard Would Govern Admissibility and Disclosure Under the Exception

The proposed new exception would use the same standard for both admissibility and disclosure of mediation evidence: To be admissible or subject to disclosure, mediation evidence must be *relevant* and must satisfy the other requirements

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Courts have interpreted the term broadly. See, e.g., People v. Goldsmith, 59 Cal. 4th 258, 266, 326 P.3d 239, 172 Cal. Rptr. 3d 637 (2014) ("Photographs and video recordings with imprinted data are writings as defined by the Evidence Code.").

770. See proposed Evid. Code § 1120.5(a)(3) *infra*.

771. Subdivisions (a)(3) and (e) of proposed Section 1120.5(e) are subject to the same exceptions stated in the first sentence of Section 703.5. Compare proposed Evid. Code § 1120.5(e) *infra* with Evid. Code § 703.5; see also note 766 *supra*.

772. See discussion of "A Mediator Generally Could Not Testify or Provide Documentary Evidence Pursuant to the Exception" *supra*.

773. With respect to electronic communications and records, federal legislation known as the Stored Communications Act ("SCA"), 18 U.S.C. §§ 2701-2712, provides additional protection. Under the SCA, a provider of an electronic communication service (like email) "shall not knowingly divulge to any person or entity the contents of a communication ...." 18 U.S.C. § 2702(a)(1). A similar rule applies to a remote computing service (like iCloud). See 18 U.S.C. § 2702(a)(2).

Those rules are subject to some exceptions and limitations, but there is no express exception for civil discovery, such as a subpoena seeking a mediator's electronic communications for purposes of a legal malpractice case. See 18 U.S.C. § 2702(b). Nor have courts been willing to imply such an exception. See, e.g., *In re* Subpoena Duces Tecum to AOL, LLC, 550 F. Supp. 2d 606, 609-12; O'Grady v. Superior Court, 139 Cal. App. 4th 1442-47, 44 Cal. Rptr. 3d 72 (2006).

For further discussion of this point, see CLRC Staff Memorandum 2017-30, pp. 6-9.

774. To be discoverable under the proposed new exception, the response would also have to satisfy the other requirements enumerated in the exception.

775. Proposed Evid. Code § 1120.5(a)(3) *infra*. For further discussion of these matters, see CLRC Staff Memorandum 2017-61, pp. 37-46; CLRC Staff Memorandum 2017-30, pp. 3-12.

stated in the exception.[776] To help safeguard the interests underlying mediation confidentiality, that is a stricter standard for disclosure than the one governing a routine discovery request.[777]

The Exception Would Limit the Extent of Disclosure

If a mediation communication satisfies the requirements of the proposed new exception (e.g., it is proffered in the correct type of case and it is relevant to an allegation that an attorney "breached a professional requirement in the context of a mediation or a mediation consultation"), then *only the portion of the communication necessary for application of the exception* could be admitted or disclosed.[778] Further, admission or disclosure of a mediation communication pursuant to the exception would not render that evidence (or any other mediation communication) admissible or discoverable for any other purpose.[779]

This restriction is modeled on a provision in the UMA.[780] It would serve to minimize the extent of disclosure of mediation communications and thus help to preserve the confidentiality expectations of mediation participants,[781] particularly persons who have no part in the attorney-client dispute triggering use of the Commission's proposed new exception.[782]

A Court Could Use Judicial Tools to Limit Public Exposure of Mediation Communications

The proposed new exception would expressly permit a court to "use a sealing order, a protective order, a redaction requirement, an in camera hearing, or a

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776. See proposed Evid. Code § 1125(a)(1) *infra*. For further discussion of this point, see CLRC Staff Memorandum 2016-58, pp. 10-17; see also CLRC Staff Memorandum 2015-55, pp. 18 (Texas approach), 27-28 (*Olam* approach).

777. *Cf.* Code Civ. Proc. § 2017.010 ("Unless otherwise limited by order of the court in accordance with this title, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence *or appears reasonably calculated to lead to the discovery of admissible evidence*." (emphasis added).)

778. See proposed Evid. Code § 1120.5(b) *infra*.

779. See *id.* For example, if a court admitted a mediation communication in a legal malpractice case stemming from a mediation, that evidence would not be admissible under the proposed new exception in the mediated dispute. Further, only the portion of the mediation communication that is relevant to the legal malpractice case could be admitted for purposes of that case, not any other portion.

780. See UMA § 6(d).

781. Consistent and careful compliance with this restriction would be key, because predictability of an evidentiary protection for sensitive communications may be necessary to accomplish its objectives. See, e.g., *Jaffee*, 518 U.S. at 18. Application of California's mediation confidentiality protections is already unpredictable to some extent. See discussion of "Federal Law" *supra*.

782. For sources discussing the importance of protecting the confidentiality expectations of mediation participants who have no part in a post-mediation dispute, see, e.g., *Cassel*, 51 Cal. 4th at 136; *id.* at 139 (Chin, J., concurring); *Grubaugh*, 238 Ariz. at 268-69; Brand, *supra* note 107, at 395, 401 & n.233; Gafni, *supra* note 398, at 1.

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."[783] A court would thus have discretion to use existing procedural mechanisms to prevent widespread dissemination of mediation evidence admitted or disclosed pursuant to the new provision, so long as the court complies with the First Amendment right of access and other laws that promote government transparency.[784] Like the UMA-based restriction discussed above, the use of such procedural mechanisms would help to preserve the confidentiality expectations of mediation participants.

