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When Mediation Confidentiality and Substantive Law Clash: an Inquiry Into the Impact of *In re Marriage of Kieturakis* on California's Confidentiality Law

By Annalisa L. H. Peterson[‡]

I. INTRODUCTION

Mediation confidentiality laws play a critical role in allowing mediation to remain a viable process for parties to discuss the issues involved in their dispute, exchange information, and potentially reach a settlement before trial. Without certain guarantees as to the confidential nature of such a meeting, no savvy party or attorney would agree to provide information that could later be turned against him at trial, and many valuable opportunities (as measured in time, cost, reputation, relationship, etc.) for resolution would be lost. However, some parties to mediated disputes either do not reach resolution, or later contest a mediated agreement in court. In these situations, what happens when the rules that govern mediation confidentiality are incompatible with the substantive law governing the case, to the point of being mutually exclusive? Is there a framework for judges to use in determining whether one set of laws should trump the other? Must the outcome always be at the expense or benefit of either substantive law or mediation confidentiality?

In March of 2006, the California Court of Appeal faced this scenario in deciding *In re Marriage of Kieturakis*, a case in which mediation confidentiality law was in conflict with the state's substantive law regarding

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marital dissolution settlements.¹ Parts II and III of this article will begin by considering California's mediation confidentiality law, the exceptions that have developed thereto, and the outcome of the *Kieturakis* case.² Part IV will discuss the likely impact of the case on California law and the practice of mediation.³ Part V will examine how other jurisdictions and the Uniform Mediation Act (UMA) have approached similar conflicts between mediation confidentiality and substantive law.⁴ Finally, Part VI will question whether holdings such as *Kieturakis* increase mediator responsibility for ensuring the fairness of a settlement, as traditional safeguards against inequality may no longer apply to parties contesting a mediated settlement.⁵

II. CALIFORNIA'S MEDIATION CONFIDENTIALITY LAW AND ITS EXCEPTIONS

California's mediation confidentiality provisions, codified in the California Evidence Code (CEC), are known for their strictness.⁶ Very few exceptions to confidentiality exist, and those that do are consistently narrowly construed.⁷ To summarize the pertinent sections of the CEC, evidence of statements or writings "made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation" is inadmissible and not subject to discovery.⁸ Mediators are not competent to testify to statements or conduct that occurred in relation to mediation in subsequent civil proceedings, except where such information could "give rise to civil or criminal contempt, . . . constitute a crime, . . . [or] be the subject of investigation by the State Bar or Commission on Judicial Performance."⁹ Additionally, mediator reports, recommendations or evaluations "of any kind" of a mediation proceeding may not be considered in later adjudicative proceedings, unless a report is required "by court rule or other law and . . .

1. *In re Marriage of Kieturakis*, 138 Cal. App. 4th 56 (Ct. App. 2006).

2. *See infra* notes 6-41 and accompanying text.

3. *See infra* notes 42-58 and accompanying text.

4. *See infra* notes 59-93 and accompanying text.

5. *See infra* notes 94-118 and accompanying text.

6. *See* James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43, 64 (2006); *see also* Peter Robinson, *Centuries of Contract Common Law Can't Be All Wrong: Why the UMA's Exception to Mediation Confidentiality in Enforcement Proceedings Should be Embraced and Broadened*, 2003 J. DISP. RESOL. 135, 138 (2003).

7. *See* ADRWorld.com, California Court Reinforces Strict Mediation Confidentiality Standards (citing *Fair v. Bakhtiari*, 40 Cal. 4th 189 (2006)), <http://www.adrworld.com/sp.asp?id=40618> (last visited Nov. 5, 2007).

8. Cal. Evid. Code § 1119 (West 1997).

9. Cal. Evid. Code § 703.5 (West 1994).

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states only whether an agreement was reached."¹⁰ Parties to a mediation may also choose to circumvent this rule by expressly agreeing otherwise.¹¹ The CEC provides for limited exceptions to the confidentiality of written settlement agreements prepared in connection to mediation.¹² Written settlement agreements that have been signed by all parties are not inadmissible or undiscoverable under the CEC if:

- (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 [the CEC], to its disclosure; or
- (d) the agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.¹³

Though the California Supreme Court has notably overturned several common law exceptions to mediation confidentiality that lower courts have articulated since the mid-1990s,¹⁴ others have retained their force. For instance, where a party's freedom is "at risk and thus constitutional due process concerns are triggered," the importance of preserving constitutional rights outweighs that of preserving confidentiality in mediation, and normally protected information may be admitted to the extent necessary to impeach inconsistent testimony.¹⁵ Additionally, a mediator's testimony may be compelled (*in camera*) where the parties request it and waive the mediation privilege, and where *not* compelling the testimony would cause greater harm than would compelling the mediator's testimony and forcing a breach of confidentiality.¹⁶ In other words, there is an exception to confidentiality where there is waiver of the privilege and "when a balancing of the need to do justice in a case against the potential for discouraging mediation weighs in favor of compelling a mediator to testify."¹⁷ Such

10. Cal. Evid. Code § 1121 (West 1997).

11. *See id.*

12. *Id.* §1123.

13. *Id.*

14. *See Rojas v. Super. Ct.*, 33 Cal. 4th 407 (2004) (overturning court of appeal holding that "pure evidence" was not intended to be protected under the CEC's mediation confidentiality provisions, and that confidential evidence from mediation was discoverable upon a showing of good cause); *see also* Foxgate Homeowners' Ass'n v. Bramalea Cal., Inc., 26 Cal. 4th 1 (2001) (overturning court of appeal holding that mediation confidentiality provisions were only intended to apply to cases in which the parties and their lawyers participated in mediation in good faith).

