# Mediation Twenty Years Later: A Cautionary Story and Proposed Reforms

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In 1996 the California Law Revision Commission ("LRC") developed and proposed legislation that eventually became the current mediation confidentiality statute, Evidence Code section 1119.[1] As more and more litigation has flowed away from the courthouses and into mediation the past twenty years,[2] mediation confidentiality has remained an ironclad doctrine in California, surviving multiple high-profile challenges.[3] The LRC is currently studying a potential exception to mediation confidentiality regarding attorney-client communications. Lynette Berg Robe explained the ongoing process in an earlier publication.[4]

This **refrains** from commenting on the already well-debated topic of a potential exception to mediation confidentiality. Rather, we build on the LRC's present work in raising some **other** aspects of mediation that are due for review. As discussed below, we briefed the LRC and attended its September 22, 2016 hearing. There we asserted our points toward a more holistic consideration.

Akin to existing judicial disclosure and disqualification statutes, the reforms we promote would be designed "to ensure public confidence…and to protect the right of litigants to a fair and impartial [process]." (See, e.g., *Peracchi v. Superior Court* (2003) 30 Cal.4th 1245, 1251.)

1. **Catherine's Story.**
   This tells the story of a client, "Catherine," [5] who believes she saw the "mediation" process permit her purported "mediator" to strip her of tens, if not hundreds, of millions of dollars.[6] It is told from Catherine's perception, and her former husband and her "mediator" dispute her allegations. We do not pretend to re-litigate or adjudicate her respective cases against each of them– forests have already been sacrificed. Similarly, this refrains from analyzing Catherine's potential claims against her prior attorney – she did not find him blameworthy and maybe he was not.

   Rather, the point is to add a new perspective to the discussion.

1. <u>The "Mediated" Divorce and Later Discovery of Apparent Wrongdoing.</u>

Catherine is the former spouse of John, who created a well-known asset – call it a "widget factory" – during the parties' marriage. They shared a business manager, who was with an accountancy and financial services firm (collectively, the "Firm").

When the couple's separation appeared imminent, the Firm reached out to Catherine, offering to help divide their estate. What the Firm did not reveal to her in inducing her into the process was that it was aiming for John's lucrative post-divorce financial services business, which could follow if he received the widget factory in the division of assets. The Firm did not reveal that it felt that the divorce had to be rushed to completion in order for it to begin making its formal pitch to John. Catherine asserts these facts based on some internal Firm emails she was able to obtain after she settled but before her further discovery efforts were terminated by mediation confidentiality as described below.

Had Catherine been informed of these facts as she now understands them, she would not have agreed to enter into negotiations with the Firm involved. She would not have agreed that the process would be deemed "confidential." As with many litigants, though, Catherine had **no clue** about the "mediation" chapter of the Evidence Code.[7] She had **no clue** how mediation confidentiality could substantially affect and even harm her.

In the divorce negotiations, the widget factory was valued at **$8 million**, in keeping with John's representations about its supposedly poor future prospects. Catherine, who felt constant pressure from the Firm to quickly make a deal with minimal due diligence, signed off and was awarded half of this amount (i.e. $4 million) in the overall division of assets.

Catherine later learned that John gave members of the Firm $50,000 wristwatches in appreciation for their settlement work.

Only two weeks after Catherine signed the Marital Settlement Agreement ("MSA"), she was shocked to read a press report that John was in negotiations to sell the widget factory for **$1.6 billion**. Catherine immediately contacted her original attorney regarding her divorce settlement.

John filed a motion to enforce the MSA as the parties' judgment. Catherine argued that her consent was procured by fraud, and that John failed to disclose the true value of the widget factory. The family law trial court ruled against her, largely based on her lack of admissible evidence. The ruling was upheld on appeal.

1. <u>Catherine's Subsequent Suit: Mediation Confidentiality Shields the Firm.</u>

Following the MSA's enforcement, Catherine filed a new lawsuit against the Firm as her remaining source of remedy.

She asserted that there was no "mediation" and thus no mediation confidentiality. Catherine had never been provided any "mediation" disclosures or notices. She never gave any consent, written or otherwise, to "mediation." According to the trial court, her reasoning failed based on the broad definition of "mediation" in Evidence Code section 1115(a): "[m]ediation means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement."

Catherine also argued that there was no "mediation" since the Firm was not "neutral" under the above definition. The term **"neutral person"** as used in section 1115 is not defined in the mediation statutes or in any appellate authority. The trial court researched the statute's legislative history and ruled that **the only "neutrality" required for one to become a mediator is merely one's objective status as a non-party.**[8] It found that, even though the Firm did not act "neutral" in the sense that it was free of bias, "neutral" merely refers to the "intended role of the person in the mediation."