Mediation Participants Would Receive Notice and Could Thus Take Steps to Prevent Improper Disclosure of Mediation Communications

If a party to a mediation misconduct dispute seeks to invoke the proposed new exception, reasonable advance notice[785] to the other mediation participants would be necessary.[786] Each mediation participant (including the mediator) would be entitled to such notice, so long as the participant's identity and address are reasonably ascertainable.[787] The notice would have to:

(1) State the names of the parties to the dispute over alleged mediation misconduct.

(2) Warn the other mediation participants that resolving the dispute might involve the disclosure of mediation communications or writings.

(3) Identify the specific statutory basis for such potential disclosure.

(4) Include a copy of the complaint or other initial pleading alleging mediation misconduct.[788]

This notice requirement would alert mediation participants who would not otherwise be involved in the misconduct dispute to the possibility of disclosure of mediation communications in connection with that case. Such participants would thus have an opportunity to speak up and guard against any improper disclosure.[789]

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783. See proposed Evid. Code § 1120.5(c) *infra*.

784. For further discussion of this point, see CLRC Staff Memorandum 2016-18; CLRC Staff Memorandum 2015-55; CLRC Staff Memorandum 2015-45, pp. 27-30, 33-41.

785. To provide flexibility, the proposed exception does not attempt to specify precisely what constitutes "reasonable advance notice" for each type of dispute in which it would apply. If it appears appropriate, the Judicial Council and/or State Bar could address that point by court rule.

786. See proposed Evid. Code § 1120.5(d) & Comment *infra*.

787. See *id.*

788. See *id.*

789. See proposed Evid. Code § 1120.5 Comment *infra*. For further discussion of this point, see CLRC Staff Memorandum 2017-61, pp. 46-54; CLRC Staff Memorandum 2016-58, p. 36.

Other Features of the Proposed New Exception

In addition to the above-described features, which would help minimize harm to the policy interests underlying the mediation confidentiality statutes, the proposed new exception would have a number of other noteworthy features. These include:

- The exception would apply evenhandedly. It would permit use of mediation communications in specified circumstances to prove *or* disprove allegations against an attorney.[790]
- The exception would apply to all types of mediation communications and writings, not just to a particular category (such as communications made in a private caucus between an attorney and a client).[791]
- The exception would apply across-the-board; there would not be any carveouts for particular types of mediations.[792]
- The exception would expressly state that "[n]othing in this section is intended to affect the extent to which a mediator is, or is not, immune from liability under existing law."[793] It would thus be clear that existing law governing mediator immunity would remain unchanged.[794]
- The exception would expressly state that any contractual agreement purporting to override the exception "is null and void."[795] This would help prevent disputes regarding whether such an agreement is effective.
- The exception would not include any sanctions provision. The Commission believes that existing law governing the availability of sanctions will be sufficient to address any potential abuse of the new exception.[796]
- The exception would only apply to evidence relating to a mediation or mediation consultation that commences on or after the exception becomes operative. To avoid disrupting confidentiality expectations of mediation participants, the new exception would not apply retroactively.[797]

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790. See proposed Evid. Code § 1120.5(a)(1) & Comment *infra*. For further discussion of this point, see CLRC Staff Memorandum 2015-45, pp. 25-27; CLRC Staff Memorandum 2014-43, p. 13; CLRC Staff Memorandum 2014-6, p. 16; see also Brand, *supra* note 107, at 397.

791. See proposed Evid. Code § 1120.5 *infra*. For further discussion of this point, see CLRC Staff Memorandum 2015-45, pp. 31-33.

792. See proposed Evid. Code § 1120.5 *infra*. For further discussion of this point, see CLRC Staff Memorandum 2016-58, pp. 25-33 (discussing exemption requests for (1) family law mediations and (2) community-based mediation programs funded under Dispute Resolution Programs Act); see also CLRC Staff Memorandum 2017-8, pp. 5-7 (discussing PERB request for exemption).

793. See proposed Evid. Code § 1120.5(g) *infra*.

794. For further discussion of this point, see CLRC Staff Memorandum 2015-45, pp. 15-17; CLRC Staff Memorandum 2015-22, pp. 34-42.

795. See proposed Evid. Code § 1120.5(h).

796. See proposed Evid. Code § 1120.5 & Comment *infra*. For further discussion of this point, see CLRC Staff Memorandum 2017-61, pp. 53-54; CLRC Staff Memorandum 2015-45, pp. 43-44.

797. See proposed uncodified provision & Comment *infra*. For further discussion of this point, see CLRC Staff Memorandum 2017-61, pp. 57-58; CLRC Staff Memorandum 2015-45, p. 44.

Conclusion

Part III of this report presents the Commission's proposed legislation and accompanying Comments. In comparison with existing law, the suggested approach would place a higher priority on holding attorneys accountable for mediation misconduct.

Although the area is controversial and many of the participants in this study view the situation differently, the Commission believes that this is the best approach for the state and its citizens in the long-term. In submitting this report, the Commission extends its thanks to all of the participants in this study, regardless of their point of view.

PART III. PROPOSED LEGISLATION

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

SECTION 1. 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 a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if all of the following requirements are satisfied:

(1) The evidence is relevant to prove or disprove an allegation that a lawyer breached a professional obligation 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 pursuant to this section solely in resolving, one or more of the following:

(A) A disciplinary proceeding against the lawyer under the State Bar Act, Chapter 4 (commencing with Section 6000) of Division 3 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, regardless of whether this cause of action is pending in court or in an arbitration.