15. L. Randolph Lowry & Peter Robinson, *Mediation Confidential*, 24-MAY L.A. LAW. 28, 30 (2001) (citing *Rinaker v. Superior Court*, 62 Cal. App. 4th 155 (Ct. App. 1998)).

16. *See Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110, 1131-32 (N.D. Cal. 1999).

17. *In re Marriage of Kieturakis*, 138 Cal. App. 4th 56 (Ct. App. 2006).

evidence must be the most reliable and probative evidence on the issue, there must be no alternative source of evidence, and the testimony must be essential to the just resolution of the case.¹⁸ Finally, where following the plain meaning of a statute would "frustrate[] the manifest purposes of the legislation as a whole or [lead] to absurd results," judges may construe the statutory language in order to avoid capricious results unintended by the Legislature.¹⁹ Though this last exception is technically applicable to mediation confidentiality, the California Supreme Court has repeatedly expressed disapproval for "judicially crafted exception[s] to the mediation confidentiality statutes," noting that "the statutory scheme . . . unqualifiedly bars disclosure of communications made during mediation absent an express statutory exception."²⁰ In other words, it would take an exceptional circumstance to persuade the California Supreme Court that following the plain meaning of the CEC's exacting mediation confidentiality provisions would frustrate the legislative purpose of "encourag[ing] mediation by permitting the parties to frankly exchange views, without fear that disclosures might be used against them in later proceedings."²¹

In *Kieturakis*, an issue of first impression was put to the California Court of Appeal which presented the possibility for a new line of exceptions to the state's strict stance on mediation confidentiality: When mediation confidentiality provisions conflict with the substantive law of the case, which law yields?²² Analogous conflicts have arisen in California law,²³ but never before with regard to confidentiality in mediation.

III. THE CASE OF *IN RE KIETURAKIS: A CONFLICT OF LAWS?*

In conjunction with the dissolution of their marriage, Anna and Maciej Jan Kieturakis participated in mediation and reached a marital settlement agreement (MSA).²⁴ Two years after they reached this agreement, Anna sought to overturn the MSA, asserting that it had been reached under duress,

18. See *Olam*, 68 F. Supp. 2d at 1138-39.

19. Cal. Sch. Employees Ass'n v. Governing Bd., 8 Cal. 4th 333, 340 (1994) (quoting *People v. Bellecci*, 24 Cal. 3d 879, 884 (1979)).

20. *Fair v. Bakhtiari*, 40 Cal. 4th 189, 194 (2006) (quoting *Foxgate Homeowners' Ass'n v. Bramalea Cal., Inc.*, 26 Cal. 4th 1, 14-15 (2001)).

21. *Fair*, 40 Cal. 4th at 194 (quoting *Foxgate*, 26 Cal. 4th at 14).

22. See *Kieturakis*, 138 Cal. App. 4th at 89.

23. See, e.g., *In re Marriage of Haines*, 33 Cal. App. 4th 277, 302 (Ct. App. 1995) (public policy requires that a presumption of undue influence in interspousal transaction prevail over common-law community property state of title presumption, where the two are in conflict).

24. *Kieturakis*, 138 Cal. App. 4th at 61.

fraud, and undue influence.²⁵ The trial court found that the terms of the settlement agreement were more favorable to Maciej than to Anna.²⁶ Under California family law, "whenever [married] parties enter into an agreement in which one party gains an advantage, the advantaged party bears the burden of demonstrating that the agreement was not obtained through undue influence."²⁷ This rule applies to marital settlement agreements even though the confidential nature of the couple's relationship generally no longer exists after separation has occurred.²⁸ Maciej sought to introduce evidence from the mediation in order to meet his burden of rebutting the presumption of the validity of Anna's claims.²⁹ However, Anna refused to waive her mediation confidentiality privilege, and Maciej was thus unable to defend himself against her claim.³⁰ The trial court, confronted with "the most difficult [legal issue] it had ever faced," admitted the evidence from mediation, reasoning that it had to do so in order to uphold fairness and the effective administration of justice.³¹

On appeal, the issue of first impression was: Whether a spouse should be required to bear the burden of disproving the presumption of undue influence that arises when a dissolution settlement agreement unequally benefits him or her, where the marital settlement was reached in mediation and is thus protected from disclosure.³² The court of appeal held that, though the MSA clearly favored Maciej, the presumption of undue influence could *not* be applied to the case, for "three independently sufficient reasons."³³ The first of those reasons—the fundamental nature of confidentiality in mediation—is the issue with which this article is concerned.³⁴ The court held that a presumption of undue influence cannot

25. *Id.* at 64.

26. *Id.* at 75.

27. *In re Marriage of Bonds*, 24 Cal. 4th 1, 27 (2000) (citing *Haines*, 33 Cal. App. 4th at 293); *see also* Cal. Fam. Code § 721(b) (2003).

28. *See Bonds*, 24 Cal. 4th at 27; *see also* CAL. FAM. CODE § 1100(e), 2102 (West 2003).

29. *Kieturakis*, 138 Cal. App. 4th at 66.

30. *Id.*

31. *Id.* at 75 (relying on *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110 (N.D. Cal. 1999)).

32. *Kieturakis*, 138 Cal. App. 4th at 89.

33. *Id.* at 85.