The trial court stated:

**"… [T]here is nothing in the statutory scheme governing the mediation privilege in [the] Evidence Code … that requires a mediator to disclose conflicts of interest such, or, more importantly, that conditions mediation privilege on disclosure of such conflicts, or on the absence of such conflicts."** [Emphasis added.][9]

It continued:

"Thus, though it may be true that it is good practice that only persons without prior relationships with both sides on a mediation act as a mediator [citations omitted], this is not a condition to mediation privilege …. And, although mediators in court-connected mediation programs must disclose conflicts (Cal. Rules of Court, rule 3.855), **[neutrality] is not a condition to mediation privilege …."** [Emphasis added.]

Based on the foregoing, the Firm successfully asserted mediation confidentiality and prevented Catherine from pursuing meaningful discovery or asserting any claims against the Firm relating to the **actual mediation**.

Catherine further raised a cause of action for fraudulent inducement arising from the Firm's **pre-mediation** deceptions that led her into the process. But the trial court barred these, too, holding "… any alleged harm is based upon what actually occurred at the mediation." As such, mediation confidentiality even blocked her claims of **pre-mediation**wrongdoing. Under this logic, a litigant who might be tricked, coerced or otherwise fraudulently induced into a biased mediation is *ipso facto* crippled from establishing any case.

Compare Catherine's experience to the situation in the recent case, *JAMS Inc. v. Superior Court (Kinsella)* (July 27, 2016, D069862) ___ Cal.App.4th ___ http://www.courts.ca.gov/opinions/documents/D069862.PDF, where a party ("Kinsella") in an underlying "private trial" setting subsequently sued JAMS and the privately retained judicial officer. Kinsella's claims were based not on the judicial officer's actions in the actual proceeding (which would have been protected under judicial immunity), but on his **pre-trial** reliance on alleged false advertising of the judicial officer's background and qualifications. Kinsella alleged that the false advertising fraudulently induced him to select that particular judicial officer, whom he would not otherwise have chosen. Although it was primarily addressing initial anti-SLAPP issues, the Court allowed Kinsella to maintain his case, indicating in dicta the case's viability if it were to be limited to allegations of wrongdoing arising **before** the trial. (See *JAMS Inc. v. Superior Court (Kinsella), supra*, at ___ [p. 6].)

Both Catherine's and Kinsella's cases involved Alternative Dispute Resolution ("ADR"). Catherine, who asserted fraudulent inducement in the mediation context, was barred by mediation confidentiality. On the other hand, Kinsella was allowed to proceed because he was in a private trial. Mediation was the difference.

Under mediation confidentiality, Catherine was barred from obtaining and presenting potential evidence toward holding the Firm accountable on any of her claims. It prevented her from even alluding to what occurred during "mediation."[10] Her hands were tied and she had no chance. Ultimately, the Firm escaped through summary judgment.

1. **Reforms would Protect Litigants, Align with the State's Policy Encouraging ADR and Improve Our Profession's Reputation.**

**The current state of the law legalizes biased mediation,** as mediators who are not neutral and can sway unsophisticated parties into entering unfavorable agreements are permitted to operate. It **misleads** litigants in calling mediators "neutrals" when true "neutrality," as the word is commonly understood, is apparently not required and might not be provided. Because parties are not necessarily provided disclosures or informed of the existence, scope and potential ramifications of mediation confidentiality, **the current paradigm lacks mandatory "informed consent."**[11]

Although it is now commonly understood that informed consent goes to the heart of mediation policy, the legislative history of Evidence Code section 1115 reveals that, in 1996, the Legislature originally considered and rejected a provision incorporating disclosure, conduct, and bias requirements in the mediation statute. The bill's author opposed the provision because, among other issues, the bias disclosure standard ignored the wide variety of mediation situations. They included "peer (student)" disputes, "community-based" mediations and the resolution of neighborhood issues. The bill's author did not want "mediators" in those scenarios burdened with such regulations.

The modern reality, however, is that parties expect their mediators, like judges, to be unbiased and fair. Even represented parties expect mediators to provide opinions on the facts and the law. One of them is often more vulnerable than the other, and they are both conducting what might well be the greatest transaction of their lifetimes while under unusual and great pressures and anxiety. Emotions are often high, reasoning can be impaired and mediators therefore have great sway.

Parties in family law mediations now have the protection of the holding in *In Re Marriage of Lappe* (2014) 232 Cal.App.4th 774. The *Lappe* Court avoided creating an exception to the mediation confidentiality doctrine in finding that disclosures made during mediation under the Family Code's mandate fall outside Evidence Code section 1119. (*Lappe, supra*, at 787.) An aggrieved party would now at least be able to point to those in follow-up litigation against the other party. Depending on the circumstances, that might or might not be helpful.

But *Lappe* is not a panacea. It does not apply to mediations outside of family law. It does not address mediator bias or require pre-mediation conflict disclosures or other notifications to parties. It does not address the disparity that barred Catherine's "fraud in the inducement" claim against the Firm compared to Kinsella's, which was allowed in the private judging context.

