

Study K-410

June 23, 1999

Second Supplement to Memorandum 99-23**Confidentiality of Settlement Negotiations:
Comments of Civil and Small Claims Advisory Committee**

The Civil and Small Claims Advisory Committee of the Judicial Council has provided new comments on the Commission's proposal on the admissibility, discoverability, and confidentiality of settlement negotiations. (Exhibit pp. 1-4.) (A seven-page letter by Justice Aldrich was attached to the new comments, but is not included here because it was previously distributed to the Commission (Memorandum 98-62, Exhibit pp. 1-7).)

Importantly, the Committee "share[s] the Law Revision Commission's concerns with preserving the confidentiality of settlement negotiations and placing a high value on the use of alternative dispute resolution methods." (*Id.* at 2.) A working group of the Committee also concluded that "the Law Revision Commission has done a good job in responding to prior criticisms and suggestions in modifying the language of the proposed legislation" (*Id.* at 3.)

Nonetheless, the Committee continues to oppose the Commission's proposal. The Committee concurs in the working group's assessment that the recommended legislation is not necessary. (*Id.* at 2.) As the working group explains:

It appears to be the stated purpose of the legislation ... to encourage more frank and open settlement discussions. It is our shared experience that this is not a significant problem in either settlement conferences or mediations, and it is highly unlikely that the proposed legislation would improve this. For one thing, it is doubtful that the litany of exceptions to the confidentiality of settlement discussions will provide litigants with more comfort in engaging in frank and open discussions with a view toward settlement. It is submitted it would have just the opposite effect.

(*Id.* at 3.)

We will discuss these comments further at the Commission's meeting.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

Judicial Council of California

HON. RONALD M. GEORGE
Chief Justice of California
Chair of the Judicial Council

June 21, 1999

WILLIAM C. VICKREY
Administrative Director of the Courts



Civil and Small Claims
Advisory Committee
455 Golden Gate Avenue
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By Facsimile
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California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739
Attention: Ms. Barbara Gaal, Staff Counsel

Re: Proposed Legislation Relating to Admissibility, Discoverability
and Confidentiality of Settlement Negotiations

Dear Commission Members:

I am writing as chair of the Civil and Small Claims Advisory Committee of the Judicial Council of California. The purpose of this letter is to inform you of the Committee's views on the latest draft of the Commission's recommendations relating to the *Admissibility, Discoverability, and Confidentiality of Settlement Negotiations*. The views expressed in this letter are those of the Committee and not those of the Judicial Council which has not considered the matter.

The Committee has closely followed the development of the Law Revision Commission's proposals. On February 13, 1998, Justice Richard D. Aldrich, former chair of this Committee, wrote a letter to the Commission expressing several of the Committee's concerns, including its concern that the proposed legislation might be premature. A working group of the Committee was formed to conduct an analysis of the proposals and report back to the Committee. On April 15, 1998, the working group spoke with Ms. Barbara Gaal by telephone to express its concerns. After further study and discussion, the Committee voted unanimously to oppose the proposed changes. The reasons for the Committee's position were summarized in Justice Aldrich's letter to the Commission dated September 14, 1998 (a copy of which is attached as Exhibit 1.)

Subsequently, the staff of the Law Revision Commission made further revisions to the recommended legislation. For instance, in response partially to Justice Aldrich's comments, proposed Evidence Code Section 1141 (on the admissibility and discoverability of evidence of settlement negotiations) was revised. The effect of this revision was to provide a more balanced approach and give courts a greater degree of discretion.