34. The second and third reasons that the court of appeal gave for not applying the presumption of undue influence to the case involved the "public policy of assuring finality of judgments," and the fact that Anna and Maciej "acknowledged in the MSA that no undue influence was exercised," and their capacity to do so freely was not in question. *Id.* at 90.

be applied to marital settlement agreements reached through mediation, period.³⁵ The court reasoned that because "voluntary participation and self-determination are fundamental principles of mediation," mediators can be "expected to consider it their duty to attempt to determine whether the parties are 'acting under their own free will' in the mediation."³⁶ The court also opined that applying the presumption "to mediated marital settlements would severely undermine the practice of mediating such agreements" because it would "turn the shield of mediation confidentiality into a sword by which any unequal agreement could be invalidated," a result not intended by the legislature in providing for either of the conflicting provisions.³⁷ Avoiding this result by allowing mediation evidence to be discovered was not a valid option either. The court affirmed that "the mediation privilege is broadly framed and strictly construed. Mediation communications are generally shielded from disclosure unless all participants expressly agree otherwise. This 'supermajority' requirement . . . effectively creates a 'super privilege' impenetrable by public policies favoring disclosure."³⁸ Ultimately, the court concluded that, since the presumption of undue influence could not be applied in this case as to Maciej, the burden shifted back to Anna to establish undue influence.³⁹ The court did not reach the issue of whether the trial court properly compelled the mediator's testimony because it determined that Anna "ha[d] no prospect of meeting her burden of proof" regardless of the mediator having testified.⁴⁰ The court therefore deemed harmless any error that may have resulted from the trial court's decision to compel the mediator's testimony.⁴¹

IV. KIETURAKIS' IMPACT ON STATE LAW AND THE PRACTICE OF MEDIATION IN CALIFORNIA

Does *Kieturakis* constitute victory, defeat or something more nuanced for proponents of the use of mediation? On the one hand, the case decisively upholds mediation confidentiality, citing California's "broadly framed and strictly construed" mediation privilege⁴² and its "strong policy encouraging

35. *Id.* at 85.

36. *Id.*

37. *Id.*

38. *Kieturakis*, 138 Cal. App. 4th at 85-86 (quoting Eileen A. Scallen, *Relational and Informational Privileges and the Case of the Mysterious Mediation Privilege*, 8 LOY. L.A. L. REV. 537, 588 (2004)).

39. *Kieturakis*, 138 Cal. App. 4th at 91.

40. *Id.* at 93-94.

41. *Id.* at 91, 94.

42. *Id.* at 85.

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settlements" as its rationale.⁴³ On the other hand, the case creates different standards for the admissibility of evidence, and different burdens of proof as between mediated and non-mediated marital settlement agreements, a result for which, as the court conceded, there exists rational criticism.⁴⁴ The court recognized that its decision would put parties defending mediated marital settlements "at an advantage," since they can refuse to waive mediation confidentiality, and "thereby prevent their settlements from effectively being challenged."⁴⁵ However, with the goals of protecting mediation confidentiality and redressing undue influence placed head to head, the court found that the "super privilege" of mediation confidentiality has the upper hand: "[I]f there is a price to be paid in fairness to preserve mediation confidentiality, the cases have required that it be paid by parties challenging, not defending, what transpired in mediation."⁴⁶

The rule of *Kieturakis* could serve as a disincentive for parties to participate in mediation of marital property settlements, because parties fearful of a spouse's influence may feel too unprotected to mediate. However, as mentioned above, the court viewed the alternative of applying the presumption of undue influence to mediated marital settlements as even more dangerous to the cause of promoting mediation. It stated that "[i]f, by virtue of the mediation privilege and the presumption of undue influence, any such favorable bargain could, as we have posited, be set aside at the option of the disappointed party, the effectiveness of mediation as a method of settling marital property disputes would be greatly impaired."⁴⁷ This estoppel-tinged rationale led the court to view its decision as a choice "between a rule that may allow *some* unfair agreements to stand and a rule that jeopardizes *all* unequal agreements."⁴⁸ Ultimately, it may simply have come down to numbers. Encouraging settlement is a policy of great importance in California, and the court seems to have concluded that far more parties would be dissuaded from mediating by a rule that put *all* unequal agreements at risk, than a rule removing one of multiple

43. *Id.* at 87.

44. *Id.* (citing Ellen Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality*, 35 U.C. DAVIS L. REV. 33, 102 (2001) ("[g]iven the importance of both confidentiality and full consent to mediated settlements, an inflexible rule in favor of ensuring one but not the other of these values is inappropriate.")).

45. *Kieturakis*, 138 Cal. App. 4th at 87.

46. *Id.* at 85, 87 (citing *Eisendrath v. Super. Ct.*, 109 Cal. App. 4th 351 (Ct. App. 2003)).

47. *Kieturakis*, 138 Cal. App. 4th at 86.

48. *Id.* at 87 (emphasis added).

preventative measures against undue influence. Was the *Kieturakis* court right in its calculations? Will this new rule serve as less of a disincentive to settlement than an alternative ruling would have? The answer to these questions will depend on how the rule of *Kieturakis* is—or is not—extended in other circumstances. A related question remains as to whether the court could have enunciated a more compromising rule that would have been more apt to both preserve confidentiality and redress undue influence.

As the court of appeal recognized, critics of *Kieturakis* object to fixed rules favoring mediation confidentiality over other important policies.⁴⁹ Critics may also be concerned that rulings such as *Kieturakis* will be a slippery slope that leads to further override of substantive law in deference to California's strict rule of mediation confidentiality. Scholars have expressed concern about the potential consequences that will result if mediated agreements are "effectively exempt from the established standards [of contract common law]."⁵⁰ The chief concern of this view relates to the potential for parties to abuse the system, in that "an individual intending abusive negotiation strategies like fraud or coercion could insist on negotiating in a mediation and then cling to his right of confidentiality when enforcing the suspect agreement."⁵¹ Concern about fraud was also present in the *Kieturakis* opinion, but the court approached the issue from a different angle:

[I]n the case of a mediated marital settlement agreement to which the presumption of undue influence attached, the disadvantaged party could claim, for example, to have acted under duress, refuse to waive the privilege, and thereby prevent the other party from introducing the evidence required to carry the burden of proving that no duress occurred.⁵²

Both of these approaches address the potential for confidentiality to shield mediated agreements from effective redress of fraud and coercion; the distinction between the two has to do with *who* and *when*. Is the fraudulent behavior being engaged in by the party that is advantaged or disadvantaged by the mediation settlement? Was the fraudulent behavior engaged in during the mediation, or after the parties have reached a settlement? The above-quoted scholars focus on the consequences of a legal rule under which a party could intentionally employ fraudulent or coercive strategies in mediation in order to gain an unfair advantage, and then use confidentiality as a shield to *enforce* a suspect settlement agreement. The *Kieturakis* court was concerned with the dangers of a legal rule under which a party

49. *Kieturakis*, 138 Cal. App. 4th at 87.

