No. S087319
2d Civil No. B124482

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

FOXGATE HOMEOWNERS' ASSOCIATION, INC.,

Plaintiff and Respondent,

vs.

BRAMALEA CALIFORNIA, INC., et al.

Defendants and Appellants.

Appeal from a Judgment of the Los Angeles Superior Court
Los Angeles Superior Court Case No. SC024139
Honorable Daniel A. Curry

APPLICATION OF LOS ANGELES COUNTY BAR ASSOCIATION AND DISPUTE RESOLUTION SERVICES, INC., FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

AND

BRIEF OF AMICI CURIAE LOS ANGELES COUNTY BAR ASSOCIATION AND DISPUTE RESOLUTION SERVICES, INC.

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TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE OF CALIFORNIA:

Pursuant to rule 14(b), California Rules of Court, the Los Angeles County Bar Association and Dispute Resolution Services, Inc., respectfully request permission to file the attached brief as amici curiae. As rule 14(b) requires, copies of the attached brief and this application have been served on all parties to the case.

Since appellants filed their reply brief on the merits on November 13, 2000, this application and proposed brief are timely under rule 14(b).

Interest of Amici Curiae

The Los Angeles County Bar Association ("LACBA") is the largest local voluntary bar association in the United States, with more than 23,000 members. In addition to meeting lawyers' professional needs, it is extensively engaged in advancing the administration of justice and promoting public service projects.

Dispute Resolution Services, Inc. ("DRS"), a nonprofit subsidiary of LACBA, has been a pioneer in alternative dispute resolution and is now one of the most active ADR providers in the country. It serves more than 25,000 persons annually through a variety of community, court, school, attorney/client, business/consumer, and training programs. It handles about 2,100 mediations each year, including about 1,200 for the court system. More than 1,200 lawyers and non-lawyers serve as mediators in DRS's various programs. Many of them are volunteers.

LACBA also provides mediation services through its Appellate Courts Committee, many of whose members serve as volunteer settlement officers for the Second District Court of Appeal's District-Wide Settlement Conference Program.

Foxgate raises concerns for everyone involved in mediation—mediators, attorneys and parties. LACBA and DRS are particularly concerned about the decision's potential impact on volunteer mediators. Many ADR programs depend heavily, if not entirely, on volunteers or near-volunteers who receive only nominal payment. In order to perform this important public service, the volunteers must often make a very substantial investment of time in acquiring the necessary skills. For example, all of DRS's programs and all programs funded under the Dispute Resolution Programs Act (Bus. & Prof. Code, § 465 et seq.) require volunteers to meet

the same extensive training requirements as paid mediators, including 25 hours or more of training (see Cal. Code Regs., tit. 16, § 3622, subd. (b)). And certification as a DRS Community Mediator requires 100 hours of training.

Foxgate exposes these volunteers, as well as paid mediators, to the risk of being compelled to play the uncomfortable and demanding role of key witnesses in contentious disputes in which they have no personal interest. LACBA and DRS are concerned that the inability under *Foxgate* even to quantify this risk may well discourage volunteers from serving as mediators at a time when the need for them has never been greater.

Issues To Be Addressed

Several statutes require that all communications and conduct occurring during or in connection with a mediation remain confidential. Apart from a handful of exceptions that the statutes explicitly lay out, the prohibition against disclosure is absolute and unqualified. The Court of Appeal has nevertheless carved out an exception, concluding that the Legislature intended to reserve to the courts the power to punish those who do not engage in "meaningful, good faith participation." (Opinion, p. 18.)

Because of their deep concern over the potential impact of this exception on the future of mediation, LACBA and DRS wish to address the following two issues:

- Is there any basis in the language or legislative history of the mediation confidentiality statutes for interpreting them to allow an exception for bad-faith behavior?
- Is there any sound policy basis for creating such an exception?

The proposed brief explores these issues in the context of court-ordered mediations in which the neutral serves only as a mediator rather than, as here, as both a mediator and a special master under a case management order. Accordingly, apart from the impact of the issues identified above, LACBA and DRS take no position on whether the judgment should be affirmed.

Having reviewed the parties' briefs, LACBA and DRS believe the Court will benefit from their perspective. The appellants' primary focus is on the disputed conduct that led to the sanctions and the dual role of the neutral. The respondent has simply relied on its Court of Appeal brief. In contrast, LACBA and DRS wish to present broader, institutional concerns about the impact of the decision. They wish to provide the Court with a more in-depth analysis of the applicable statutes and the important purposes they serve.

We respectfully ask the Court to accept the brief for filing.

Dated: December 13, 2000

Respectfully submitted,

GREINES, MARTIN, STEIN & RICHLAND LLP

By _____
Robin Meadow

Attorneys for Amici Curiae Los Angeles County Bar Association and Dispute Resolution Services, Inc.

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INTRODUCTION

Mediation has become a ubiquitous and highly-valued vehicle for dispute resolution. Its evolution has been marked by an ever-increasing recognition that confidentiality is an "'absolutely essential'" component of the process. (*Ryan v. Garcia* (1994) 27 Cal.App.4th 1006, 1010.) As the Legislature has provided additional opportunities and forums for mediation, it has increasingly restricted the potential for disclosure of mediation communications and conduct. And in at least one case—the enactment of Evidence Code section 1121, which precludes mediators from making reports to any adjudicative body—the Legislature barred exactly the kind of disclosure that occurred here.

Confidentiality was once limited to cases where parties agreed to it, but 1993 legislation reversed that rule. Now, disclosure is what requires consent. That legislation also brought mediators under the same testimonial prohibitions that disqualify judges and arbitrators from testifying about cases over which they preside. In 1995 the Legislature banned reports by mediators, and in 1996 it expanded the scope of mediation-related communications to which evidentiary preclusions applied. Finally, in 1997 the Legislature completely overhauled the confidentiality statute, restricting disclosure still further.