(C) A dispute between the lawyer and client concerning fees, costs, or both, including, but not limited to, a proceeding under Article 13 (commencing with Section 6200) of Chapter 4 of Division 3 of the Business and Professions Code.

(3) The evidence does not constitute or disclose a writing or an oral communication of the mediator relating to a mediation conducted by the mediator. This paragraph does not apply to a writing or an oral communication that could (i) give rise to civil or criminal contempt, (ii) constitute a crime, (iii) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (iv) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure.

(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, use a sealing order, a protective order, a redaction requirement, an in camera hearing, or a similar judicial technique to prevent public disclosure of mediation evidence, 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)(1) This section only applies if one or more of the parties to the dispute over alleged mediation misconduct provides reasonable advance notice to all of the mediation participants whose identities and addresses are reasonably ascertainable, including, but not limited to, the mediator.

(2) The notice provided pursuant to this subdivision shall do all of the following:

(A) State the names of the parties to the dispute over alleged mediation misconduct.

(B) Warn the other mediation participants that resolving the dispute might involve disclosure of mediation communications or writings.

(C) Specify which subparagraph of paragraph (2) of subdivision (a) applies.

(D) Include a copy of the complaint or other initial pleading alleging mediation misconduct.

(3) This requirement is in addition to, not in lieu of, any requirements relating to service of the complaint or other initial pleading.

(e) No mediator shall be competent to provide evidence pursuant to this section, through oral or written testimony, production of documents, or otherwise, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with a mediation that the mediator conducted, except as to a statement or conduct that could (i) give rise to civil or criminal contempt, (ii) constitute a crime, (iii) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (iv) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure.

(f) Nothing in this section is intended to alter or affect Section 703.5.

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

(h) Any agreement purporting to override this section is null and void.

Comment. Section 1120.5 is added to promote attorney accountability in the mediation context, while also enabling an attorney to defend against a baseless allegation of mediation misconduct. It creates an exception to the general rule that makes mediation communications and writings confidential and protects them from admissibility and disclosure in a noncriminal proceeding (Section 1119). The exception is narrow and subject to specified limitations to avoid unnecessary impingement on the policy interests served by mediation confidentiality.

Under paragraph (1) of subdivision (a), this exception pertains to an attorney's conduct in a professional capacity. More precisely, the exception applies "when the merits of the claim will necessarily depend on proof that an attorney violated a professional obligation — that is, an obligation the attorney has *by virtue of* being an attorney — in the course of providing professional services." Lee v. Hanley, 61 Cal. 4th 1225, 1229, 34 P.3d 334, 191 Cal. Rptr. 3d 536 (2015) (emphasis in original); see also *id.* at 1239. "Misconduct does not 'aris[e] in' the performance of professional services ... merely because it occurs during the period of legal representation or because the representation brought the parties together and thus provided the attorney the opportunity to engage in the misconduct." *Id.* at 1238. The exception applies only with respect to alleged misconduct of an attorney acting as an advocate, not with respect to alleged misconduct of an attorney-mediator.

Paragraph (1) also makes clear that the alleged misconduct must occur in the context of a mediation or a mediation consultation. This would include misconduct that allegedly occurred at *any* stage of the mediation process (encompassing the full span of mediation activities, such as a mediation consultation, a face-to-face mediation session with the mediator and all parties present, a private caucus with or without the mediator, a mediation brief, a mediation-related phone call, or other mediation-related activity). The determinative factor is whether the misconduct allegedly occurred in a mediation context, not the time and date of the alleged misconduct.

Paragraph (1) further clarifies that the exception applies evenhandedly. It permits use of mediation evidence in specified circumstances to prove *or* disprove allegations against an attorney.

To be admissible or subject to disclosure under this section, however, mediation evidence must be relevant and must satisfy the other stated requirements. To safeguard the interests underlying mediation confidentiality, that is a stricter standard than the one governing a routine discovery request. *Cf.* Code Civ. Proc. § 2017.010 ("Unless otherwise limited by order of the court in accordance with this title, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence *or appears reasonably calculated to lead to the discovery of admissible evidence*." (emphasis added).)

Paragraph (2) of subdivision (a) specifies the types of claims in which the exception applies:

- A State Bar disciplinary proceeding, which focuses on protecting the public from attorney malfeasance.
- A legal malpractice claim, which further promotes attorney accountability and provides a means of compensating a client for damages from breach of an attorney's professional duties in the mediation context.
- An attorney-client fee dispute, such as a mandatory fee arbitration under the State Bar Act, which is an effective, low-cost means to resolve fee issues in a confidential setting.

The exception does not apply for purposes of any other kind of claim. Of particular note, the exception does not apply in resolving a claim relating to enforcement of a mediated settlement agreement (e.g., a claim for rescission of a mediated settlement agreement or a claim for enforcement of a mediated settlement agreement). That restriction promotes finality in settling disputes and protects the policy interests underlying mediation confidentiality.

Under paragraph (3) of subdivision (a), the mediation confidentiality exception created by this section is inapplicable to evidence that constitutes or discloses a writing or an oral communication of a mediator relating to a mediation conducted by the mediator. This limitation complements the mediator competency restrictions stated in subdivision (e) and Section 703.5, and it is subject to the same four exceptions as those provisions.

Thus, unless one of the four exceptions applies, a litigant could not compel disclosure (from the mediator or anyone else) of what a mediator said during a mediation. Similarly, a litigant could not obtain a mediator's writing directly from the mediator nor circumvent that restriction by obtaining such a writing from another source. Further, a litigant could not learn the content of such a writing through other materials in the custody of another source. For instance, if the *response* to a mediator's email message reflects the content of that message, the response would not be discoverable under this section unless the portion of it reflecting the content of the mediator's message could be effectively redacted. Otherwise, the response would impermissibly "disclose a writing ... of the mediator relating to a mediation conducted by the mediator."