50. Robinson, *supra* note 6, at 162.

51. *Id.* at 163.

52. *Kieturakis*, 138 Cal. App. 4th at 86.

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disadvantaged by a settlement agreement could fraudulently claim duress in order to *invalidate* a mediated agreement. The court's concentration on preserving the validity of settlements is unsurprising given California's pro-settlement policy, and the court's conclusion that more fraud would occur under a presumptive rule that renders all unequal settlements voidable, than under its own.

It is helpful to examine the *Kieturakis* decision in the context of the national debate that is taking place within the ADR community as to whether the rules governing confidentiality in mediation should be "bright-lines" or whether they should call for case-by-case determination. On one end of the spectrum, some argue that "[i]t is odd for ADR scholars to advocate bright-line, legalistic rules to remedy problems created in a process heralded because of its focus on self-determination. [Bright-line] rules . . . do not allow for individual differences or assessments based on the unique facts or personal choices made in each case."⁵³ On the other end of the spectrum is the view that uniformity in rules relating to mediation confidentiality will help disputants and lawyers looking for confidentiality know what they can expect from the mediation process, and will help to protect mediators from being pulled out of the role of neutral and into litigation.⁵⁴ The *Kieturakis* decision is a firm rule that corresponds with the argument in support of bright-line laws. Five years before the *Kieturakis* decision, one scholar suggested the following alternative to the court's approach to determining whether substantive policy or mediation confidentiality should yield when the two conflict:

[A] bright-line rule is inappropriate in this situation [where mediation confidentiality and other policies are in conflict] and courts should instead balance the need for mediation evidence in the specific case against the harm that disclosure would cause to the purposes served by confidentiality. Legislatures need to acknowledge the need for individualized decisions on confidentiality in the context of contract defenses and set an appropriately strict standard for disclosure. They should also mandate in camera methods, which can protect confidentiality while a court evaluates the need for mediation confidentiality in the world of contract doctrine.⁵⁵

53. Peter N. Thompson, *Enforcing Rights Generated In Court-Connected Mediation—Tension Between The Aspirations Of A Private Facilitative Process and the Reality of Public Adversarial Justice*, 19 OHIO ST. J. ON DISP. RESOL. 509, 550 (2004).

54. See Mindy D. Rufenacht, *The Concern Over Confidentiality in Mediation—An In-Depth Look at the Protection Provided by the Proposed Uniform Mediation Act*, 2000 J. DISP. RESOL. 113, 134 (2000).

55. Deason, *supra* note 44, at 102.

This proposal focuses on the area of law arguably most prone to conflict with confidentiality in mediation: the common law of contracts. Such a balancing test values the importance of confidentiality and contract law equally, stressing the need for judicial discretion based on the circumstances of each case, while insuring a basic level of confidentiality by calling for *in camera* review of the confidential material.⁵⁶ In other words, under a balancing approach, even if a judge determined that the "need for mediation evidence" outweighed the purposes served by confidentiality, the mediation evidence in question would not become a matter of public record, but would be disclosed to the judge(s) only.⁵⁷ Though this may be of little consolation to the party against whom mediation evidence is admitted to determine the outcome of his or her case, it does afford more protection than would a rule of bare disclosure. But would this minimal level of protection be enough?

The *Kieturakis* court did not comment on the possibility of applying this "middle-ground" balancing approach, though it was no doubt familiar with the notion, as the opinion quoted the article in which that approach was proposed.⁵⁸ Certainly, a rule that calls for case-by-case evaluation is less straightforward than an absolute imperative, and could result in some degree of judicial unpredictability and inconsistency. The question remains, whether the flexibility gained by a balancing approach would outweigh the loss of the full protection of confidentiality and the lack of a uniform legal rule. Balancing approaches are by no means foreign to the judiciary; however, it seems at least plausible that, were they to adopt such an approach, California judges could use their discretion to shape a discernible rule by identifying some specific factors relevant to each side of the balance.

V. OTHER APPROACHES: A COMPARATIVE ANALYSIS

A. *The Uniform Mediation Act*

Some argue that the Uniform Mediation Act (UMA) offers an alternative that would accommodate both of the conflicting policies at issue in *Kieturakis*.⁵⁹ The UMA was drafted in 2001 by a joint effort of the ABA Section of Dispute Resolution and the National Conference of Commissioners on Uniform State Laws, aided by an advisory faculty of

56. *Id.*

57. *Id.*

58. *In re Marriage of Kieturakis*, 138 Cal. App. 4th 56, 87 (Ct. App. 2006).