The resulting statutory scheme unqualifiedly bars disclosure in virtually every conceivable situation, with only limited, explicitly defined exceptions. And it does it in the most expansive way—not by creating a testimonial privilege to which waiver or estoppel can apply, but by making the evidence inadmissable as a matter of evidentiary policy.

The Court of Appeal nevertheless felt that the Legislature could not really have meant what it said:

> "We do not believe the Legislature intended them [evidentiary preclusions] as an immunity from sanctions, shielding parties to court-ordered mediation who disobey valid orders governing their participation in the mediation process, thereby

intentionally thwarting the process to pursue other litigation tactics." (Opinion, pp. 18-19.)

No one can quarrel with the Court of Appeal's concerns, and we need hardly state that neither LACBA nor DRS condones bad faith conduct. But that isn't the issue. Rather, it is how to balance two important policies—the policy that promotes effective mediation by requiring confidentiality, and the policy that parties to court-ordered mediation should not be able to burden opposing parties, mediators and the courts with conduct that frustrates the goals of mediation. There is no inherent, natural-law principle that governs the balance; it is a classic example of legislative policy choice.

We will demonstrate that the Legislature has chosen to weigh the balance in favor of preserving mediation confidentiality. Not only are the statutes explicit and unequivocal, but the legislative history confirms the importance that the Legislature accords to confidentiality.

We will also demonstrate that even if there were some uncertainty about what the Legislature intended, there are substantial policy reasons to avoid engrafting a "bad faith" exception onto the statutory scheme—among them the fact that a "bad faith" exception invites, rather than discourages, counterproductive satellite litigation.

The Court of Appeal's decision has created pervasive uncertainty throughout the mediation community, and it calls for an equally broad pronouncement by this Court. We urge the Court to make that pronouncement in favor of enforcing the statutory scheme exactly as it is written—absolute confidentiality of mediation proceedings, subject only to those exceptions explicitly authorized by statute.

ARGUMENT

I.

THE EVOLUTION OF THE STATUTORY SCHEME DEMONSTRATES THE LEGISLATURE'S STRONG SUPPORT FOR PRESERVING THE CONFIDENTIALITY NECESSARY FOR EFFECTIVE MEDIATION.

In 1986, the Legislature made clear that it regarded mediation and other forms of alternative dispute resolution as core components of the administration of justice. That year, it enacted the Dispute Resolution Programs Act ("DRPA"), declaring:

> "To achieve more effective and efficient dispute resolution in a complex society, greater use of alternatives to the courts, such as mediation, conciliation, and arbitration should be encouraged." (Bus. & Prof. Code, § 465, subd. (b).)[1]

The Legislature further declared:

> "Courts, prosecuting authorities, law enforcement agencies, and administrative agencies should encourage greater use of alternative dispute resolution techniques whenever the administration of justice will be improved." (*Id*., subd. (d).)

Over the years, the Legislature has bolstered its encouragement with an increasing emphasis on the confidentiality needed to promote effective mediation. This emphasis ripples through the history of the statutes governing mediation confidentiality, Evidence Code section 703.5 and

---

[1] "Mediation" is typically defined as "a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement." (Evid. Code, § 1115, subd. (a); see also, e.g., Code Civ. Proc., §§ 1731, subd. (c), 1775.1, subd. (a)(2).)

chapter 2 of division 9, consisting of sections 1115-1128 ("chapter 2") (unless otherwise noted, all statutory citations are to the Evidence Code).

A. History Of Sections 703.5 And 1121—No Disclosure By Mediators.

Two distinct statutes restrict disclosure of mediation communications by mediators, sections 703.5 and 1121.[2]

1. Section 703.5.

Section 703.5 imposes a blanket rule: Subject to limited exceptions, mediators are *not competent* to testify "as to *any* statement, conduct, decision, or ruling, occurring *at or in conjunction with*" a mediation. (Emphasis added.)[3]

---

[2] Section 703.5 states: "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."

Section 1121 states: "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."

[3] The Court of Appeal "[did] not consider the effect of section 703.5 on (continued...)

Mediators were added to section 703.5 in 1993; it previously covered only judges and arbitrators. (See Stats. 1979, ch. 205 [original enactment]; Stats. 1988, ch. 281, § 1, p. 813 [adding arbitrators].) The amendment was enacted by both an Assembly bill (Assem. Bill No. 1757 (1993-1994 Reg. Sess.), Stats. 1993, ch. 114 ["A.B. 1757"]) and a later Senate bill (Sen. Bill No. 401 (1993-1994 Reg. Sess.), Stats. 1993, ch. 1261 ["S.B. 401"]), the latter becoming the controlling version.

The history of A.B. 1757 is replete with concerns about mediation confidentiality. For example:

- An analysis of the bill prepared for the Assembly Committee on Judiciary described concerns about the fact that "more and more mediators are being subpoenaed in subsequent civil actions" and that compelling mediators' testimony "threatens the integrity of the mediation process and discourages parties from employing mediation as a method to resolve disputes." (Request for Judicial Notice ["RJN"] Exh. A, p. 2; see also RJN Exh. B, p. 3, Exh. C, p. 4, Exh. D, p. 5.)
- A letter to the Judiciary Committee chair from a mediator described disputants' need "to have a third party neutral to whom they can put their trust and be assured that no offers to settle or confidential information *shall ever be divulged* in any subsequent court proceeding or tribunal." (RJN Exh. E, p. 7, emphasis added.)
- This same author also urged that "[f]or mediation to be effective and resolve disputes in a dignified and professional manner, the process must be conducted in such a fashion that anything said or done during the discussions *will not ever* cause jeopardy to any

---

[3] (...continued)
Judge Smith's declaration . . . because appellants did not raise it either below or on appeal and are deemed to have waived it." (Opinion, p. 20, fn. 16.) But this Court should not attempt a comprehensive evaluation of mediation confidentiality without considering the impact of this statute.

of the parties should there be subsequent litigation." (*Ibid*., emphasis added.)