Subdivision (b) is modeled on Section 6(d) of the Uniform Mediation Act. It establishes an important limitation on the admissibility or disclosure of mediation communications pursuant to this section.

Subdivision (c) gives a court discretion to use existing procedural mechanisms to prevent widespread dissemination of mediation evidence that is admitted or disclosed pursuant to this section. For example, a party could seek a sealing order pursuant to the existing rules governing sealing of court records (Cal. R. Ct. 8.45-8.47, 2.550-2.552). Any restriction on public access

must comply with constitutional constraints and other applicable law. See, e.g., NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 20 Cal. 4th 1178, 980 P.2d 330, 86 Cal. Rptr. 2d 778 (1999).

Under subdivision (d), before a party to a mediation misconduct dispute seeks disclosure or introduction of mediation communications or writings pursuant to this section, the other mediation participants must be given reasonable advance notice, which satisfies four stated requirements. Each mediation participant is entitled to such notice, so long as the participant's identity and address are reasonably ascertainable. This affords an opportunity for a mediation participant who would not otherwise be involved in the misconduct dispute to take steps to prevent improper disclosure of mediation communications or writings of particular consequence to that participant. For instance, a mediation participant could move to intervene and could then seek a protective order or oppose an overbroad discovery request. To provide flexibility to tailor to different contexts, subdivision (d) does not specify precisely what constitutes "reasonable advance notice." That could be the subject of one or more court rules, as appears appropriate.

Under subdivision (e), a mediator generally cannot testify or produce documents pursuant to this section, whether voluntarily or under compulsion of process, regarding a mediation that the mediator conducted. That general rule is subject to the same exceptions stated in Section 703.5, which does not expressly refer to documentary evidence.

For federal restrictions on obtaining a mediator's electronic records from the mediator's service provider, see 18 U.S.C. § 2702(a); O'Grady v. Superior Court, 139 Cal. App. 4th 1423, 44 Cal. Rptr. 3d 72 (2006).

Subdivision (f) makes clear that the enactment of this section in no way changes the effect of Section 703.5.

Subdivision (g) makes clear that the enactment of this section has no impact on the state of the law relating to mediator immunity.

To help ensure that attorneys are held accountable for mediation misconduct, subdivision (h) prevents mediation participants from contractually avoiding the impact of this section.

See Sections 250 ("writing"), 1115(a), (c) ("mediation" and "mediation consultation"). For availability of sanctions, see, e.g., Section 1127; Code Civ. Proc. §§ 128.5, 128.7.

Uncodified (added). Operative date

SEC. 2. (a) This act shall become operative on January 1, 2019.

(b) This act only applies with respect to a mediation or a mediation consultation that commenced on or after January 1, 2019.

Comment. To avoid disrupting confidentiality expectations of mediation participants, this act only applies to evidence that relates to a mediation or a mediation consultation commencing on or after the operative date of the act.

APPENDIX: EVIDENCE CODE SECTIONS 703.5 AND 1115-1128 AND CORRESPONDING COMMENTS (AS OF 1/1/18)

Evid. Code § 703.5. Testimony by judge, arbitrator, or mediator

703.5. No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure. However, this section does not apply to a mediator with regard to any mediation under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

Comment. Section 703.5 is amended to correct the cross-reference to former Family Code Section 3155 to reflect the reorganization of those sections in 1993 Cal. Stat. ch. 219. This is a technical, nonsubstantive change. [24 Cal. L. Revision Comm'n Reports 621 (1994).]

Evid. Code § 1115. Definitions

1115. For purposes of this chapter:

(a) "Mediation" means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement.

(b) "Mediator" means a neutral person who conducts a mediation. "Mediator" includes any person designated by a mediator either to assist in the mediation or to communicate with the participants in preparation for a mediation.

(c) "Mediation consultation" means a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator.

Comment. Subdivision (a) of Section 1115 is drawn from Code of Civil Procedure Section 1775.1. To accommodate a wide range of mediation styles, the definition is broad, without specific limitations on format. For example, it would include a mediation conducted as a number of sessions, only some of which involve the mediator. The definition focuses on the nature of a proceeding, not its label. A proceeding may be a "mediation" for purposes of this chapter, even though it is denominated differently.

Under subdivision (b), a mediator must be neutral. The neutrality requirement is drawn from Code of Civil Procedure Section 1775.1. An attorney or other representative of a party is not neutral and so does not qualify as a "mediator" for purposes of this chapter.

A "mediator" may be an individual, group of individuals, or entity. See Section 175 ("person" defined). See also Section 10 (singular includes the plural). This definition of mediator encompasses not only the neutral person who takes the lead in conducting a mediation, but also any neutral who assists in the mediation, such as a case-developer, interpreter, or secretary. The definition focuses on a person's role, not the person's title. A person may be a "mediator" under this chapter even though the person has a different title, such as "ombudsperson." Any person who meets the definition of "mediator" must comply with Section 1121 (mediator reports and

communications), which generally prohibits a mediator from reporting to a court or other tribunal concerning the mediated dispute.