59. See Jeff Kichaven, *Some New Thoughts About Mediation Confidentiality*, INTERNATIONAL RISK MANAGEMENT INSTITUTE, Apr. 2006, <http://www.irmi.com/Expert/Articles/2006/Kichaven04.aspx>.

mediation scholars assembled from the law schools at Harvard, Ohio State University, the University of Missouri-Columbia, and Bowdoin University.⁶⁰ States with strong histories of protecting confidentiality in mediation, specifically California and Texas, have opted not to adopt the UMA, criticizing its less vigorous confidentiality provisions.⁶¹ Drafters explain that the UMA was not drafted with states like California and Texas in mind, but rather to provide a framework of rules for the many jurisdictions that have no mediation confidentiality rules at all.⁶² Richard C. Reuben, associate professor at the University of Missouri-Columbia School of Law and the reporter for the UMA drafting committee, notes that "[the UMA] was drafted for the 25 states that have no protection for mediation confidentiality, and the other 10-15 that have very unclear, confusing and often contradictory law regarding specific communications."⁶³ Currently, nine states—Utah, Washington D.C., Iowa, Nebraska, Illinois, Ohio, New Jersey, Washington, and Vermont—have adopted the UMA, and it has been introduced and is pending in four others: New York, Massachusetts, Connecticut, and Minnesota.⁶⁴

For those who feel that adoption of the UMA's confidentiality provisions would be beneficial even in California, the difficult intersection of settlement enforcement and confidentiality is a key motivation.⁶⁵ Unlike California's strict rule, the UMA "explicitly acknowledges that, at times, mediation confidentiality must defer."⁶⁶ Among the situations for which the UMA provides an exception to mediation confidentiality are cases in which a party is seeking to "prove a claim to rescind or reform" a mediated agreement, or to assert "a defense to avoid liability on a contract arising out of mediation,"⁶⁷ as in *Kieturakis*. This exception does not provide for unmitigated disclosure, however; there are several conditions that must be

60. Uniform Mediation Act, *Frequently Asked Questions*, <http://www.pon.harvard.edu/guests/uma/> (last visited Nov. 5 2007).

61. See *Uniform Mediation Act Is Ready For Fall Examinations*, 19 ALTERNATIVES TO HIGH COST LITIG. 198, 199 (Sept. 2001).

62. See *UMA Position Emerges, Organizes*, 19 ALTERNATIVES TO HIGH COST LITIG. 241, 242 (Nov. 2001).

63. *Id.*

64. Uniform Law Commissioners, *A Few Fast Facts about the Uniform Mediation Act*, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uma2001.asp (last visited Nov. 5, 2007).

65. See Robinson, *supra* note 6, at 168.

66. Robinson, *supra* note 6, at 168.

67. UNIF. MEDIATION ACT § 6(b)(2) (2002).

met in order for it to be successfully invoked. First, the UMA requires that an *in camera* hearing regarding the circumstances surrounding the case be performed by a court, arbitrator, or administrative agency.⁶⁸ The exception will only extend to the case if this neutral reviewer finds: "that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, [and] that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality"⁶⁹ The scheme of this UMA exception to confidentiality should not feel altogether foreign when held up to California precedent. In the rare instances in which California mediation confidentiality exceptions have been applied, *in camera* hearings have been employed to reduce the extent of disclosure,⁷⁰ and judges have required that there be no available alternative source of evidence.⁷¹ However, the cases in which these measures have been applied involved situations in which either a party's constitutional rights were at stake,⁷² or the parties waived the mediation privilege.⁷³

B. Other States' Approaches

This article is concerned with the specific issue of how California has handled the issue of first impression raised in *Kieturakis*. Though other states' precedent is not binding authority in California, an examination of how other jurisdictions have dealt with comparable issues is, nonetheless, instructive, given the relative paucity of precedent in this area.

1. Texas

Texas is recognized as a state with broad statutory protection for mediation confidentiality.⁷⁴ The Texas ADR Act provides for a few narrow exceptions to confidentiality, including "when the parties execute a written settlement agreement at the mediation session and one of the parties later brings a contract enforcement action on the agreement."⁷⁵ In the unreported

68. *Id.* at § 6(b).

69. *Id.*

70. *See Rinaker v. Super. Ct.*, 62 Cal. App. 4th 155-56 (Ct. App. 1998); *see also Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110 (N.D. Cal. 1999).

71. *See Olam*, 68 F. Supp. 2d at 1132.

72. *See Rinaker*, 62 Cal. App. 4th at 160-61.

73. *See Olam*, 68 F. Supp. 2d at 1118-19.

74. Brian D. Shannon, *Confidentiality Of Texas Mediations: Ruminations On Some Thorny Problems*, 32 TEX. TECH L. REV. 77, 77 (2000).

75. Shannon, *supra* note 74, at 77, 92.

case of *Randle v. Mid Gulf, Inc.*, a Texas court of appeals applied an estoppel approach to the issue of whether confidential evidence is admissible to prove a contract defense to an enforcement action on a mediated settlement.⁷⁶ Notwithstanding the lack of a pertinent formal exception to confidentiality, the court held that a party may not move to enforce a mediated agreement and simultaneously claim the protection of mediation confidentiality to prevent the other side from establishing a contract defense.⁷⁷ Eight years later, in *Alford v. Bryant*, a Texas court of appeals extended the "offensive use doctrine" to mediation confidentiality.⁷⁸ Texas' offensive use doctrine provides that:

[A defendant] cannot invoke the jurisdiction of the courts in search of affirmative relief, and yet, on the basis of privilege, deny a party the benefit of evidence that would materially weaken or defeat the claims against her . . . [because] [s]uch offensive . . . use of a privilege lies outside the intended scope of the privilege.⁷⁹

Though mediation confidentiality did not have the status of a privilege in Texas, the *Alford* court held that "[b]ecause the mediation confidentiality statutes and the attorney-client privilege are grounded upon similar policy rationales, including effective legal services and administration of justice, the offensive use doctrine should apply similarly to the mediation confidentiality statutes."⁸⁰ Three conditions must be met in order for the doctrine to apply: 1) the party asserting the privilege must be "seeking affirmative relief," 2) the privileged information must be, "in all probability . . . outcome determinative" of the asserted claim for relief, and 3) disclosure of the confidential information must be "the only means by which the aggrieved party may obtain the evidence."⁸¹

Neither *Randle* nor *Alford* deal with the exact scenario of *Kieturakis*, in which a party sought to invalidate a mediated settlement by asserting that a presumption of undue influence applied, but simultaneously refused to waive confidentiality, effectively preventing the other side from being able to meet his burden of proof. To recap, *Randle* bars a party seeking to *enforce* a mediated settlement from refusing to waive confidentiality at the

76. *Randle v. Mid Gulf, Inc.*, No. 14-95-01292-CV, 1996 WL 447954, at *1 (Tex. App. Aug. 8, 1996).