- The California Manufacturers Association urged that exclusion of mediator testimony "is necessary for the effective use of ADR processes," adding that "In effect, parties will more likely be satisfied with using ADR when *there is no likelihood* that the confidentiality of earlier settlement attempts will be breached." (RJN Exh. F, p. 9.)
- An analysis of the bill for the Senate Judiciary Committee added a further goal, that of "assur[ing] the continued neutrality of the person conducting the dispute resolution proceeding." (RJN Exh. G, p. 11.)

A.B. 1757 addressed only the amendment of section 703.5. In contrast, S.B. 401 was much broader; it created the scheme embodied in Code of Civil Procedure section 1775 et seq. for mandatory mediation of under-$50,000 cases. But S.B. 401 included the identical amendment to section 703.5. In a letter to Governor Wilson urging him to sign the bill, the bill's sponsor, then-Senator Lockyer, wrote that the amendment "encourages the use of private mediation to resolve disputes by *assuring* parties that their open and honest discussions *would not be subject to discovery* and subsequently used against them if litigation should ensue." (RJN Exh. H, p. 14, emphasis added.)

2. Section 1121.

Section 1121 imposes a different kind of restriction. Except as required by court rule or permitted by the parties' agreement, this section absolutely bars mediators from reporting on, and courts from considering, anything that happens in a mediation:

> "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 . . . ."

The first precursor to this statute appeared in the 1993 legislation discussed above. That legislation (S.B. 401) did not enact an absolute prohibition against mediator reports such as now appears in section 1121, but it did add to section 1152.5 a disincentive to seeking mediator testimony:

"(d) If the testimony of a mediator is sought to be compelled in any action or proceeding as to anything said or any admission made in the course of the mediation that is inadmissible and not subject to disclosure under this section, the court shall award reasonable attorney's fees and costs to the mediator against the person or persons seeking that testimony." (*Ibid*., at § 6.)

1995 enactment. The restriction against mediator reporting that now appears in section 1121 was enacted, in more limited form, in 1995. It provided that, except in certain mediations under the Family Code,

"A mediator may not file, and a court may not consider, any declaration or finding of any kind by the mediator, other than a required statement of agreement or nonagreement, unless all parties in the mediation expressly agree otherwise in writing prior to commencement of the mediation." (Former § 1152.6, Stats. 1995, ch. 576, § 8.)

1996 amendment. As with subdivision (a) of former section 1152.5, 1996 legislation expanded subdivision (d) of that section (which remained on the books despite the enactment of section 1152.6) to cover communications "in the course of a consultation for mediation." (Stats. 1996, ch. 174.)

1997 enactment. Chapter 2 was enacted in 1997, and section 1121 succeeded section 1152.6. It emphasized and expanded section 1152.6's restrictions on mediator testimony, as this comparison shows:

> "~~A mediator may not file,~~ *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 ~~declaration~~ *report, assessment, evaluation, recommendation,* or finding of any kind by the mediator *concerning a mediation conducted by the mediator*, other than a ~~required statement of agreement or nonagreement~~ *report that is mandated by court rule or other law and that states only whether an agreement was reached*, unless all parties ~~in~~ *to* the mediation expressly agree otherwise in writing ~~prior to commencement of the mediation.~~, or orally in accordance with Section 1118." (Deletions in strikeout, additions in italic.)

The Law Revision Commission Comment states that these changes were designed "to make clear" the statute's broad scope—that it covers "all submissions, not just filings," "all types of adjudications" and "any report or statement of opinion, however denominated," and that "neither a mediator nor anyone else may submit the prohibited information." (27 Cal.L.Rev.Comm.Rep. App. 5 (1997), West's Ann. Evid. Code (2000 Supp.) § 1121, p. 59.)

> In addition, and particularly pertinent here, the Comment states: "[T]he 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." (*Ibid*.)

B. History Of Section 1119—General Mediation Confidentiality.

The history of section 1119 reflects ever-increasing legislative concern with maintaining mediation confidentiality.

Section 1119 completely bars all use—the evidence is not "admissible or subject to discovery, and disclosure of the evidence shall not be compelled"—of the broadest possible range of mediation communications and conduct: "anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation," including all writings. In addition, the section affirmatively states that all mediation communications "shall remain confidential."[4]

---

[4] The full text of section 1119 states:

> "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."

Other sections detail the limited exceptions to these rules. For example, section 1118 specifies four specific requirements that an oral agreement made during a mediation must meet in order to be admissible.[5]

There wasn't always such a statutory scheme. It took over a decade to reach the level of confidentiality that chapter 2 now imposes.

Original section 1152.5. Chapter 2 began life as a much more limited section 1152.5. (Stats. 1985, ch. 731.) The Legislative Revision Commission described section 1152.5's purpose as "provid[ing] protection to information disclosed during mediation to encourage this alternative to a judicial determination of the action." But the protection was slight. Under subdivision (c), mediation communications were inadmissible *only if the parties agreed in advance*.[6] And, according to the Law Revision

---

[5] Section 1118 provides:

> "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, tape recorder, or other reliable means of sound 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."

[6] The original statute read:

> "(a) Subject to the conditions and exceptions provided in this section, when persons agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving a dispute:

(continued...)

Commission Comment, "Nothing in Section 1152.5 prohibits consideration of information disclosed in a mediation if the evidence is received without objection." (18 Cal.L.Rev.Com.Rep. 241 (1985), West's Ann. Evid. Code (1995 ed.) § 1152.5, p.527.) Finally, there was no provision comparable to current section 1121, which bars reports by mediators about what happened in a mediation.

