

## Memorandum 2017-52

**Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct (Analysis of Comments on Tentative Recommendation)**

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The many comments on the tentative recommendation in this study are collected in Memorandum 2017-51.<sup>1</sup> Reaction to the proposal was decidedly negative.

This memorandum provides some staff analysis of the comments directed to the proposal as a whole. It also presents some options for the Commission to consider. The Commission needs to decide how to proceed, given the unfavorable response.

If the Commission decides to go forward with the tentative recommendation, the staff will prepare a follow-up memorandum for the December meeting. That memorandum will discuss the comments that focus on specific aspects of the Commission's proposal.

Before turning to the comments, we briefly summarize the tentative recommendation.

## SUMMARY OF THE TENTATIVE RECOMMENDATION

The Commission's tentative recommendation consists of three parts. Part I (pages 3-132) summarizes the Commission's research for this study, including the extensive background work requested by the Legislature.

Part II (pages 133-43) explains that the Commission tentatively recommends the creation of a new exception to California's mediation confidentiality law. The purpose of this exception would be to hold attorneys accountable for misconduct in the mediation process, while also allowing attorneys to effectively rebut meritless misconduct claims.

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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.

Part III (pages 145-48) presents the Commission's proposed legislation. The new exception and accompanying Comment would provide:

**Evid. Code § 1120.5 (added). Alleged misconduct of lawyer when representing client in mediation context**

SEC. \_\_\_\_. Section 1120.5 is added to the Evidence Code, to read:

1120.5. (a) A communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if all of the following requirements are satisfied:

(1) The evidence is relevant to prove or disprove an allegation that a lawyer breached a professional requirement when representing a client in the context of a mediation or a mediation consultation.

(2) The evidence is sought or proffered in connection with, and is used pursuant to this section solely in resolving, one or more of the following:

(A) A disciplinary proceeding against the lawyer under the State Bar Act, Chapter 4 (commencing with Section 6000) of the Business and Professions Code, or a rule or regulation promulgated pursuant to the State Bar Act.

(B) A cause of action for damages against the lawyer based upon alleged malpractice.

(C) A dispute between the lawyer and client concerning fees, costs, or both, including, but not limited to, a proceeding under Article 13 (commencing with Section 6200) of Chapter 4 of the Business and Professions Code.

(3) The evidence does not constitute or disclose a writing of the mediator relating to a mediation conducted by the mediator.

(b) If a mediation communication or writing satisfies the requirements of subdivision (a), only the portion of it necessary for the application of subdivision (a) may be admitted or disclosed. Admission or disclosure of evidence under subdivision (a) does not render the evidence, or any other mediation communication or writing, admissible or discoverable for any other purpose.

(c) In applying this section, a court may, but is not required to, use a sealing order, a protective order, a redaction requirement, an in camera hearing, or a similar judicial technique to prevent public disclosure of mediation evidence, consistent with the requirements of the First Amendment to the United States Constitution, Sections 2 and 3 of Article I of the California Constitution, Section 124 of the Code of Civil Procedure, and other provisions of law.

(d) Upon filing a complaint or a cross-complaint that includes a cause of action for damages against a lawyer based on alleged malpractice in the context of a mediation or a mediation consultation, the plaintiff or cross-complainant shall serve the complaint or cross-complaint by mail, in compliance with Sections

1013 and 1013a of the Code of Civil Procedure, on all of the mediation participants whose identities and addresses are reasonably ascertainable. This requirement is in addition to, not in lieu of, other requirements relating to service of the complaint or cross-complaint.

(e) No mediator shall be competent to provide evidence pursuant to this section, through oral or written testimony, production of documents, or otherwise, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with a mediation that the mediator conducted, 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.

(f) Nothing in this section is intended to alter or affect Section 703.5.

(g) Nothing in this section is intended to affect the extent to which a mediator is, or is not, immune from liability under existing law.

**Comment.** Section 1120.5 is added to promote attorney accountability in the mediation context, while also enabling an attorney to defend against a baseless allegation of mediation misconduct. It creates an exception to the general rule that makes mediation communications and writings confidential and protects them from admissibility and disclosure in a noncriminal proceeding (Section 1119). The exception is narrow and subject to specified limitations to avoid unnecessary impingement on the policy interests served by mediation confidentiality.