Mediation reforms are also needed toward improving our profession's reputation. It is no secret that mediation confidentiality provides attorneys and others with a level of insulation from scrutiny and potential recourse for mistakes and other wrongdoing that is not enjoyed outside the mediation cocoon. Indeed, the LRC has heard public complaints about how the current paradigm undermines California's historical commitment to consumer protections. To the extent that mediation confidentiality, fairly or unfairly but still unarguably, gives the impression of a self-serving firewall against the usual standards of accountability, it is in our collective interest to enhance the public's impression that mediations must be transparent and fair.

Based on the foregoing, we urge the following:

1. <u>Requirement of Mediator Neutrality.</u>

Evidence Code section 1115(b) ought to be revised to require **true neutrality** of mediators. Its current use of the term "**neutral person**" ought to mean more than "someone with a pulse who is not one of the parties." This should be accompanied by an express assertion of public policy **embracing** disclosure and **rejecting** bias. Even parties in peer disputes, community mediations and neighborhood issues ought to know that, when they turn to a "neutral person" to help with an important dispute, the "neutral" is truly neutral as laypersons understand the term.

Alternatively, the requirement for true neutrality ought to at least apply to all mediations held **in contemplation or resolution of litigation.** There is no longer a compelling rationale for denying a mediator's true neutrality to prospective or actual litigants in order to encourage mediation of other types of disputes. Contrarily, a requirement of true neutrality for litigation-related mediations would not be expected to dampen enthusiasm for the mediation of other types of disputes.

As the mediator in *In re Marriage of Kieturakis* (2006) 138 Cal.App.4th 56 emphasized (ironically, in arguing **for** mediation confidentiality), "… neutrality [is] the life and breath of mediation. … [A] party must be guaranteed that the mediator is neutral …." (*Kieturakis, supra*, at 68.)

"The job of third parties such as mediators, conciliators and evaluators involves impartiality and neutrality, as does that of a judge, commissioner or referee …." (*Howard v. Drapkin*(1990) 222 Cal.App.3d 843, 860.)

*Rossco Holdings v. Bank of America* (2007) 149 Cal.App.4th 1353 described a standard for determining whether an arbitration was biased: "[w]hether [a] person aware of the facts might reasonably entertain a doubt that the [arbitrators] would be able to be impartial." (*Id.* at 1367.) The same standard could apply to mediations, too.

1. Requirement of Disclosures, Notifications and Options.

The law should be revised to require the pre-mediation presentation to parties of mandatory **written conflicts disclosures** that identify all of a mediator's existing as well as reasonably foreseeable future involvement with either party.[12] The disclosures should have to be updated through the mediation's termination.

The recent case, *Hayward v. Superior Court (Osuch)* (Aug. 3, 2016, A144823) ___ Cal.App.4th ___ <http://www.courts.ca.gov/opinions/documents/A144823.PDF>, emphasized the importance of written disclosures in the circumstances of "private judging." As participants reasonably expect mediators to also be truly neutral, the retention of mediators is analogous to that of private judges. The *Hayward* Opinion explained:

"Although disclosure may be onerous, matrimonial practitioners (and others who frequently participate in the…process) have a greater interest in assiduous disclosure than they may realize. … [T]he use by the 'small and collegial' family law bar 'of our friends, colleagues, and prior opposing counsel as private judges unwittingly exposes all of us, as a community and as individuals, to potential liability for violations of the various ethical canons, claims of cronyism, allegations of bias, complaints of self-dealing, and malpractice law suits. I believe that we are well intentioned, but I also believe the problems related to the inter-relationships of our bar in this way have been 'under-discussed' and 'under-examined.'" *(Id.* at __ [p. 39], quoting Hersh, *Ethical Considerations in Appointing our Colleagues as Private Judge*, 31 Family Law

News 31 (Issue No. 4, 2009), official publication of the California State Bar, Family Law Section.)

The law should be revised to also require the pre-mediation presentation to parties of **written notifications** that inform them of the existence, scope and potential ramifications of mediation confidentiality. Parties should be warned that, under that doctrine, post-settlement discoveries of misrepresentations, omissions, or fraud that might have been committed prior to or in mediation could be impossible to investigate or rectify.

Parties should be presented with an express **option to waive confidentiality.** As the LRC has heard, New York, for instance, generally lacks mediation confidentiality and the sky has not fallen in the Empire State. In this manner, mediation confidentiality would become a real point of consideration rather than a tacit and apparently unavoidable expectation of the ADR "system." It would hurt **no one** to provide parties the opportunity to make an educated choice; rather, **choice would be good**.

The above written disclosures, notifications and options could be presented through the creation of mandatory Judicial Council forms.