1993 amendment. In 1993, S.B. 401 reversed the priorities of the original statute, making mediation communications *automatically* confidential *unless* the parties agreed otherwise. The mechanism was to replace subdivision (c) with subdivision (a)(4), which stated:

> "All or part of a communication or document which may be otherwise privileged or confidential may be disclosed if all parties who conduct or otherwise participate in a mediation so consent." (Stats. 1993, ch. 1261, § 6.)

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[6] (...continued)

> "(1) Evidence of anything said or of any admission made in the course of the mediation is not admissible in evidence, and disclosure of any such evidence shall not be compelled, in any civil action in which, pursuant to law, testimony can be compelled to be given.
>
> "(2) Unless the document otherwise provides, no document prepared for the purpose of, or in the course of, or pursuant to, the mediation, or copy thereof, is admissible in evidence, and disclosure of any such document shall not be compelled, in any civil action in which, pursuant to law, testimony can be compelled to be given.
>
> "(b) Subdivision (a) does not limit the admissibility of evidence if all persons who conducted or otherwise participated in the mediation consent to its disclosure.
>
> "(c) This section does not apply unless, before the mediation begins, the persons who agree to conduct and participate in the mediation execute an agreement in writing that sets out the text of subdivisions (a) and (b) and states that the persons agree that this section shall apply to the mediation."

1996 amendment. The Legislature further expanded the scope of confidentiality in 1996, so as to include not only communications occurring during an actual mediation, but also contacts occurring when "a person consults a mediator or mediation service for the purpose of retaining the mediator or mediation service." (Stats. 1996, ch. 174.)[7] According to the Law Revision Commission Comment for the 1997 enactment (described below), this change, as carried forward to current section 1115, was designed to cover "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." (27 Cal.L.Rev.Com.Rep. App. 5 (1997), West's Ann. Evid. Code (2000 supp.) § 1115, p. 54.)

1997 enactment. In 1997, the Legislature enacted what is now chapter 2, drawing most of its provisions from former sections 1152.5 and 1152.6. Section 1119 superseded section 1152.5, subdivision (a), and still further extended its reach. In addition to covering statements and admissions "made in the course of a consultation for mediation services or in the course of the mediation" (Stats. 1996, ch. 174, former § 1152.5, subd. (a)), the new statute covers those "made *for the purpose of*, in the course of, *or pursuant to*, a mediation or a mediation consultation" (§ 1119, emphasis added, enacted by Stats. 1997, ch. 772, § 3).

C. Other Statutes.

As ADR schemes have proliferated, the Legislature has routinely made them subject to the Evidence Code's confidentiality provisions. For example, Code of Civil Procedure titles 11.5 and 11.6 (two schemes

---

[7] Thus, for example, subdivision (a)(1) was amended to read: "Except as otherwise provided in this section, evidence of anything said or of any admission made in the course of *a consultation for mediation services or in the course of* the mediation is not admissible . . . ." (*Ibid*., addition in italic.)

permitting court-ordered mediation) make all mediations subject to the Evidence Code sections discussed above:

> "All statements made by the parties during a mediation under this title shall be subject to Sections 703.5 and 1152, and Chapter 2 (commencing with Section 1115) of Division 9 of, the Evidence Code." (Code Civ. Proc., §§ 1738, subd. (a), 1775.10.)

Many other varied schemes do the same thing, or incorporate their own confidentiality provisions.[8]

And DRPA, in addition to requiring that all data collected in any program remain confidential (Bus. & Prof. Code, § 471.5), doubly emphasizes the importance of confidentiality by requiring it for all DRPA proceedings, regardless of their label:

> "Notwithstanding the express application of Chapter 2 (commencing with Section 1115) of Division 9 of the Evidence Code to mediations, all proceedings conducted by a program funded pursuant to this chapter, including, but not limited to, arbitrations and conciliations, are subject to

---

[8] See Bus. & Prof. Code, § 6200, subd. (h) (attorney-client fee disputes—"All discussions and offers of settlement are confidential and may not be disclosed in any subsequent arbitration or other proceedings."); Code Civ. Proc., § 1297.371, subd. (a) (international commercial disputes—"Evidence of anything said" is inadmissible and disclosure "shall not be compelled"); Food & Agr. Code, § 54453, subd. (b) (agricultural cooperative bargaining associations—statements confidential; "[t]he conciliator shall not be compelled to divulge the information or to testify in regard to the conciliation in any proceeding or judicial forum."); Gov. Code, §§ 11420.20-11420.30 (administrative adjudication—parties have privilege to prevent disclosure, mediator not competent to testify), 12984-12985 (housing discrimination—"Except as provided in Section 12980, all matters connected with any conference, conciliation, or persuasion efforts under this part are privileged and may not be received in evidence"), 66032-66033 (land use—"Section 703.5 and Chapter 2 (commencing with Section 1115) of Division 9 of the Evidence Code apply to any mediation conducted pursuant to this chapter"); Ins. Code, § 10089.80 (earthquake insurance—same); Lab. Code, § 65 (labor disputes—same).

> Chapter 2 (commencing with Section 1115) of Division 9 of the Evidence Code." (Bus. & Prof. Code, § 467.5.)

In other words, "We really mean it."

D. The Nature Of California's Confidentiality Rules Underscores The Legislature's Views Of Their Importance.

There are several ways to restrict the disclosure of mediation communications. Our Legislature has chosen the most restrictive.

Section 703.5 appears in division 6, "Competency of Witnesses." The statute doesn't just limit the admissibility of evidence; it bars the witness from even taking the stand.

Chapter 2 appears in division 9, which covers "Evidence Affected or Excluded by Extrinsic Policies." This category also includes such evidence as character (§§ 1100-1109), subsequent repairs (§ 1151), settlement offers (§ 1152), existence of insurance (§ 1155) and the like. The rules in this division generally do not concern the relevance or reliability of evidence. Rather, they reflect policy balances. Witkin classifies them under the heading of "Evidence Involving Undue Prejudice," and notes that the courts' power under these rules "is exercised to exclude *relevant* evidence." (1 Witkin, Cal. Evidence (4th ed. 2000) Circumstantial Evidence, § 132 et seq., p. 481 et seq.) As Witkin notes, quoting *Love v. Wolf* (1964) 226 Cal.App.2d 378, 404, "[r]elevance is not always enough. There may remain the question, is its value worth what it costs?"