77. *Randle*, 1996 WL 447954, at *1.

78. *Alford v. Bryant*, 137 S.W.3d 916, 922 (Tex. App. 2004).

79. *Id.* at 921 (citing *Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105, 107 (Tex. 1985)).

80. *Alford*, 137 S.W.3d at 922.

81. *Id.* at 921 (citing *TransAmerican Natural Gas Corp. v. Flores*, 870 S.W.2d 10, 11-12 (Tex. 1994)).

expense of the other party's ability to assert a contract defense. *Alford* bars a party asserting a claim for affirmative relief from refusing to waive confidentiality to prevent the other party from admitting evidence from mediation likely to be outcome determinative in the new action. However, unlike the *Kieturakis* court,⁸² these Texas cases recognize the argument that a party may waive mediation confidentiality by virtue of having asserted certain claims against the other party. Maciej Kieturakis made this argument in his trial brief as he sought to admit evidence from mediation in order to refute the presumption of undue influence being asserted against him.⁸³ However, the *Kieturakis* court rejected this line of reasoning, relying on prior California precedent that held that the mediation privilege cannot be impliedly waived, unlike the attorney-client privilege, the confidential marital communication privilege, the physician-patient privilege, and the psychotherapist-patient privilege.⁸⁴ The court also noted that "[s]ome of the other privileges are also expressly subject to the 'in issue' doctrine, which creates an implied waiver when the holder of the privilege raises an issue involving the substance of protected communications," but was clear in its reading of past precedent, saying "[t]he court declined to 'extend these waiver provisions beyond their existing limits'" to reach the mediation privilege.⁸⁵

2. West Virginia

The question of the appropriate relationship between mediated settlement agreements and traditional contract law principles inevitably raises the issue of whether a mediator's testimony should ever be compelled to prove the invalidity (or validity, as in *Kieturakis*) of an agreement. As a neutral party, theoretically unbiased to either side's vision of the case, a mediator's perspective would no doubt be useful evidence to a court in determining the fairness of a mediated agreement. This fact is exactly why mediators are covered by confidentiality provisions—the same position of neutrality that makes a mediator a uniquely appealing witness is what allows her to effectively facilitate the resolution of conflict. Without the safeguard of confidentiality, however, parties would not be able to participate in mediation without the very legitimate fear that everything they said could be used against them later in court. West Virginia is an example of a state with

82. *In re Marriage of Kieturakis*, 138 Cal. App. 4th 56, 81 (Ct. App. 2006).

83. *Id.* at 68 ("Maciej's trial brief argued among other things that [the other side] had waived the mediation privilege given the nature of the claims she was asserting.").

84. *Id.* at 81 (citing *Eisendrath v. Super. Ct.*, 109 Cal. App. 4th 351 (Ct. App. 2003)).

85. *Kieturakis*, 138 Cal. App. 4th at 81 (quoting *Eisendrath*, 109 Cal. App. 4th at 363).

a strict mediator privilege that "appears to prohibit mediator testimony in nearly every circumstance."⁸⁶ However, West Virginia law also states that "[i]f the parties reach a settlement and execute a written agreement, the agreement is enforceable in the same manner as any other written contract."⁸⁷ The potential for conflict between these rules calls into question the difficult issue of whether and when mediator testimony is appropriately compelled. In *Riner v. Newbraugh*, the parties reached an agreement in mediation, but a dispute over enforcement arose after one of the parties made changes to the terms of the agreement, and the other party refused to sign the new document.⁸⁸ The trial court compelled the mediator's testimony, and relied heavily on it in finding that the agreement was valid and enforceable.⁸⁹ On appeal, the West Virginia Supreme Court of Appeals invalidated the agreement on contract law grounds, but also took pains to disapprove of the trial court's decision to compel the mediator's testimony.⁹⁰ The court's opinion suggests that mediators can testify only as to whether an agreement was reached and the terms thereof, but should not be subjected to specific questioning about the details of the mediation process.⁹¹ In other words, strict confidentiality is ostensibly still the governing standard for mediator testimony in West Virginia in the wake of *Riner*.

As outlined in section III above, the *Kieturakis* court held that the trial court's decision to compel the mediator's testimony was harmless error, if it was an error at all.⁹² Like the *Riner* court, the *Kieturakis* court did express doubt about the applicability of the exception as applied by the trial court despite its judgment not to formally decide the issue.⁹³ The extent to which California will continue to recognize, extend, or limit exceptions to the general rule against mediator testimony remains to be seen.

86. Joshua S. Rogers, *Riner v. Newbraugh: The Role of Mediator Testimony in the Enforcement of Mediated Agreements*, 107 W. VA. L. REV. 329, 346 (2004).

87. *Id.* at 347 (quoting W. VA. TRIAL CT. R. 25.14).

88. *Riner v. Newbraugh*, 563 S.E.2d 802, 804-05 (W. Va. 2002).

89. *Id.* at 805.

90. *Id.* at 808-09 ("[W]e question the wisdom of permitting the mediator to testify in the fashion allowed in this case.").

91. See *Riner*, 563 S.E.2d 802; see also Rogers, *supra* note 86, at 349-50.

92. See *In re Marriage of Kieturakis*, 138 Cal. App. 4th 56, 94 (Ct. App. 2006).

93. *Id.* ("[W]e do not think that *Olam* could be stretched so far as to cover the situation the trial court faced here, where one of the parties objected to the mediator's evidence . . .").