Subdivision (c) is drawn from former Section 1152.5, which was amended in 1996 to explicitly protect mediation intake communications. See 1996 Cal. Stat. ch. 174, § 1. Subdivision (c) is not limited to communications to retain a mediator. It also encompasses contacts concerning whether to mediate, such as where a mediator contacts a disputant because another disputant desires to mediate, and contacts concerning initiation or recommencement of mediation, such as where a case-developer meets with a disputant before mediation.

For the scope of this chapter, see Section 1117.

[*1997-1998 Annual Report*, 27 Cal. L. Revision Comm'n Reports 531, 595-621 (Appendix 5) (1997).]

Evid. Code § 1116. Effect of chapter

1116. (a) Nothing in this chapter expands or limits a court's authority to order participation in a dispute resolution proceeding. Nothing in this chapter authorizes or affects the enforceability of a contract clause in which parties agree to the use of mediation.

(b) Nothing in this chapter makes admissible evidence that is inadmissible under Section 1152 or any other statute.

Comment. Subdivision (a) of Section 1116 establishes guiding principles for applying this chapter.

Subdivision (b) continues the first sentence of former Section 1152.5 without substantive change.

[*1997-1998 Annual Report*, 27 Cal. L. Revision Comm'n Reports 531, 595-621 (Appendix 5) (1997).]

Evid. Code § 1117. Scope of chapter

1117. (a) Except as provided in subdivision (b), this chapter applies to a mediation as defined in Section 1115.

(b) This chapter does not apply to either of the following:

(1) A proceeding under Part 1 (commencing with Section 1800) of Division 5 of the Family Code or Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

(2) A settlement conference pursuant to Rule 3.1380 of the California Rules of Court.

Comment. Under subdivision (a) of Section 1117, mediation confidentiality and the other safeguards of this chapter apply to a broad range of mediations. See Section 1115 Comment.

Subdivision (b) sets forth two exceptions. Section 1117(b)(1) continues without substantive change former Section 1152.5(b). Special confidentiality rules apply to a proceeding in family conciliation court or a mediation of child custody or visitation issues. See Section 1040; Fam. Code §§ 1818, 3177.

Section 1117(b)(2) establishes that a court settlement conference is not a mediation within the scope of this chapter. A settlement conference is conducted under the aura of the court and is subject to special rules.

[*1997-1998 Annual Report*, 27 Cal. L. Revision Comm'n Reports 531, 595-621 (Appendix 5) (1997).]

Evid. Code § 1118. Recorded oral agreement

1118. An oral agreement "in accordance with Section 1118" means an oral agreement that satisfies all of the following conditions:

(a) The oral agreement is recorded by a court reporter or reliable means of audio recording.

(b) The terms of the oral agreement are recited on the record in the presence of the parties and the mediator, and the parties express on the record that they agree to the terms recited.

(c) The parties to the oral agreement expressly state on the record that the agreement is enforceable or binding, or words to that effect.

(d) The recording is reduced to writing and the writing is signed by the parties within 72 hours after it is recorded.

Comment (1997). Section 1118 establishes a procedure for orally memorializing an agreement, in the interest of efficiency. Provisions permitting use of that procedure for certain purposes include Sections 1121 (mediator reports and communications), 1122 (disclosure by agreement), 1123 (written settlement agreements reached through mediation), and 1124 (oral agreements reached through mediation). See also Section 1125 (when mediation ends). For guidance on authority to bind a litigant, see Williams v. Saunders, 55 Cal. App. 4th 1158, 64 Cal. Rptr. 2d 571 (1997) ("The litigants' direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent."). [*1997-1998 Annual Report,* 27 Cal. L. Revision Comm'n Reports 531, 595-621 (Appendix 5) (1997).]

Comment (2009). Section 1118 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to "audiotape" in Civil Discovery Act with either "audio technology," "audio recording," or "audio record," as context required). [37 Cal. L. Revision Comm'n Reports 211 (2007).]

Evid. Code § 1119. Mediation confidentiality

1119. Except as otherwise provided 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 any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(b) No writing, as defined in Section 250, that is prepared 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 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.

Comment. Subdivision (a) of Section 1119 continues without substantive change former Section 1152.5(a)(1), except that its protection explicitly applies in a subsequent arbitration or administrative adjudication, as well as in any civil action or proceeding. See Section 120 ("civil

action" includes civil proceedings). In addition, the protection of Section 1119(a) extends to oral communications made for the purpose of or pursuant to a mediation, not just oral communications made in the course of the mediation.

Subdivision (b) continues without substantive change former Section 1152.5(a)(2), except that its protection explicitly applies in a subsequent arbitration or administrative adjudication, as well as in any civil action or proceeding. See Section 120 ("civil action" includes civil proceedings). In addition, subdivision (b) expressly encompasses any type of "writing" as defined in Section 250, regardless of whether the representations are on paper or on some other medium.

Subdivision (c) continues former Section 1152.5(a)(3) without substantive change. A mediation is confidential notwithstanding the presence of an observer, such as a person evaluating or training the mediator or studying the mediation process.

See Sections 1115(a) ("mediation" defined), 1115(c) ("mediation consultation" defined). See also Section 703.5 (testimony by a judge, arbitrator, or mediator).