In sections 703.5, 1119 and 1121, the Legislature answered this question for mediation: Disclosure isn't worth what it costs.

Not every state handles the issue this way. The commentary to the most recent draft of the Uniform Mediation Act—whose "primary focus" is confidentiality—notes that California is among a small minority of states that impose a categorical exclusion rule. (National Conference of Commissioners on Uniform State Laws, *Uniform Mediation Act* ["Uniform Act"] (November 2000 draft), Prefatory Note and Section 5, Comment 5(b),

available at <http://www.law.upenn.edu/bll/ulc/ulc_frame.htm>.)[9] The drafters disagree with this approach, concluding that the disclosure/cost balance was different for mediation communications than for the other kinds of evidence that, in California, appear in division 9 of the Evidence Code. (*Ibid*.) Ironically, another one of their reasons is that the very strictness of the exclusionary approach motivates courts to find exceptions to it, because "courts have been hesitant to enforce these provisions in a way that eliminates a whole category of evidence." (*Ibid*., citing the present case, *Rinaker v. Superior Court* (1998) 62 Cal.App.4th 155 and *Olam v. Congress Mortgage Co.* (N.D. Cal. 1999) 68 F.Supp.2d 1110.)

But while the drafters of the Uniform Act have the luxury of recommending what they feel is the wisest solution, courts do not. Our Legislature has made a deliberate policy choice, reflected in unequivocal statutory language, to preclude mediation communications in all but the narrowest of circumstances. Nothing in the Court of Appeal opinion justifies ignoring the Legislature's mandate.

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[9] LACBA and DRS have not yet expressed a position on the advisability of any of the provisions of the Uniform Act, and are not likely to do so until the Act is presented for legislative action in California. However, the draft's extensive commentary provides a comprehensive, critical review of the goals and nation-wide implementation of mediation confidentiality.

II.

THE COURT OF APPEAL DECISION PROVIDES NO PERSUASIVE RATIONALE FOR CREATING A "BAD FAITH" EXCEPTION TO STATUTORILY-REQUIRED MEDIATION CONFIDENTIALITY.

Citing many of the principles discussed above, the Court of Appeal explicitly recognized the importance of mediation confidentiality. (Opinion, pp. 17-18.) It also tacitly acknowledged that the statutory scheme is unambiguous. (Opinion, pp. 15-16.) However, noting that "[a]mbiguity is not always a condition precedent to interpretation" (Opinion, p. 15), the court reasoned:

> "The literal meaning of the words used in a statute may be disregarded to avoid absurd results or to give effect to manifest purposes that, in light of the legislative history, appear from the provisions considered as a whole." (*Ibid*.)

The court concluded that an essential component of the mediation process is "the meaningful, good faith participation of the parties and their lawyers." (*Id*. at p. 18.) Accordingly, the court held, conduct inconsistent with this participation may be revealed and punished. (*Id*. at pp. 18-19.)

The court cited no legislative history, no academic commentary, and no decisional authority for this conclusion.[10] Instead, it simply said that "[w]e do not believe" that the Legislature intended for "evidentiary privileges" to confer "immunity from sanctions." (Opinion, p. 18.) The reason the court gave for this belief was that it would be an "absurd result" to conclude that the Legislature gave priority to the policy of confidentiality over the policy of punishing bad-faith conduct. (See Opinion, pp. 16-19.)

This is an inadequate analytical basis for overthrowing the plain language of a statute. The court's very description of its rationale reflects

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[10] The court did cite *Rinaker* v. *Superior Court*, *supra*, 62 Cal.App.4th 155, but recognized that the exception to confidentiality carved out in that case was designed to protect "a minor's constitutional right to confront and cross-examine witnesses." (Opinion, p. 18, fn. 14.)

what it was really doing: legislating. It made a policy choice between two competing interests that both, in the court's view, further the goals of mediation, albeit in different ways. But courts do not have the power to make this kind of judgment once the Legislature has spoken. As this Court has observed:

> "The judiciary, in reviewing statutes enacted by the Legislature, may not undertake to evaluate the wisdom of the policies embodied in such legislation; absent a constitutional prohibition, the choice among competing policy considerations in enacting laws is a legislative function." (*Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 53.)

Here, the Legislature made its choice when it enacted unambiguous statutes that categorically exclude evidence of mediation communications, with only a few exceptions. As far as we can determine, nothing anywhere in the legislative history of any of these statutes even remotely suggests that the Legislature intended to permit any kind of inquiry into the "good faith" of parties' participation in a mediation. Quite the contrary, every statutory change has delivered increased protections for confidentiality. That includes the most recent enactment, section 1121, which proscribes exactly the kind of report the mediator made here.

Likewise emphasizing the Legislature's choice of priorities is the fact that the statutes already list specific exceptions. They exclude settlement conferences under rule 222 of the California Rules of Court, as well as mediations under the Family Code's provisions for mediation of custody and visitation issues. (Fam. Code, § 3160 et seq.) And a mediator's incompetence to testify does not extend to such grave matters as statements or conduct that could constitute contempt, a crime, or grounds for investigation of judicial conduct or disqualification.[11] These exceptions

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[11] These exceptions cover the only hypothetical example the Court of Appeal used to show the supposed "absurdity" of excluding "bad faith" conduct. The Court of Appeal asked, "What if a party to a particularly

(continued...)

trump the need for confidentiality; but by making these choices, the Legislature has also said, "This far and no farther."

Beyond these considerations, it is nowhere near "absurd," as the Court of Appeal seemed to believe, to give priority to mediation confidentiality. As we now demonstrate, far from being "absurd," the Legislature's choice is sound and sensible.

