

## Memorandum 2016-40

**Minutes of Meeting on July 22, 2016 (Draft)**

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The California Law Revision Commission<sup>1</sup> held a meeting on July 22, 2016. A draft of Minutes for that meeting is attached for Commissioners to review.

The attached draft will be deemed final after it is approved by a vote of the Commission. When voting, the Commission may make specific changes to the Minutes. If so, those changes will be memorialized in the Minutes for the meeting at which the vote occurred.

Respectfully submitted,

Barbara Gaal  
Chief Deputy Counsel

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1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website ([www.clrc.ca.gov](http://www.clrc.ca.gov)). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

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**DRAFT** MINUTES OF MEETING  
CALIFORNIA LAW REVISION COMMISSION  
JULY 22, 2016  
LOS ANGELES

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A meeting of the California Law Revision Commission was held in Los Angeles on July 22, 2016.

**Commission:**

*Present:* Taras Kihiczak, Chairperson  
Crystal Miller-O'Brien, Vice Chairperson  
Damian Capozzola  
Thomas Hallinan  
Victor King  
Jane McAllister

*Absent:* Assembly Member Ed Chau  
Senator Richard D. Roth  
Diane F. Boyer-Vine, Legislative Counsel  
Susan Duncan Lee

**Staff:** Brian Hebert, Executive Director  
Barbara Gaal, Chief Deputy Counsel  
Kristin Burford, Staff Counsel  
Steve Cohen, Staff Counsel

**Other Persons:**

Bob Andersen, Andersen Mediations  
Lee Jay Berman, American Institute of Mediation  
Lee Blackman, Blackman ADR Services  
Suzanne V. Chamberlain  
Mary B. Culbert, The Loyola Law School Center for Conflict Resolution  
Robert Flack  
Jacqueline Harake, The Loyola Law School Center for Conflict Resolution  
Ron Kelly  
Jeff Kichaven  
Priscilla W. Lloyd  
Phyllis G. Pollack, PGP Mediation  
Lynette Berg Robe  
Fern Topas Salka  
Ana Sambold, San Diego County Bar Association

Floyd Siegal  
Jill Switzer

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APPROVAL OF ACTIONS TAKEN

1       Unless otherwise indicated, the Commission decisions noted in these Minutes  
2 were approved by all members present at the meeting. If a member who was  
3 present at the meeting voted against a particular decision, abstained from voting,  
4 or was not present when the decision was made, that fact will be noted below.

MINUTES OF JUNE 1, 2016, COMMISSION MEETING

6       Memorandum 2016-31 and its First Supplement presented a draft of the  
7 Minutes of the June 1, 2016, Commission meeting. The Commission approved  
8 the Minutes, with the revision set out in the First Supplement.

ADMINISTRATIVE MATTERS

10   **Report of Executive Director**

11       The Executive Director reported that the State Budget for 2016-17 does not  
12 materially change the Commission’s funding or staffing level.

13       The Executive Director proposed that the Commission consider adopting a  
14 Tribal Consultation Policy, as a more formalized way to comply with Governor  
15 Brown’s Executive Order B-10-11. The Commission directed the staff to prepare a  
16 memorandum on that topic, for presentation at a future meeting.

17   **Commissioner Suggestions**

18       Commissioner Capozzola suggested that the Commission study the  
19 procedure for objecting to a deposition and recommend clarifying changes to the

1 law. Commissioner Capozzola will provide background information to the staff,  
2 which will address the matter in the Commission’s next New Topics and  
3 Priorities memorandum.

4 Chairperson Kihiczak encouraged Commissioners to submit other study  
5 proposals to the staff for consideration in the next New Topics and Priorities  
6 memorandum.

7 **Meeting Schedule**

8 The Commission considered Memorandum 2016-32, discussing the  
9 Commission’s 2017 meeting schedule. The Commission changed the date of its  
10 April 2017 meeting. The meeting will now be held on April 13, 2017.

11 2016 LEGISLATIVE PROGRAM

12 The Commission considered Memorandum 2016-33, discussing the status of  
13 its 2016 Legislative Program. No Commission action was required or taken.

14 STUDY K-402 — RELATIONSHIP BETWEEN MEDIATION CONFIDENTIALITY AND  
15 ATTORNEY MALPRACTICE AND OTHER MISCONDUCT

16 The Commission’s discussion of this study was divided into three parts:

- 17 (1) Preliminary *in camera* filtering.  
18 (2) Possible questions for the State Bar.  
19 (3) Public comment.

20 **Preliminary *In Camera* Filtering**

21 The Commission considered Memorandum 2016-38 (preliminary *in camera*  
22 filtering) and its First Supplement. The Commission also received documents  
23 from Prof. Mary Culbert (Loyola Law School Center for Conflict Resolution), as  
24 noted in the Third Supplement to Memorandum 2016-39.

25 The Commission made the following decisions:

- 26 • The staff should not further pursue the concept of conducting an  
27 Early Neutral Evaluation Conference (“ENEC”) or similar process  
28 in a legal malpractice case that alleges mediation misconduct.  
29 (*Commissioner Capozzola was not present for this decision.*)

- 1 • The staff should not further pursue an approach modeled on Civil  
2 Code Section 1714.10 (alleged conspiracy between attorney and  
3 client).

4 *(Commissioner Capozzola was not present for this decision.)*

- 5 • The staff should further investigate the possibility of creating a  
6 specialist certification requirement or a self-certification  
7 requirement for a legal malpractice case that alleges mediation  
8 misconduct.

9 *(Commissioner Hallinan and Commissioner Miller-O'Brien voted  
10 against this decision.)*

11 In addition, the Commission decided not to study the idea of fee-shifting in a  
12 legal malpractice case that alleges mediation misconduct. *(Commissioner  
13 Capozzola and Commissioner King supported a motion to study this topic; Chairperson  
14 Kihiczak, Vice-Chairperson Miller-O'Brien, Commissioner Hallinan, and Commissioner  
15 McAllister voted against that motion.)*

#### 16 **Possible Questions for the State Bar**

17 The Commission considered Memorandum 2016-37 (possible questions for  
18 the State Bar). Chairperson Kihiczak and the staff encouraged stakeholders and  
19 other interested persons to submit further input on empirical data relevant to this  
20 study, particularly data that is not discussed in Memorandum 2015-5 (empirical  
21 data) or Memorandum 2015-6 (data from Early Mediation Pilot Programs).

22 The Commission asked the staff to further explore the ideas raised at page 6  
23 of Memorandum 2016-37, relating to requiring the State Bar to collect certain  
24 data upon enactment of the mediation confidentiality exception under discussion  
25 in this study. *(Commissioner Miller-O'Brien voted against this decision.)*

#### 26 **Public Comment**

27 The Commission considered Memorandum 2016-39 (public comment), its  
28 First Supplement, and its Second Supplement, which was distributed at the  
29 meeting. The Commission received a document from Fern Topas Salka, which is  
30 attached to the Third Supplement to Memorandum 2016-39. No Commission  
31 action was required or taken.



1       The Commission also considered Memorandum 2016-35, which presents  
2 public comment from the Yurok Tribe. No Commission action was required or  
3 taken in connection with that memorandum.

APPROVED AS SUBMITTED \_\_\_\_\_ Date

APPROVED AS CORRECTED \_\_\_\_\_ Chairperson

(for corrections, see Minutes of next meeting) \_\_\_\_\_ Executive Director