Under paragraph (1) of subdivision (a), this exception pertains to an attorney's conduct in a professional capacity. More precisely, the exception applies "when the merits of the claim will necessarily depend on proof that an attorney violated a professional obligation — that is, an obligation the attorney has *by virtue of* being an attorney — in the course of providing professional services." *Lee v. Hanley*, 61 Cal. 4th 1225, 1229, 34 P.3d 334, 191 Cal. Rptr. 3d 536 (2015) (emphasis in original); see also *id.* at 1239. "Misconduct does not 'aris[e] in' the performance of professional services ... merely because it occurs during the period of legal representation or because the representation brought the parties together and thus provided the attorney the opportunity to engage in the misconduct." *Id.* at 1238. The exception applies only with respect to alleged misconduct of an attorney acting as an advocate, not with respect to alleged misconduct of an attorney-mediator.

Paragraph (1) also makes clear that the alleged misconduct must occur in the context of a mediation or a mediation consultation. This would include misconduct that allegedly occurred at *any* stage of the mediation process (encompassing the full span of mediation activities, such as a mediation consultation, a face-to-face mediation

session with the mediator and all parties present, a private caucus with or without the mediator, a mediation brief, a mediation-related phone call, or other mediation-related activity). The determinative factor is whether the misconduct allegedly occurred in a mediation context, not the time and date of the alleged misconduct.

Paragraph (1) further clarifies that the exception applies evenhandedly. It permits use of mediation evidence in specified circumstances to prove *or* disprove allegations against an attorney.

To be admissible or subject to disclosure under this section, however, mediation evidence must be relevant and must satisfy the other stated requirements. To safeguard the interests underlying mediation confidentiality, that is a stricter standard than the one governing a routine discovery request. *Cf.* Code Civ. Proc. § 2017.010 (“Unless otherwise limited by order of the court in accordance with this title, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence *or appears reasonably calculated to lead to the discovery of admissible evidence.*” (emphasis added).)

Paragraph (2) of subdivision (a) specifies the types of claims in which the exception applies:

- A State Bar disciplinary proceeding, which focuses on protecting the public from attorney malfeasance.
- A legal malpractice claim, which further promotes attorney accountability and provides a means of compensating a client for damages from breach of an attorney’s professional duties in the mediation context.
- An attorney-client fee dispute, such as a mandatory fee arbitration under the State Bar Act, which is an effective, low-cost means to resolve fee issues in a confidential setting.

The exception does not apply for purposes of any other kind of claim. Of particular note, the exception does not apply in resolving a claim relating to enforcement of a mediated settlement agreement (e.g., a claim for rescission of a mediated settlement agreement or a claim for enforcement of a mediated settlement agreement). That restriction promotes finality in settling disputes and protects the policy interests underlying mediation confidentiality.

Subdivision (b) is modeled on Section 6(d) of the Uniform Mediation Act. It establishes an important limitation on the admissibility or disclosure of mediation communications pursuant to this section.

Subdivision (c) gives a court discretion to use existing procedural mechanisms to prevent widespread dissemination of mediation evidence that is admitted or disclosed pursuant to this section. For example, a party could seek a sealing order pursuant to the existing rules governing sealing of court records (Cal. R. Ct.

8.45-8.47, 2.550-2.552). Any restriction on public access must comply with constitutional constraints and other applicable law. See, e.g., *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178, 980 P.2d 330, 86 Cal. Rptr. 2d 778 (1999).

Under subdivision (d), when a party files a legal malpractice case in which mediation communications or writings might be disclosed pursuant to this section, that party must promptly provide notice to the mediation participants regarding commencement of the case. Each mediation participant is entitled to such notice, so long as the participant's identity and address is reasonably ascertainable. This affords an opportunity for a mediation participant who would not otherwise be involved in the malpractice case to take steps to prevent improper disclosure of mediation communications or writings of particular consequence to that participant. For instance, a mediation participant could move to intervene and could then seek a protective order or oppose an overbroad discovery request.

Under subdivision (e), a mediator generally cannot testify or produce documents pursuant to this section, whether voluntarily or under compulsion of process, regarding a mediation that the mediator conducted. That general rule is subject to the same exceptions stated in Section 703.5, which does not expressly refer to documentary evidence.

For federal restrictions on obtaining a mediator's electronic records from the mediator's service provider, see 18 U.S.C. § 2702(a); *O'Grady v. Superior Court*, 139 Cal. App. 4th 1423, 44 Cal. Rptr. 3d 72 (2006).