III.

CREATING A "BAD FAITH" EXCEPTION TO MEDIATION CONFIDENTIALITY WOULD FRUSTRATE CORE PURPOSES OF MEDIATION WITH NO MEANINGFUL BENEFIT TO COURTS, MEDIATORS OR PARTIES.

The universally agreed starting point for any discussion of mediation confidentiality is, as the Court of Appeal acknowledged, that "'[c]onfidentiality is absolutely essential to mediation.'" (Opinion, p. 17.) The drafters of the Uniform Act—which contains no "bad faith" exception of any kind—observe:

> "[M]ediators typically promote a candid and informal exchange regarding events in the past . . . . This frank exchange is achieved *only if the participants know that what is said in the mediation will not be used to their detriment* through later court proceedings and other adjudicatory processes." (Uniform Act, Section 2, Reporter's Working Notes, ¶ 2, emphasis added.)

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[11] (...continued)
fractious and emotional dispute attacked or threatened an opposing party or counsel during a mediation session? Should those parties and the mediator be prevented by the mediation confidentiality privileges from alerting the trial court to such conduct?" (Opinion, pp. 18-19.) It concluded: "We think not, but such would be the absurd result if we follow the uncritical interpretation urged by appellants." (*Ibid*.) Section 703.5 contains an exception for just such conduct, since a mediator's incompetence to testify does not extend to "conduct that could . . . (b) constitute a crime."

Trust and predictability are central to effective mediation. Permitting an exception to confidentiality for bad-faith conduct would compromise these essential elements. There are multiple reasons.

A. "Meaningful, Good Faith Participation" Is An Impossibly Vague Concept That Cannot Adequately Guide Parties, Mediators Or Courts.

Let's consider the impact of a "bad faith" exception at the ground level, in the actual workings of a mediation.

Mediators commonly begin a mediation by walking the parties through the steps in the process and explaining the rules of the road. This is part of how the mediator begins to develop trust and engage the parties in focusing on solutions to their dispute. One of the standard rules, ideally embodied in a written agreement, is that everything said in the mediation is confidential. The purpose of this, as we have shown, is to promote candor. But does the existence of a "bad faith" exception require the mediator to advise the parties that if their participation isn't "meaningful" enough, the confidentiality may disappear—and that the mediator may involuntarily end up having to describe the "misconduct" to a court? And if either the mediator or a party questions the "good faith" of someone's participation, will the mediation then descend into a counterproductive debate about the legitimacy of various negotiation tactics—with counsel silently ticking down the moments until he or she can run to court with a sanctions motion?

The inquiry stumbles at the outset, for a simple reason: While a party may have to comply with a court order to attend a mediation, no one *ever* has an obligation to settle. Yet in the heat and passion of litigation, what party *ever* believes that an opponent's failure to accede to that party's view can possibly be in "good faith"?

Parties' motivations are varied and often complex. Some institutional defendants may feel a need to fight certain kinds of cases for fear of being perceived as too quick to settle. Others may want to carry a case through trial and appeal in order to establish a legal principle, or to get a decision on an open legal question. A plaintiff in a sexual harassment,

discrimination, or wrongful termination case may feel that the defendant's conduct was so reprehensible that it requires public airing in a trial. The defendant in that same case may feel that any settlement would acknowledge fault and leave a permanent, career-blocking stigma.

And some people are simply risk-takers who want to gamble.

All of these parties have an absolute right to go to trial, no matter how wise it may seem for them to settle and no matter how displeased the court may be at having to hear the case. As one court observed,

> "[A] trial court may not sanction (under § 128.5) a defendant's decision to insist on its constitutional right to a jury trial rather than settle a case, even if the trial court concludes the failure to settle was motivated by ulterior, and allegedly improper, purposes." (*Triplett v. Farmers Ins. Exchange* (1994) 24 Cal.App.4th 1415, 1422.)

So—is it "bad faith" for a defendant to refuse to put any money on the table, or for a plaintiff to refuse to move off a demand that appears outrageously high? It is a lack of "meaningful participation" for the victim of sexual harassment to refuse to accept any amount of money without a detailed, public apology from the alleged wrongdoer? Or for a party to insist on, or to refuse to accept, a confidentiality clause? Or for a party to follow a negotiation strategy that others might consider just plain dumb? Or, in the end, for a party to become fed up and walk out?[12]

"Meaningful, good faith participation" will almost always be in the eye of the beholder, different in every case. And there will always be those for whom "bad faith" will be nothing more than the other side's refusal to

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[12] In a true mediation, parties have the right to leave any time: "Unless the parties have agreed to a binding award, nothing in this chapter shall be construed to prohibit any person who voluntarily enters the dispute resolution process from revoking his or her consent, withdrawing from dispute resolution, and seeking judicial or administrative redress." (Bus. & Prof. Code, § 467.7.)

do what they want. To attempt to condition mediation confidentiality on such a fluid concept invites the destruction, not promotion, of mediation.[13]

B. A "Bad Faith" Exception Overemphasizes The Desirability Of Settlement At The Expense Of Allowing Mediators To Help Parties Find Their Own Solutions—Or To Help Them Acknowledge That, At That Particular Point, Settlement Is Not Possible.

As the Evidence Code itself states, a mediator's goal is to "facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement." (Evid. Code, § 1115, subd. (a).) Mediators normally want to help parties explore their positions and interests so that they can make the best possible decision about whether and how to settle. But a bad faith standard fuels a different, judgmental question: "Why aren't you trying harder to settle?"

The context of that question is the unfortunate reality of the courts' perpetual struggle with overcrowded calendars and the fact that the fastest way to move cases is by getting them to settle. From a court-administration perspective, settlement, rather than the parties' ultimate satisfaction with both the process and the result, must be the paramount goal of mediation—and reluctance to settle therefore may not endear a party to the court. But allowing that reluctance to be characterized as "bad faith" poses significant, and unfair, risks to a party whose attitude toward settlement—and, indeed, toward the whole litigation process—may involve much more than a simple desire to leave the courthouse quickly.