- **The September 22, 2016 LRC Hearing.**

We presented the foregoing to the LRC at its September 22, 2016 hearing. It acknowledged the sheer volume of information, comments and data it has received since the study began in 2013. All the Commissioners expressed a desire to soon prepare recommendations to the Legislature. The LRC mentioned the possibility of issuing multiple recommendations – one focusing narrowly on the question of creating an exception to mediation confidentiality in attorney malpractice cases, and others focusing more broadly on reforms such as requiring informed consent.

1. **Conclusion.**

A well-respected California family law judge recently privately emphasized,

"[T]he fact is that anyone can hold themselves out as a family law mediator regardless of skill, training and expertise. … Lawyers are bound by lawyer ethics, but former auto mechanics holding themselves out as family law mediators are not held to any specific ethics."

Mediators are unregulated by the State Bar and mediation law currently suffers from some significant flaws. Mediator neutrality, and pre-mediation disclosures, notifications and options should be mandated. Twenty years following the implementation of the current statutes, these

reforms would support the goals of ensuring justice, and improving the public's trust and our profession's reputation. The burden on scrupulous mediators and mediation-oriented counsel would likely be minimal and it would be outweighed by the benefit of protecting the right of litigants to a fair and impartial process.

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[1] Section 1119 provides, "[e]xcept 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 be to given. (b) No writing … 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."

[2] See, e.g., Zachary G. Newman & Yoon-Jee Kim, *The Increasing Popularity and Utility of Mediation* (February 13, 2012) American Bar Association's Section of Litigation Newsletter.

[3] "There are no exceptions to the confidentiality of mediation communications or to the statutory limits on the content of mediator's reports. Neither a mediator nor a party may reveal communications made during mediation." (*In re Marriage of Woolsey* (2013) 220 Cal.App.4th 881, 901, quoting *Foxgate Homeowners' Ass'n, Inc. v. Bramalea California, Inc., infra,* at 4.)

[4] The LRC is an independent state agency, which functions to recommend to the Legislature and the Executive Branch changes to the law to eliminate "defects, anachronisms, or need for clarity." (Lynette Berg Robe, *Another way of Making Sausage…The California Law Revision Commission Studies and Exception to "Mediation Confidentiality*" (Spring 2016) ACFLS Family Law Specialist, No. 2.)

[5] Catherine is not her real name. This also refers to her former spouse as John (not his real name either). I represented Catherine in certain post-dissolution family law matters. I also carefully followed Catherine's civil court litigation discussed herein.

[6] As discussed below, Catherine unsuccessfully argued that her settlement proceeding was not a "mediation" since the "mediator" was not a "neutral person" pursuant to Evidence Code section 1115, subdivision (b), and for other reasons.

[7] The mediation chapter begins at Evidence Code section 1115.

[8] Section 1115, subdivision (b) provides, "[m]ediator means a **neutral person** who conducts a mediation." The section also includes assistants as "mediators." (Emphasis added.)

[9] Actually, "[t]he mediation confidentiality statutes **do not** create a 'privilege' in favor of any particular person. [Citations omitted.] … The mediation confidentiality statutes govern only the narrow category of mediation-related communications, but they apply broadly within that category, and are designed to provide maximum protection for the privacy of communications in the mediation context." (*Cassel v. Super. Ct. (Wasserman, et al.*) (2011) 51 Cal.4th 113, 132 (emphasis added).)

[10] Evidence Code section 1128 makes any reference to a mediation in any later civil proceeding "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." (*In re Marriage of Kieturakis* (2006) 138 Cal.App.4th 56, 62, fn. 2.)

[11] "Informed consent is vital to the self-determination principle at the heart of mediation. Client decisions must be informed and voluntary." (Hon. Thomas Trent Lewis, Elizabeth Potter Scully & Forrest S. Mosten, *Late Nights and Cancellation Rights: Bolstering Enforceability of Mediated Settlement with a Cooling off Period*, 38 Family Law News 1 (Issue No. 1, 2016), official publication of the California State Bar, Family Law Section.) That article suggested a "cooling off" period for parties to potentially reconsider and revoke agreements made in family law mediations. Based on principles expressed in *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, we, however, disfavor the prospect of differentiated treatment of family law litigants. Moreover, an arbitrary "reconsideration" period of some few days, as suggested by that article, would not have helped Catherine, who learned of the prospective billion dollar deal two weeks after she signed her deal.

[12] For instance, canon 6D(5)(a) of the California Code of Judicial Ethics provides that in "all proceedings" temporary judges must "disclose in writing or on the record information as required by law, or information that is reasonably relevant to the question of disqualification under canon 6D(3), including personal or professional relationships known to the temporary judge…that he or she or his or her law firm has had with a party, lawyer, or law firm in the

current proceeding, even though the temporary judge…concludes that there is no actual basis for disqualification."  We advocate this for mediators, too.