Subdivision (f) makes clear that the enactment of this section in no way changes the effect of Section 703.5.

Subdivision (g) makes clear that the enactment of this section has no impact on the state of the law relating to mediator immunity.

See Sections 250 ("writing"), 1115(a), (c) ("mediation" and "mediation consultation"). For availability of sanctions, see, e.g., Section 1127; Code Civ. Proc. §§ 128.5, 128.7.

## OUTLINE OF DISCUSSION

The discussion below is organized as follows:

- (1) Overview of the reaction to the Commission's proposal as a whole.
- (2) Reasons given by those who oppose or have serious concerns about the proposal.
- (3) Reasons given by those who generally support the proposal.
- (4) Options to consider.
- (5) Decision to make.

## OVERVIEW OF THE REACTION TO THE PROPOSAL AS A WHOLE

The 155 pages of comments include scattered words of praise or appreciation for the Commission, its staff, its process, and its work on this study.<sup>2</sup> In general, however, they do not have much positive to say about the Commission's proposal.

Ten stakeholder organizations submitted comments opposing the tentative recommendation or expressing serious concerns about it.<sup>3</sup> Among those organizations was the Civil and Small Claims Advisory Committee of the Judicial Council of California (hereafter, "Civil and Small Claims Advisory Committee"), the key group responsible for expressing the position of the California court system on matters affecting civil cases.<sup>4</sup> Also included were two other particularly important groups that had not previously spoken up in this study: the Consumer Attorneys of California ("CAOC")<sup>5</sup> and the California Defense Counsel ("CDC"),<sup>6</sup> which took the unusual step of submitting a joint letter on the matter.<sup>7</sup>

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2. See, e.g., Memorandum 2017-51, Exhibit pp. 1, 7, 14, 76, 80, 82, 91, 127, 134, 135, 137, 143, 151, 152.

3. See Memorandum 2017-51, Exhibit pp. 1-22.

4. See *id.* at Exhibit p. 1 ("In the view of the committee, ... the potential risks of making the statutory changes tentatively recommended by the Commission outweigh the potential benefits.").

The Civil and Small Claims Advisory Committee consists of "justices, judges, court administrators, lawyers whose primary area of practice is civil law, and persons knowledgeable about court-connected alternative dispute resolution programs for civil and small claims cases." *Id.* at Exhibit p. 1. The committee is responsible for "identifying issues and concerns affecting court administration in civil and small claims proceedings and making recommendations to the Judicial Council for improving the administration of justice in these proceedings." *Id.* The committee submitted its comments with permission from the Judicial Council, the administrative arm of the California court system. *Id.*

5. CAOC describes itself as "a professional organization that represents the interests of 39 million Californians." See <https://www.caoc.org/ca/index.cfm?pg=history>. The group consists of "more than 3,000 lawyers" that represent plaintiffs in lawsuits "seeking accountability from those who do wrong." See [https://en.wikipedia.org/wiki/Consumer\\_Attorneys\\_of\\_California](https://en.wikipedia.org/wiki/Consumer_Attorneys_of_California); <https://www.caoc.org/ca/index.cfm?pg=history>.

6. CDC is the political arm of the Association of Defense Counsel of Southern California (ASCDC) and the Association of Defense Counsel of Northern California and Nevada ("ADC") See <http://www.califdefense.org/>. ASCDC describes itself as "the nation's preeminent regional defense organization," consisting of more than 2,200 lawyers. See <http://www.ascdc.org/About.asp>. ADC describes itself as "the preeminent organization in northern California and Nevada standing up for attorneys who make their living defending civil lawsuits."; <http://www.adcnc.org>.

7. See Memorandum 2017-51, Exhibit p. 7 (CAOC and CDC "must jointly oppose the tentative recommendation released in June 2017.").

The other organizations in this category were the Academy of Professional Family Mediators (“APFM”),<sup>8</sup> the California Dispute Resolution Council (“CDRC”),<sup>9</sup> the California Judges Association (“CJA”),<sup>10</sup> the Center for Conflict Resolution,<sup>11</sup> the Consortium for Children,<sup>12</sup> the Los Angeles Department of

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8. See Memorandum 2017-51, Exhibit p. 11 (APFM “strongly urges the Law Revision Commission to reject the proposed change regarding confidentiality.” (emphasis in original)).