After all, "[t]he courts exist for litigants. Litigants do not exist for courts." (*Neary v. Regents of University of California* (1992) 3 Cal.4th

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[13] The Court of Appeal characterized "the exceptions we craft here" as "narrow ones," but the narrowness concerned only the nature of the evidence that could be used to show "bad faith"—that is, "only such information as is reasonably necessary." (Opinion, p. 20.) This itself is disturbingly vague and broad. But the vagueness and breadth of the substance of the exception—lack of "meaningful, good faith participation"—is beyond doubt.

273, 280.) Parties need to be able to say "no" without fear. Indeed, the Canons of Judicial Ethics provide that "[a] judge should encourage and seek to facilitate settlement, but *parties should not feel coerced* into surrendering the right to have their controversy resolved by the courts." (Advisory Committee Comment to Canon 3(B)(8), emphasis added.)

Novice mediators who seek court appointments have a particularly strong motivation to produce settlements, which can evolve into an inclination to blame the parties for mediations that do not do so. The availability of a "bad faith" exception gives this inclination a voice that it should not have, either within the confines of a mediation or in subsequent dealings with the court. Complicating this inclination is the fact that novice mediators also sometimes have an unrealistic expectation of how much they can or should accomplish. They may feel that every case should settle, and they may therefore be too eager to assume that only "bad faith" can explain a different result.

Regardless of how desirable settlement may seem in the abstract, in any particular mediation the parties' true interests and goals may be far too complex to yield to a simple dollar valuation. If mediation is to work effectively, parties should begin it with an open agenda, rather than one in which getting to a quick monetary bottom line is paramount. Giving a priority to "meaningful, good faith participation" at the expense of the confidentiality that allows such an open agenda will frustrate, rather than further, effective mediation.

C. A "Bad Faith" Exception To Mediation Confidentiality Will Provide Incentives To Seek Sanctions While Shattering The Barriers That Should Shield A Judge From Exposure To Settlement Negotiations.

Courts are not supposed to participate in settlement discussions without the parties' consent. (Canon 3(b)(7)(c) ["A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge."].) One good reason is the risk that a judge may become prejudiced against a party who the judge believes is not negotiating "meaningfully." That risk can create the very coercive effect that judges are supposed to avoid. (See Advisory Committee Comment to Canon 3(B)(8), *supra* ["parties should not feel coerced into surrendering the right to have their controversy resolved by the courts"].)

The Court of Appeal's "bad faith" exception invites—indeed, virtually guarantees—this very difficulty. With a "bad faith" exception, the most likely scenario in which a judge will learn about what happened in a mediation will be when a party has behaved in a way that motivates the other party, or perhaps even the mediator, to bring the matter to the court's attention by way of a sanctions motion. Thus, at the very point where a party is encouraged to be the most candid, it runs the risk that its candor will be exploited to its detriment.

And that's an optimistic view. In the real world of today's take-no-prisoners litigation, lawyers rarely wait for truly egregious behavior before firing off a motion for sanctions. The perceived opportunity to color a judge's view of an opponent—erroneous though the perception may be—is enough. And what better opportunity could one side have to portray itself as the personification of wronged reasonableness than the other side's failure to devote "meaningful, good faith participation" to a mediation?

Particularly dangerous is possibility of a mediator's report to a judge, because the mediator's presumed neutrality freights the report with credibility. That is how this appeal started—the mediator presented the

trial court with a report that, the Court of Appeal held, would have been impermissible but for the fact that it described "bad faith" conduct.

The Uniform Act contains a clause prohibiting such reports, noting that California is one of several states that "have already adopted similar prohibitions." (Uniform Act, Section 9, Reporter's Working Notes, ¶ 2, "Disclosures by a Mediator to Government Officials.") According to the Uniform Act's drafters,

> "seminal reports in the field condemn the use of such reports as permitting coercion by the mediator and destroying confidence in the neutrality of the mediator and in the mediation process." (*Ibid*.)

As noted earlier, our Legislature expressed that very concern when it enacted section 1121. (See p. 8, *ante*.)

The drafters of the Uniform Act also specifically reject the idea of a "bad faith" exception:

> "[The exceptions to the prohibition] would not permit a mediator to communicate, for example, on whether a particular party engaged in 'good faith' negotiation, or to state whether a party had been 'the problem' in reaching a settlement." (Uniform Act, Section 9, Reporter's Working Notes, ¶ 2, "Disclosures by a Mediator to Government Officials.")[14]

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[14] The Uniform Act's proposed language is similar to section 1121, but narrower in that it operates only on the mediator and permits slightly more information in the limited report it does permit:

> "Except as permitted under Sections 7 and 8 [waiver and exceptions to privilege], a mediator may not provide a report, assessment, evaluation, recommendation, or finding regarding a mediation to a court, agency, or any other authority that may make a ruling on or an investigation into a dispute that is the subject of the mediation, other than whether the mediation occurred, has terminated, or a settlement was reached and a report of attendance at mediation sessions." (Uniform Act,

(continued...)

Judicial involvement in issues of "meaningful, good faith participation" carries an additional risk: the lack of any effective appellate remedy. Unlike discovery disputes, in which writ relief can block disclosure of sensitive documents, an attack on a party's lack of "meaningful, good faith participation" necessarily *begins* with disclosure. There is no practical way to forestall the trial court's review of potentially prejudicial information. Even if the trial court denies sanctions, by that time the damage has been done and cannot be cured on appeal.