For examples of specialized mediation confidentiality provisions, see Bus. & Prof. Code §§ 467.4-467.5 (community dispute resolution programs), 6200 (attorney-client fee disputes); Code Civ. Proc. §§ 1297.371 (international commercial disputes), 1775.10 (civil action mediation in participating courts); Fam. Code §§ 1818 (family conciliation court), 3177 (child custody); Food & Agric. Code § 54453 (agricultural cooperative bargaining associations); Gov't Code §§ 11420.20-11420.30 (administrative adjudication), 12984-12985 (housing discrimination), 66032-66033 (land use); Ins. Code § 10089.80 (earthquake insurance); Lab. Code § 65 (labor disputes); Welf. & Inst. Code § 350 (dependency mediation). See also Cal. Const. art. I, § 1 (right to privacy); Garstang v. Superior Court, 39 Cal. App. 4th 526, 46 Cal. Rptr. 2d 84, 88 (1995) (constitutional right of privacy protected communications made during mediation sessions before an ombudsperson).

[*1997-1998 Annual Report,* 27 Cal. L. Revision Comm'n Reports 531, 595-621 (Appendix 5) (1997).]

Evid. Code § 1120. Types of evidence not covered

1120. (a) Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation.

(b) This chapter does not limit any of the following:

(1) The admissibility of an agreement to mediate a dispute.

(2) The effect of an agreement not to take a default or an agreement to extend the time within which to act or refrain from acting in a pending civil action.

(3) Disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute.

(4) The admissibility of declarations of disclosure required by Sections 2104 and 2105 of the Family Code, even if prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation.

Comment. Subdivision (a) of Section 1120 continues former Section 1152.6(a)(6) without change. It limits the scope of Section 1119 (mediation confidentiality), preventing parties from using a mediation as a pretext to shield materials from disclosure.

Subdivision (b)(1) makes explicit that Section 1119 does not restrict the admissibility of an agreement to mediate. Subdivision (b)(2) continues former Section 1152.5(e) without substantive change, but also includes an express exception for extensions of litigation deadlines. Subdivision (b)(3) makes clear that Section 1119 does not preclude a disputant from obtaining basic information about a mediator's track record, which may be significant in selecting an impartial

mediator. Similarly, mediation participants may express their views on a mediator's performance, so long as they do not disclose anything said or done at the mediation.

See Sections 1115(a) ("mediation" defined), 1115(b) ("mediator" defined), 1115(c) ("mediation consultation" defined).

[*1997-1998 Annual Report,* 27 Cal. L. Revision Comm'n Reports 531, 595-621 (Appendix 5) (1997).]

Evid. Code § 1121. Mediator reports and communications

1121. Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that is mandated by court rule or other law and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise in writing, or orally in accordance with Section 1118.

Comment. Section 1121 continues the first sentence of former Section 1152.6 without substantive change, except to make clear that (1) the section applies to all submissions, not just filings, (2) the section is not limited to court proceedings, but rather applies to all types of adjudications, including arbitrations and administrative adjudications, (3) the section applies to any report or statement of opinion, however denominated, and (4) neither a mediator nor anyone else may submit the prohibited information. The section does not prohibit a mediator from providing a mediation participant with feedback on the dispute in the course of the mediation.

Rather, the focus is on preventing coercion. As Section 1121 recognizes, a mediator should not be able to influence the result of a mediation or adjudication by reporting or threatening to report to the decisionmaker on the merits of the dispute or reasons why mediation failed to resolve it. Similarly, a mediator should not have authority to resolve or decide the mediated dispute, and should not have any function for the adjudicating tribunal with regard to the dispute, except as a non-decisionmaking neutral. See Section 1117 (scope of chapter), which excludes settlement conferences from this chapter.

The exception to Section 1121 (permitting submission and consideration of a mediator's report where "all parties to the mediation expressly agree" in writing) is modified to allow use of the oral procedure in Section 1118 (recorded oral agreement) and to permit making of the agreement at any time, not just before the mediation. A mediator's report to a court may disclose mediation communications only if all parties to the mediation agree to the reporting and all persons who participate in the mediation agree to the disclosure. See Section 1122 (disclosure by agreement).

The second sentence of former Section 1152.6 is continued without substantive change in Section 1117 (scope of chapter), except that Section 1117 excludes proceedings under Part 1 (commencing with Section 1800) of Division 5 of the Family Code, as well as proceedings under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

See Sections 1115(a) ("mediation" defined), 1115(b) ("mediator" defined). See also Sections 703.5 (testimony by a judge, arbitrator, or mediator), 1127 (attorney's fees), 1128 (irregularity in proceedings).

[*1997-1998 Annual Report,* 27 Cal. L. Revision Comm'n Reports 531, 595-621 (Appendix 5) (1997).]

Evid. Code § 1122. Disclosure by agreement

1122. (a) A communication or a writing, as defined in Section 250, that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if either of the following conditions is satisfied:

(1) All persons who conduct or otherwise participate in the mediation expressly agree in writing, or orally in accordance with Section 1118, to disclosure of the communication, document, or writing.

(2) The communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree in writing, or orally in accordance with Section 1118, to its disclosure, and the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation.

(b) For purposes of subdivision (a), if the neutral person who conducts a mediation expressly agrees to disclosure, that agreement also binds any other person described in subdivision (b) of Section 1115.

Comment. Section 1122 supersedes former Section 1152.5(a)(4) and part of former Section 1152.5(a)(2), which were unclear regarding precisely whose agreement was required for admissibility or disclosure of mediation communications and documents.

Subdivision (a)(1) states the general rule that mediation documents and communications may be admitted or disclosed only upon agreement of all participants, including not only parties but also the mediator and other nonparties attending the mediation (e.g., a disputant not involved in litigation, a spouse, an accountant, an insurance representative, or an employee of a corporate affiliate). Agreement must be express, not implied. For example, parties cannot be deemed to have agreed in advance to disclosure merely because they agreed to participate in a particular dispute resolution program.