APFM says it is “the premier national organization of Professional Family Mediators and is the successor to the former Academy of Family Mediators founded in the late 1970’s.” *Id.* at Exhibit p. 10. According to APFM:

These organizations formed to assist clients to work outside of the constraints and procedural limitations of the court-based adversarial system. As an organization, APFM has established standards of practice for family mediators, while also supporting the teaching, training, and skill development of mediators, and to increase public awareness of mediation, specifically those families in transition. Professional Family Mediators focus on client-centered services that allow their clients to achieve mutually beneficial resolution of their issues in a way that minimizes conflict that is so damaging to children.

*Id.*

9. See Memorandum 2017-51, Exhibit p. 16 (CDRC “urges the Commissioners to reflect on the decision making process that has led them to the proposal that has been circulated for public comment, to consider the consequences of creating any exception to mediation confidentiality and to decide not to recommend legislation that would create any new exception to mediation confidentiality.”).

CDRC was organized in 1994 as a non-profit membership corporation, with a mission of “advocat[ing] before the California Legislature, courts, and administrative agencies for fair, accessible, and effective alternative dispute resolution processes.” *Id.* at Exhibit p. 15. “CDRC’s membership consists of individual neutrals, community dispute resolution organizations and providers of ADR services which, taken together, represent more than 15,000 California mediators and arbitrators.” *Id.*

10. See Memorandum 2017-51, Exhibit p. 14 (“[W]e regret to advise you that the California Judges Association will be opposing th[e] proposed legislation if it remains in its present form.”).

CJA describes itself as follows:

The California Judges Association was established in 1929 and is the professional association representing the interests of the judiciary of the State of California. Members include judges of the Superior Courts and Courts of Appeal, Commissioners of State courts and State Bar Court judges. Judges retired from these courts are also members. CJA is governed by a democratically-elected, 25-member Executive Board. Representatives are drawn from 12 regional districts and also from the Court of Appeal, commissioners, commissioners and retired bench officers.

See <http://www.caljudges.org/aboutCJA.asp>.

11. See Memorandum 2017-51, Exhibit pp. 21-22 (expressing serious concern regarding potential impact of Commission’s proposal on malpractice insurance rates for community mediation programs).

The Center for Conflict Resolution “is a 501 (c) 3 non-profit that is based in Los Angeles County, primarily funded by two DRPA grants.” *Id.* at Exhibit p. 21. One grant is “for the community” and the other is for “Day-of-Hearing in the Los Angeles County court.” *Id.*

Last year, the Center for Conflict Resolution “mediated roughly 2,900 cases.” *Id.* Those cases “almost entirely took place during the day-of-hearing with unrepresented litigants.” *Id.* They were “primarily in Small Claims, Civil Harassment, and Unlawful Detainer jurisdictions and performed by volunteer mediators.” *Id.*

12. See Memorandum 2017-51, Exhibit p. 5 (“Consortium for Children would like to express our strong opposition to the proposed Law Revision Commission recommendation to amend the Evidence Code to remove some of the protections for confidentiality as it pertains to mediation.”).

Consumer and Business Affairs (“DCBA”),<sup>13</sup> and the Executive Committee of the Family Law Section of the Los Angeles County Bar Association (hereafter, “LACBA Family Law Section”).<sup>14</sup> Of those organizations, only CDRC and CJA submitted earlier comments.<sup>15</sup>

Many individuals also wrote to oppose or express serious concerns about the tentative recommendation: 42 individuals associated with the Consortium for Children<sup>16</sup> and 20 other people.<sup>17</sup> Seven of these were previous commenters.<sup>18</sup>

In contrast, the only stakeholder organization expressing support for the tentative recommendation was the Conference of California Bar Associations (“CCBA”), which has championed the need for an attorney misconduct exception since well before this study began.<sup>19</sup> Also submitting generally

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The Consortium for Children’s mediation program “works with birth and adoptive families in the public child welfare system.” It does “over 4,500 mediations a year in concert with 48 California Counties.” *Id.* at Exhibit p. 5.

13. See Memorandum 2017-51, Exhibit p. 8 (“DCBA is against the proposed exception for several reasons.”).

Los Angeles County and DCBA operate “a community-based mediation program that provides residents with a dispute resolution alternative to court.” *Id.* at Exhibit p. 8. That program “has been successfully providing favorable outcomes to residents of Los Angeles County since 1976.” *Id.*

14. See Memorandum 2017-51, Exhibit p. 19 (“I am writing on behalf of the LACBA Family Law Executive Committee to voice our unanimous opposition to any exception to the absolute mediation confidentiality presently provided by Evidence Code secs. 1119 et seq.” (emphasis in original)).