The limited exceptions to mediation confidentiality reflect the Legislature's recognition that, as a general proposition, court involvement in mediations is inappropriate. A court that feels it needs to control the parties' conduct can order them into a mandatory settlement conference under rule 222 of the California Rules of Court, which is exempt from the operation of chapter 2. (§ 1117, subd. (b)(2).) But the better approach is to decline to become entangled in monitoring mediations. Unfortunately, the Court of Appeal's "bad faith" exception will guarantee more, rather than less, entanglement.

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[14] (...continued)
proposed Section 9(c).)

The current draft indicates that alternative language has been proposed that is somewhat broader in that it "include[s] all communications, not just reports, and other named documents":

> "Except as permitted under Sections 7 and 8, a mediator may not communicate with a court or administrative agency that refers a case to mediation or before which the matter being mediated is pending, nor with the prosecutor or investigative agency referring the case that is the subject of the dispute to mediation, other than whether the mediation occurred, has terminated, or a settlement was reached and a report of attendance at mediation sessions." (Uniform Act, Section 9, Reporter's Working Notes, ¶ 2, "Disclosures by a Mediator to Government Officials.")

D. Permitting Mediator Testimony About A Party's Claimed "Bad Faith" Will Distort The Mediator's Role, Make Mediators Less Effective, And Discourage Volunteers From Serving As Mediators.

The most intractable cases—where the parties are the farthest apart and the most hostile toward one another—call for the most highly skilled mediators. They are also the most likely candidates for "bad faith" behavior and for resulting sanctions motions. And under the Court of Appeal's "bad faith" exception, they present the greatest likelihood that the mediator will be called upon to testify.

The very possibility of having to play such a role will interfere with a mediator's work. The mediator should be totally focused on listening to the parties and finding ways to help them communicate effectively with one another. But if a sanctions motion is possible, the mediator may have to devote energy to keeping the peace in an environment where it might be more productive, even though provocative, to let the parties "vent." Instead of focusing on what the parties are saying in an effort to foster communication, the mediator will be motivated to manipulate the mediation to minimize the likelihood of being called to testify. Among other things, that might mean keeping the parties from expressing themselves instead of drawing them out. The likely result: a mediation that is less contentious, but probably also be less effective.

If things do go wrong, the mediator will have to devote additional time to preparing and giving testimony—perhaps a declaration, or in a serious case even a deposition or court testimony. Once there is a breach in the confidentiality wall, there is no theoretical limit on how far the parties can go in attempting to present evidence.

No mediator welcomes such a role. It is fundamentally at odds with the constructive problem-solving role that characterizes mediation. And the mediator may have to spend substantial amounts of time without any assurance of payment—or, for a volunteer, with the definite assurance of *non*-payment.

This last possibility is of particular concern to LACBA and DRS. The mediators in their programs all serve either as volunteers or with only minimal pay, never enough to compensate for time lost from practice. Further, since the need for mediators always outruns their availability, organizations like DRS must depend heavily on mediators who are fresh out of training and who may not have the experience to know how to effectively manage so-called "bad faith" behavior. Even a single mediation that degenerated into a sanctions dispute over a claimed lack of "meaningful, good faith participation" could become frighteningly costly to a volunteer mediator. While there is no way to predict whether allowing a "bad faith" exception will deter LACBA and DRS volunteers from serving in the first instance, we can predict with high confidence that a single engagement in a contentious sanctions dispute will be enough to make most volunteers extremely reluctant to serve again.

E. A "Bad Faith" Exception Does Not Confer Sufficient Benefits To Justify The Damage It Will Do To Mediation.

The Court of Appeal concluded that it would be "absurd" to believe that the Legislature did not intend courts to be able to control "bad faith" mediation behavior. But what, exactly, is so compelling about the need to control that behavior? The Court of Appeal did not consider this question.

LACBA and DRS have. They believe the correct answer is that in the context of mediation, bad faith behavior just isn't that big a deal—the threat it poses does not nearly outweigh the value of confidentiality.

To repeat: LACBA and DRS do not condone truly bad faith conduct in any context. But there is a limited range in which bad faith conduct can operate in a mediation. What it usually boils down to is that one party frustrates the other party's hopes of settlement, perhaps causing the other party to waste some time or money, and suffer some aggravation, in the process.

But while a court can order a mediation to convene, it can't order the parties to settle. And if the mediator can't get the parties talking constructively, either should be free to leave. As we noted earlier, this is

what DRPA expressly contemplates. (See fn. 12, *ante*.) And no mediator is required to tolerate bad faith behavior—he or she is also free to leave. There is no reason for a mediation to continue unless all the players believe it is productive to do so. Early termination, rather than a sanctions motion, is the most effective antidote to bad faith behavior.

This is doubtless not a very satisfying prospect for a trial judge, who understandably wants to see cases settle and expects the processes he or she orders to be carried through. But it is important to keep in mind that the societal goal is for mediation to be broadly effective—to be available, and to work, in as many cases as possible. Maintaining strict confidentiality may leave some parties without a remedy for "bad faith" behavior, whatever that means. But it will also encourage many more parties and mediators to participate in mediations and, ultimately, to settle more cases. That is surely why the Legislature decided that, in the words of *Love v. Wolf*, *supra*, 226 Cal.App.2d at p. 404, "its value [is] worth what it costs."

CONCLUSION

No social process is immune to abuse, and mediation is no exception. But the value of mediation to society is so high, and the cost of abuse is so minimal and self-regulating, that we should be prepared to take some risks. Limiting confidentiality in a way that allows mediators and parties to be dragged into court for sanctions proceedings imposes a far greater cost on both the courts and the mediation system than any lack of "meaningful, good faith participation" in individual mediations ever could.

It took nearly 15 years to develop the statutory scheme we now have. The Legislature has consistently expanded the confidentiality of mediations, as the evolution of mediation-related statutes shows. We urge the Court to respect this history and to avoid imposing a standard in which the Legislature has never shown even the slightest interest.

The Court should declare that the mediation confidentiality statutes mean what they say.

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Respectfully submitted,

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