Subdivision (a)(2) facilitates admissibility and disclosure of unilaterally prepared materials, but it only applies so long as those materials may be produced in a manner revealing nothing about the mediation discussion. Materials that necessarily disclose mediation communications may be admitted or disclosed only upon satisfying the general rule of subdivision (a)(1).

Mediation materials that satisfy the requirements of subdivisions (a)(1) or (a)(2) are not necessarily admissible or subject to disclosure. Although the provisions on mediation confidentiality do not bar admissibility or disclosure, there may be other bases for exclusion.

Subdivision (b) makes clear that if the person who takes the lead in conducting a mediation agrees to disclosure, it is unnecessary to seek out and obtain assent from each assistant to that person, such as a case developer, interpreter, or secretary.

For exceptions to Section 1122, see Sections 1123 (written settlement agreements reached through mediation) and 1124 (oral agreements reached through mediation) & Comments.

See Section 1115(a) ("mediation" defined), 1115(c) ("mediation consultation" defined). See also Sections 703.5 (testimony by a judge, arbitrator, or mediator), 1119 (mediation confidentiality), 1121 (mediator reports and communications).

[*1997-1998 Annual Report,* 27 Cal. L. Revision Comm'n Reports 531, 595-621 (Appendix 5) (1997).]

Evid. Code § 1123. Written settlement agreements reached through mediation

1123. A written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if the agreement is signed by the settling parties and any of the following conditions are satisfied:

(a) The agreement provides that it is admissible or subject to disclosure, or words to that effect.

(b) The agreement provides that it is enforceable or binding or words to that effect.

(c) All parties to the agreement expressly agree in writing, or orally in accordance with Section 1118, to its disclosure.

(d) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

Comment. Section 1123 consolidates and clarifies provisions governing written settlements reached through mediation. For guidance on binding a disputant to a written settlement agreement, see Williams v. Saunders, 55 Cal. App. 4th 1158, 64 Cal. Rptr. 2d 571 (1997) ("The litigants' direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent.").

As to an executed written settlement agreement, subdivision (a) continues part of former Section 1152.5(a)(2). See also Ryan v. Garcia, 27 Cal. App. 4th 1006, 1012, 33 Cal. Rptr. 2d 158, 162 (1994) (Section 1152.5 "provides a simple means by which settlement agreements executed during mediation can be made admissible in later proceedings," i.e., the "parties may consent, as part of a writing, to subsequent admissibility of the agreement").

Subdivision (b) is new. It is added due to the likelihood that parties intending to be bound will use words to that effect, rather than saying their agreement is intended to be admissible or subject to disclosure.

As to fully executed written settlement agreements, subdivision (c) supersedes former Section 1152.5(a)(4). To facilitate enforceability of such agreements, disclosure pursuant to subdivision (c) requires only agreement of the parties. Agreement of the mediator and other mediation participants is not necessary. Subdivision (c) is thus an exception to the general rule governing disclosure of mediation communications by agreement. See Section 1122.

Subdivision (d) continues former Section 1152.5(a)(5) without substantive change.

A written settlement agreement that satisfies the requirements of subdivision (a), (b), (c), or (d) is not necessarily admissible or subject to disclosure. Although the provisions on mediation confidentiality do not bar admissibility or disclosure, there may be other bases for exclusion.

See Section 1115(a) ("mediation" defined).

[*1997-1998 Annual Report,* 27 Cal. L. Revision Comm'n Reports 531, 595-621 (Appendix 5) (1997).]

Evid. Code § 1124. Oral agreements reached through mediation

1124. An oral agreement made in the course of, or pursuant to, a mediation is not made inadmissible, or protected from disclosure, by the provisions of this chapter if any of the following conditions are satisfied:

(a) The agreement is in accordance with Section 1118.

(b) The agreement is in accordance with subdivisions (a), (b), and (d) of Section 1118, and all parties to the agreement expressly agree, in writing or orally in accordance with Section 1118, to disclosure of the agreement.

(c) The agreement is in accordance with subdivisions (a), (b), and (d) of Section 1118, and the agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

Comment. Section 1124 sets forth specific circumstances under which mediation confidentiality is inapplicable to an oral agreement reached through mediation. Except in those circumstances, Sections 1119 (mediation confidentiality) and 1124 codify the rule of Ryan v. Garcia, 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (1994) (mediation confidentiality applies to oral statement of settlement terms), and reject the contrary approach of Regents of University of California v. Sumner, 42 Cal. App. 4th 1209, 50 Cal. Rptr. 2d 200 (1996) (mediation confidentiality does not protect oral statement of settlement terms).

Subdivision (a) of Section 1124 facilitates enforcement of an oral agreement that is recorded and memorialized in writing in accordance with Section 1118. For guidance in applying subdivision (a), see Section 1125 (when mediation ends) & Comment.

Subdivision (b) parallels Section 1123(c).

Subdivision (c) parallels Section 1123(d).

An oral agreement that satisfies the requirements of subdivision (a), (b), or (c) is not necessarily admissible or subject to disclosure. Although the provisions on mediation confidentiality do not bar admissibility or disclosure, there may be other bases for exclusion. For guidance on binding a disputant to a settlement agreement, see Williams v. Saunders, 55 Cal. App. 4th 1158, 64 Cal. Rptr. 2d 571 (1997) ("The litigants' direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent.").

See Section 1115(a) ("mediation" defined).

[*1997-1998 Annual Report*, 27 Cal. L. Revision Comm'n Reports 531, 595-621 (Appendix 5) (1997).]