VI. TO WHAT DEGREE SHOULD A MEDIATOR BE HELD RESPONSIBLE FOR THE FAIRNESS OF A SETTLEMENT?

A mediator's job is to serve as a neutral facilitator and to help disputing parties discuss the relevant issues and decide for themselves if and how they want to resolve the dispute. But when it comes to the substantive terms of settlement, is the mediator responsible for ensuring that an agreement is fair to both sides? Predictably, there is some disagreement on this subject.⁹⁴ This section will consider the various approaches to the topic of the appropriate standards of practice for mediators. It will also broach the subject of whether holdings such as *Kieturakis* increase mediators' responsibility for ensuring the fairness of settlements.

A. Standards of Practice for Mediation

As mediation has become more institutionalized and linked to the court system, courts have begun to add ADR-specific standards of practice to their court rules.⁹⁵ Many independent mediation associations and organizations have also drafted model standards based on their expertise and practical experience in the field,⁹⁶ some of these standards are eventually incorporated in part or in full into state law.

1. Model Standards of Practice for Family and Divorce Mediation

One model relevant to the topic of this article is the Model Standards of Practice for Family and Divorce Mediation (Model Family Mediation Standards), developed by the Symposium on Standards of Practice in 2000.⁹⁷ The Model Family Mediation Standards begin by recognizing that

94. Compare Andrew Shepard, *An Introduction to the Model Standards of Practice for Family and Divorce Mediation*, 35 FAM. L.Q. 1, 17 (2001) ("[M]ediators have some responsibility under the Model Standards to help insure minimum fairness in both the process of bargaining and substantive outcomes . . .") with CAL. RULES OF COURT, Rule 3.857(b) (2003) (amended 2007) ("A mediator is not obligated to ensure the substantive fairness of an agreement reached by the parties.").

95. See, e.g., Boise State University, Department of Public Policy and Administration, *Overview of States' Codes of Mediator Ethics*, <http://ppa.boisestate.edu/mediation/documents/table-a.pdf> (last visited Nov. 5, 2007).

96. See, e.g., California Dispute Resolution Council, <http://www.mediate.com/articles/cdrccstds.cfm> (last visited Nov. 5, 2007); Iowa Association for Dispute Resolution, <http://iamediators.org/standards.html> (last visited Nov. 5, 2007); Maine Association of Dispute Resolution Professionals, <http://www.madrp.org/ethics/index/html> (last visited Oct 28, 2007).

97. MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION (2000), http://www.afccnet.org/resources/resources_model_mediation.asp (last visited Nov. 5, 2007) (hereinafter MODEL FAMILY MEDIATION STANDARDS).

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"[s]elf-determination is the fundamental principle of family mediation. The mediation process relies upon the ability of participants to make their own voluntary and informed decisions."⁹⁸ Rooted in this guiding principle of party autonomy, mediators are expected to uphold several responsibilities. First, mediators "should be alert to the capacity and willingness of the participants to mediate before proceeding with the mediation and throughout the process."⁹⁹ The Model Family Mediation Standards also require that the mediator "facilitate full and accurate disclosure . . . of information during mediation so that the participants can make informed decisions."¹⁰⁰ These responsibilities are procedural duties, but the Model Family Mediation Standards also call for the mediator to monitor the substantive outcome of a case: a mediator "should consider suspending or terminating the mediation . . . [if] the participants are about to enter into an agreement that the mediator reasonably believes to be unconscionable."¹⁰¹ As one scholar has explained, "[t]his provision imposes a requirement on the mediator to insure that an agreement that results from mediation is not so unfair that it shocks the conscience . . . or because the substantive terms are so wildly unfair that no reasonable person would enter into them."¹⁰² This unconscionability standard is designed to ensure that mediators endorse only those settlement agreements that satisfy minimum standards of fairness; "it does not require that the terms of a mediated agreement be identical to those that would be achieved in a court order after years of discovery and litigation."¹⁰³

2. California Rules of Court: Requirements for the Quality of the Mediation Process in Civil Cases

Under California Rule of Court 3.857(b), "[a] mediator must conduct the mediation proceedings in a procedurally fair manner. 'Procedural fairness' means a balanced process in which each party is given an opportunity to participate and make uncoerced decisions. *A mediator is not obligated to ensure the substantive fairness of an agreement reached by the parties.*"¹⁰⁴

98. *Id.* Standard I.A.

99. *Id.* Standard III.C.

100. *Id.* Standard VI.A.

101. *Id.* Standard XI.A.4.

102. Schepard, *supra* note 94, at 15.

103. Schepard, *supra* note 94, at 15-16.

104. CAL. RULES OF COURT, Rule 3.857(b) (2003) (amended 2007) (emphasis added).

The only additional provision that speaks to a mediator's proper response to possible unfairness in the mediation process is Rule 3.857(i), which indicates that:

[A] mediator may suspend or terminate the mediation or withdraw as mediator when he or she reasonably believes the circumstances require it, including when he or she suspects that: 1) [t]he mediation is being used to further illegal conduct; 2) [a] participant is unable to participate meaningfully in negotiations; or 3) [c]ontinuation of the process would cause significant harm to any participant or a third party.¹⁰⁵

Here, the mediator has discretion as to whether or not to withdraw, rather than being obligated to do so.

3. Mediators Responsibility for Fairness in Mediation Based on Professional Background

Another model for determining mediator responsibility for fairness in mediation is based on the mediator's professional background.¹⁰⁶ Under this view, "[t]he extent of mediator accountability for fairness varies by whether or not the mediator is a lawyer, and by whether the parties are independently represented by counsel."¹⁰⁷ This idea is based on the ethical restrictions specific to attorneys' involvement in alternative dispute resolution processes.¹⁰⁸ In contrast, the Model Family Mediation Standards specifically provide that they "apply to all mediators—lawyers and therapists alike—regardless of the mediator's profession of origin."¹⁰⁹ This second approach is arguably the better rule, given that many accomplished mediators are not lawyers, and because having separate standards for fairness for different mediators would likely lead to inconsistent results both in mediation and in subsequent court proceedings.