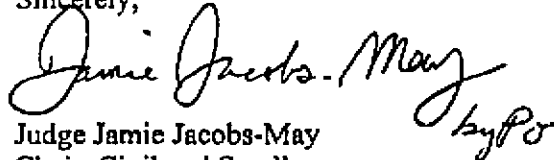
California Law Revision Commission
June 21, 1999
Page 2

The Civil and Small Claims Advisory Committee has continued to follow the Commission's revised draft proposals. In April 1999, a working group chaired by Judge Arthur Wallace reviewed the Commission staff's Memorandum 99-23 dated March 24, 1999 and the staff's Draft Recommendation. The working group also re-reviewed earlier memoranda and correspondence on this matter. Although the working group felt that the Commission has done a good job of responding to prior criticisms and suggestions, the group concluded that the Committee's previous position should not be changed. The group thought that the proposed legislation was unnecessary and might have the opposite effect from that which was intended. (A copy of the working group's letter dated April 23, 1999 is attached as Exhibit 2.)

On April 26, 1999, the full Committee considered the working group's recommendations. The Committee shared the Law Revision Commission's concerns with preserving the confidentiality of settlement negotiations and placing a high value on the use of alternative dispute resolution methods. Nevertheless, after reviewing the latest proposals, the Committee concurred with the working group that the recommended legislation is not necessary. Hence, the Committee recommends against its adoption.

Thank you for your attention to this matter. I hope that the Committee's comments have been helpful. On behalf of the Committee, I look forward to working together with the Law Revision Commission in the future.

Sincerely,

A handwritten signature in cursive script that reads "Jamie Jacobs-May". To the right of the signature, the letters "by PO" are written in a smaller, less formal cursive.

Judge Jamie Jacobs-May
Chair, Civil and Small
Claims Advisory
Committee

Enclosures

cc: Hon. Marvin Baxter, Chair
Policy Coordination and Liaison Committee
Ms. Bettina Redway, Attorney
Office of Governmental Affairs

THE SUPERIOR COURT**ARTHUR E. WALLACE**
JudgeOF THE STATE OF CALIFORNIA
IN AND FOR THE
COUNTY OF KERN

April 23, 1999

Judicial Council of California
Administrative Office of the Courts
Council and Legal Services Division
455 Golden Gate Avenue
San Francisco, CA 94102-3660
Via Fax 415-865-7664Attention: Mr. Patrick O'Donnell
Attorney

Re: Legislation Relating to Settlement Negotiations

Dear Patrick:

After receipt of your letter of March 29, 1999, our working group individually reviewed its enclosures and re-reviewed Tab 21 in the binder for the January 29, 1999 meeting of the Advisory Committee. We recently had a telephonic meeting and came to the same general conclusions.

It is felt that while the Law Revision Commission has done a good job in responding to prior criticisms and suggestions in modifying the language of the proposed legislation, they have nevertheless not convinced our working group that the position taken by our Committee should be changed. None of the three of us have experienced any particular problem in dealing with settlement negotiations, their discoverability or admissibility, that the proposed legislation would remedy.

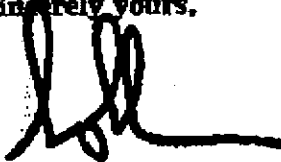
It appears to be the stated purpose of the legislation is to encourage more frank and open settlement discussions. It is our shared experience that this is not a significant problem in either settlement conferences or mediations and it is highly unlikely that the proposed legislation would improve this. For one thing, it is doubtful that the litany of exceptions to the confidentiality of settlement discussions will provide litigants with more comfort in engaging in frank and open discussions with a view toward settlement. It is submitted it would have just the opposite effect.

It is therefore the recommendation of our working group that the Advisory Committee reaffirm its position to the effect that the proposed legislation is unnecessary and may well have an opposite effect to that intended in the stated purpose for the proposed legislation.

Judicial Council of California
Attn: Mr. Patrick O'Donnell, Attorney
April 23, 1999
Page Two

Thank you for your kind attention to this matter.

Sincerely yours,



ARTHUR E. WALLACE
Judge of the Superior Court

AEW:js

cc: Ms. Melissa McKeith, Esq.
Via Fax (213) 688-3460

Mr. Peter Ostroff, Esq.
Via Fax (213) 896-6600

Hon. Jamie Jacobs-May
Via Fax (408) 298-0582