Evid. Code § 1125. When mediation ends

1125. (a) For purposes of confidentiality under this chapter, a mediation ends when any one of the following conditions is satisfied:

(1) The parties execute a written settlement agreement that fully resolves the dispute.

(2) An oral agreement that fully resolves the dispute is reached in accordance with Section 1118.

(3) The mediator provides the mediation participants with a writing signed by the mediator that states that the mediation is terminated, or words to that effect, which shall be consistent with Section 1121.

(4) A party provides the mediator and the other mediation participants with a writing stating that the mediation is terminated, or words to that effect, which shall be consistent with Section 1121. In a mediation involving more than two parties, the mediation may continue as to the remaining parties or be terminated in accordance with this section.

(5) For 10 calendar days, there is no communication between the mediator and any of the parties to the mediation relating to the dispute. The mediator and the parties may shorten or extend this time by agreement.

(b) For purposes of confidentiality under this chapter, if a mediation partially resolves a dispute, mediation ends when either of the following conditions is satisfied:

(1) The parties execute a written settlement agreement that partially resolves the dispute.

(2) An oral agreement that partially resolves the dispute is reached in accordance with Section 1118.

(c) This section does not preclude a party from ending a mediation without reaching an agreement. This section does not otherwise affect the extent to which a party may terminate a mediation.

Comment. By specifying when a mediation ends, Section 1125 provides guidance on which communications are protected by Section 1119 (mediation confidentiality).

Under subdivision (a)(1), if mediation participants reach an oral compromise and reduce it to a written settlement fully resolving their dispute, confidentiality extends until the agreement is signed by all the parties. For guidance on binding a disputant to a settlement agreement, see Williams v. Saunders, 55 Cal. App. 4th 1158, 64 Cal. Rptr. 2d 571 (1997) ("The litigants' direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent.").

Subdivision (a)(2) applies where mediation participants fully resolve their dispute by an oral agreement that is recorded and memorialized in writing in accordance with Section 1118. The mediation is over upon completion of that procedure, and the confidentiality protections of this chapter do not apply to any later proceedings, such as attempts to further refine the content of the agreement. See Section 1124 (oral agreements reached through mediation). Subdivisions (a)(3) and (a)(4) are drawn from Rule 14 of the American Arbitration Association's Commercial Mediation Rules (as amended, Jan. 1, 1992). Subdivision (a)(5) applies where an affirmative act terminating a mediation for purposes of this chapter does not occur.

Subdivision (b) applies where mediation partially resolves a dispute, such as when the disputants resolve only some of the issues (e.g., contract, but not tort, liability) or when only some of the disputants settle.

Subdivision (c) limits the effect of Section 1125.

See Sections 1115(a) ("mediation" defined), 1115(b) ("mediator" defined).

[*1997-1998 Annual Report,* 27 Cal. L. Revision Comm'n Reports 531, 595-621 (Appendix 5) (1997).]

Evid. Code § 1126. Effect of end of mediation

1126. Anything said, any admission made, or any writing that is inadmissible, protected from disclosure, and confidential under this chapter before a mediation ends, shall remain inadmissible, protected from disclosure, and confidential to the same extent after the mediation ends.

Comment. Section 1126 clarifies that mediation materials are confidential not only during a mediation, but also after the mediation ends pursuant to Section 1125 (when mediation ends).

See Section 1115(a) ("mediation" defined).

[*1997-1998 Annual Report,* 27 Cal. L. Revision Comm'n Reports 531, 595-621 (Appendix 5) (1997).]

Evid. Code § 1127. Attorney's fees

1127. If a person subpoenas or otherwise seeks to compel a mediator to testify or produce a writing, as defined in Section 250, and the court or other adjudicative body determines that the testimony or writing is inadmissible under this chapter, or protected from disclosure under this chapter, the court or adjudicative body making the determination shall award reasonable attorney's fees and costs to the mediator against the person seeking the testimony or writing.

Comment. Section 1127 continues former Section 1152.5(d) without substantive change, except to clarify that either a court or another adjudicative body (e.g., an arbitrator or administrative tribunal) may award the fees and costs. Because Section 1115 (definitions) defines "mediator" to include not only the neutral person who takes the lead in conducting a mediation, but also any neutral who assists in the mediation, fees are available regardless of the role played by the person subjected to discovery.

See Section 1115(b) ("mediator" defined).

[*1997-1998 Annual Report,* 27 Cal. L. Revision Comm'n Reports 531, 595-621 (Appendix 5) (1997).]

Evid. Code § 1128. Irregularity in proceedings

1128. Any reference to a mediation during any subsequent trial is an irregularity in the proceedings of the trial for the purposes of Section 657 of the Code of Civil Procedure. Any reference to a mediation during any other subsequent noncriminal proceeding is grounds for vacating or modifying the decision in that proceeding, in whole or in part, and granting a new or further hearing on all or part of the issues, if the reference materially affected the substantial rights of the party requesting relief.

Comment. Section 1128 is drawn from Code of Civil Procedure Section 1775.12. The first sentence makes it an irregularity to refer to a mediation in a subsequent civil trial; the second sentence extends that rule to other noncriminal proceedings, such as an administrative adjudication. An appropriate situation for invoking this section is where a party urges the trier of fact to draw an adverse inference from an adversary's refusal to disclose mediation communications.

See Section 1115 ("mediation" defined).

[*1997-1998 Annual Report,* 27 Cal. L. Revision Comm'n Reports 531, 595-621 (Appendix 5) (1997).]