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6 SUPERIOR COURT OF CALIFORNIA, COUNTY OF _____

7 THE PEOPLE OF THE STATE OF) Case No.
8 CALIFORNIA,)
9 Plaintiff,) POINTS AND AUTHORITIES
10 vs.) IN SUPPORT OF ADMISSIBILITY
11) OF SUPERIOR COURT DIVORCE
12 Defendant.) MEDIATOR'S TESTIMONY
13) IN CRIMINAL PROCEEDING
Date:
Time:
Dept:

14 **I**

15 **FACTUAL BACKGROUND**

16 The alleged victim in this case (is/has been) the
17 subject of (child custody/visitation) disputes involving
18 (resolution/attempted resolution) by a family court
19 mediator. (Name of victim) has made statements to the
20 mediator which are inconsistent with statements she has made
21 to others concerning Defendant's culpability in this matter.
22 (Set forth the statements in detail). Defendant seeks an
23 order from this authorizing him to (impeach/rehabilitate)
24 (name of victim).

25 **II**

26 **THE DEFENDANT'S RIGHT TO CONFRONT AND CROSS-EXAMINE**
27 **WITNESSES AGAINST HIM OVERRIDES FAMILY CODE §3177 WHICH**
28 **PROVIDES FOR THE CONFIDENTIALITY OF FAMILY COURT**
MEDIATION PROCEEDINGS.

1 Family Code §3177 provides as to custody and visitation
2 disputes in dissolution proceedings:

3 "Mediation proceedings pursuant to this chapter
4 shall be held in private and shall be
5 confidential. All communications, verbal and
6 written, from the parties to the mediator made in
7 the proceeding are official information within the
8 meaning of Evidence Code §1040."

9 As determined in Marriage of Rosson (1986) 178 Cal.App.3d
10 1094, 1105 (disapproved on other grounds in Marriage of
11 Burgess (1996) 13 Cal.4th 25), the privilege belongs to the
12 court, not the parties and the court may choose to waive the
13 privilege. Government Code Section 6250 et seq.
14 establishes the law on official records and which are public
15 and which are confidential. The law provides for the use of
16 official records in criminal proceedings:

17 "The provisions of this chapter shall not be
18 deemed in any manner to affect the status of
19 judicial records as it existed immediately prior
20 to the effective date of this section, nor to
21 affect the rights of litigants, including parties
22 to administrative proceedings, under the laws of
23 discovery of this state, nor to limit or impair
24 any rights of discovery in a criminal case."

25 In a virtually identical situation involving the
26 confidentiality of mediation proceedings in the civil
27 context, the Court of Appeal in Rinaker v. Superior Court
28 (1998) 62 Cal.App.4th 155 found that a minor's
29 constitutional right to confront and cross-examine an
30 adverse witness in a juvenile delinquency proceeding
31 overrode the confidentiality of such proceedings as set
32 forth in Evidence Code §1119. That section provides:

33 "(a) No evidence of anything said or of any admission
34 made
35 for the purpose of, in the course of, or pursuant to,

1 a mediation or a mediation consultation is admissible
2 or subject to discovery, and disclosure of the evidence
3 shall not be compelled in any arbitration,
4 administrative
5 adjudication, civil action, or other noncriminal
6 proceeding in which, pursuant to law, testimony can be
7 compelled to be given."

8 Section (b) is to the same effect as to writings.

9 In finding that the confidentiality set forth in
10 Evidence Code §1119 yielded when it conflicted with the
11 minor's constitutional confrontation rights, the court
12 recognized that right as essential to due process and as
13 including the right to impeach, i.e., "discredit the witness
14 with evidence of his or her inconsistent statements." (Id.,
15 at p. 165.) The court further acknowledged the "important
16 public purpose in promoting the settlement of legal disputes
17 through confidential mediation rather than litigation" but
18 held that "when balanced against the goals of preventing
19 perjury and preserving the integrity of the truth-seeking
20 process of trial in a juvenile delinquency proceeding, the
21 promotion of settlements must yield to the constitutional
22 right to effective impeachment." (Id., at p. 166.)

23 Rinaker was cited with approval in Folb v. Motion
24 Picture Industry Pension & Health Plans (1998) 16 F.Supp.2d
25 1164, 1178 wherein the court noted that a federal mediation
26 privilege "may be attenuated of necessity in criminal or
27 quasi-criminal cases where the defendant's constitutional
28 rights are at stake."

III

**DEFENDANT IS ENTITLED TO AN IN-CAMERA HEARING
TO DETERMINE WHETHER HIS CONSTITUTIONAL RIGHTS
OF CONFRONTATION OVERRIDE THE STATUTORY PRIVILEGE.**

1 Rinaker does not allow the automatic admission
2 into evidence at juvenile proceedings of statements made
3 during civil mediation proceedings. Rather, the trial court
4 is to conduct an in-camera hearing "to weigh 'the
5 constitutionally based claim of need against the statutory
6 privilege' and determine whether the minors have established
7 that [the witness's] testimony is necessary to 'vindicate
8 their rights of confrontation.' (Citations omitted)." (Id.,
9 at p. 168.) The in-camera hearing process "maintains the
10 confidentiality of the mediation process while the juvenile
11 court considers other factors bearing upon whether the
12 minor's constitutional right of effective impeachment
13 compels breach of the confidential mediation process."
14 (Id., at p. 169.) Defendant therefore requests that this
15 Court conduct an in-camera hearing to make this
16 determination.

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Dated:

Respectfully submitted,

Attorney for Defendant