B. Mediator Responsibility for Procedural vs. Substantive Fairness

As demonstrated by the above examples, different standards of practice assume different positions as to whether mediators are responsible for substantive as well as procedural fairness in mediation. This is a debate that has developed relatively recently; "[u]nder *traditional* mediation theory, mediator accountability is satisfied by a procedurally fair process that treats

105. *Id.* at Rule 3.857(i) (2003) (amended 2007).

106. See Judith L. Maute, *Public Values and Private Justice: A Case for Mediator Accountability*, 4 GEO. J. LEGAL ETHICS 503, 508 (1991).

107. *Id.*

108. *Id.*

109. Shepard, *supra* note 94, at 7.

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parties with dignity and respect, and that stops intimidating or abusive behavior."¹¹⁰ As for substantive outcome, under a traditional approach, "[a]bsent abuse of the mediation process, any settlement the parties agree to is deemed fair"¹¹¹ Though the terms "intimidating" or "abusive" are somewhat ambiguous, the boundary of mediator responsibility under this view extends only to the procedural aspects of mediation. California adheres to this more traditional approach, while the Model Family Mediation Standards call for a mediator to venture out into the task of distinguishing unconscionable agreement terms from those that are voluntarily entered into, without abuse of the process by either party.¹¹²

C. Does Kieturakis Increase Mediator Responsibility for the Fairness of Mediated Settlements?

In *Kieturakis*, the court chose not to apply the presumption of undue influence to mediated settlement agreements.¹¹³ Ultimately, this shifted the burden of proving undue influence from the alleged perpetrator to the party seeking to invalidate the mediated agreement. The court's opinion also established different standards of treatment for mediated and non-mediated settlement agreements under the law. Because of California's strict mediation confidentiality provisions, a mediation participant who wishes to challenge the validity of an agreement on a claim of undue influence may be unable to do so, if the other party refuses to waive the mediation privilege. This consequence of *Kieturakis* makes the fairness of both the process and substance of mediation even more critical, as there is far less chance of recourse after the fact. This result raises a new question: Does the heightened need for fairness during mediation puts additional pressure on mediators to ensure that the terms of an agreement are fair? On the one hand, California's Rules of Court clearly state that California mediators are not responsible for the substantive fairness of mediation.¹¹⁴ On the other hand, the *Kieturakis* court relied on the assertion that a mediator's successful preservation of procedural fairness makes substantive fairness a more likely

110. Maute, *supra* note 106, at 506 (emphasis added).

111. *Id.*

112. See *supra* Part V.A.1-2.

113. See *supra* Part III.

114. See *supra* note 104 and accompanying text.

result, as well.¹¹⁵ On this basis, the court opined that, "while mediation is no guarantee against the exercise of undue influence, it should help to minimize unfairness in the process by which a marital settlement is reached."¹¹⁶ Ultimately, whether a mediator's responsibility for fairness is increased comes down to the rather inane question of how fair is fair; are there gradations of effort that a mediator can put forth in the pursuit of ensuring procedural fairness? If so, perhaps a mediator is required, post-*Kieturakis*, to act at the very zenith of her efforts to ensure procedural fairness, so as to have the best chance of minimizing substantive unfairness. This argument is a stretch, at best. It seems far more plausible that California's requirement that "a mediator must conduct the mediation proceedings in a procedurally fair manner"¹¹⁷ means just what it says, and does not contemplate degrees of procedural fairness. Thus, though *Kieturakis* leaves parties to mediation less protected from the threat of undue influence, it does not *increase* mediator responsibility for fairness, because mediators were already required to act within their full power to ensure procedural fairness. *Kieturakis* does not alter California's stance that mediators are "not obligated to ensure the substantive fairness of an agreement reached by the parties."¹¹⁸

VII. CONCLUSION

The *Kieturakis* opinion both maintains California's historically strict standard of confidentiality and reduces the scope of the state's presumption that unequal marital settlements were achieved through undue influence.¹¹⁹ There is a strong argument that the court could have more effectively honored both the conflicting policy of mediation confidentiality and the substantive family and contract law presumption of undue influence, by establishing a balancing test and calling for *in camera* review. However, it is unclear whether the practical result of such a decision would have undermined the state's confidentiality protection to an unacceptable degree. It is no wonder that the trial court in *Kieturakis* described the issues presented in the case as "the most difficult it had ever faced."¹²⁰ Whether

115. *In re Marriage of Kieturakis*, 138 Cal. App. 4th 56, 85 (Ct. App. 2006) ("[D]ivorce mediators generally work to balance the negotiating power between the parties. This tends to produce agreements that are more fair and voluntary, rather than coerced." (quoting ROTH ET AL., THE ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE § 31:5 at 31-5 (Lawyers Cooperative Publishing Co. 2005)).

116. *Kieturakis*, 138 Cal. App. 4th at 85.

117. CAL. RULES OF COURT, Rule 3.857(b) (2003) (amended 2007).

118. *Id.*

119. *See supra* Parts III and IV.

120. *Kieturakis*, 138 Cal. App. 4th at 75.

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the court of appeal's strict adherence to confidentiality will discourage parties from participating in mediation, whether it was "necessary to protect the mediation process,"¹²¹ or whether it will result in a legacy of "absurd enforcement results" will only be apparent with the passage of time (and litigation).¹²²

121. Robinson, *supra* note 6, at 142.

122. *Id.* at 148.