LACBA “was founded in 1878 and is one of the largest voluntary bar associations in the country, with over 20,000 members.” *Id.* at Exhibit p. 19. The Family Law Executive Committee “oversees the Family Law Section of LACBA.” *Id.* It “provide[s] educational programs, networking, pro bono services, informational resources and public service ....” *Id.*

15. For previous written comments by CDRC, see Memorandum 2015-45, Exhibit p. 8; Second Supplement to Memorandum 2013-47, Exhibit pp. 3-7. CDRC representatives have also participated in Commission meetings throughout this study.

For previous written comments by CJA, see Memorandum 2016-19, Exhibit pp. 5-6. CJA representatives have also participated in several Commission meetings (Dec. 2016, Feb. 2017, April 2017, and June 2017).

16. See Memorandum 2017-51, Exhibit pp. 23-67.

17. See *id.* at Exhibit pp. 68-121.

18. The previous commenters were Barbara Anscher, Gillian Brady, Robert Flack, Elizabeth Jones, Ron Kelly, Jill Switzer, and Kirk Yake. For information on where to find their previous comments, see *id.* at pp. i-iii.

19. See Memorandum 2017-51, Exhibit p. 122 (CCBA “strongly supports the Tentative Recommendation developed by the Commission regarding Study K-402 (‘Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct’).”).

CCBA is “a statewide organization of attorneys representing more than 30 metropolitan, regional and specialty bar associations ....” *Id.*

For previous written comments by CCBA, see First Supplement to Memorandum 2017-20, Exhibit pp. 1-2; First Supplement to Memorandum 2016-60, Exhibit pp. 1-3; Third Supplement to Memorandum 2015-46, Exhibit pp. 1-3. CCBA’s representative has also participated in a number of Commission meetings (April 2014, June 2014, Oct. 2014, Feb. 2015, April 2015, June 2015, Feb. 2016, and June 2017).

In 2012, CCBA was the sponsor of AB 2025 (Wagner), which led to the Commission’s study.



supportive comments were ten individuals,<sup>20</sup> of which just two were new commenters.<sup>21</sup>

The contrast between support and opposition is even more dramatic upon taking into account the written comments that interested parties submitted earlier in this study. The following additional organizations<sup>22</sup> voiced concerns about weakening of mediation confidentiality:

- Air Conditioning Sheet Metal Association (“ACSMA”).<sup>23</sup>
- Association for Dispute Resolution of Northern California (“ADRNC”).<sup>24</sup>
- Associated General Contractors (“AGC”).<sup>25</sup>
- California Building Industry Association (“CBIA”).<sup>26</sup>
- California Chapters of the National Electrical Contractors Association (“NECA”).<sup>27</sup>
- California Legislative Conference of the Plumbing, Heating, and Piping Industry (“CLC”).<sup>28</sup>
- Collaborative Attorneys and Mediators of Marin (“CAMM”).<sup>29</sup>

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20. See Memorandum 2017-51, Exhibit pp. 124-55.

21. The previous commenters were Jeff Kichaven, Elizabeth Moreno, John E. and Deborah Blair Porter, Prof. Peter Robinson, Jerome Sapiro, Jr., Nancy Neal Yeend, and Prof. Richard Zitrin. For information on where to find their previous comments, see *id.* at pp. iv-v.

22. The Commission also received a letter from the president of Alternative Resolution Centers (“ARC”), who wrote that she is “vigorously opposed to interfering with the shield of confidentiality that has protected the mediation process since its inception.” See Third Supplement to Memorandum 2015-46, Exhibit p. 4. It is not clear whether the president of ARC was expressing her personal views or those of the organization. ARC describes itself as “[o]ne of California’s first and longest standing private conflict resolution providers.” See <http://arc4adr.com/about.html>.

23. See Memorandum 2016-50, Exhibit p. 1 (“If adopted in its present framework, [the Commission’s proposal] would remove our current confidentiality protections if any of the parties drawn into construction defect cases later filed a claim against their lawyer alleging misconduct in the mediation.”); *id.* at Exhibit p. 2 (If the Commission “persists in its current direction when it makes its formal recommendation to the Legislature, our opposition to the legislation will regretfully become a priority.”). The comment cited here was submitted jointly by ACSMA, AGC, CBIA, CEA, CLC, NECA, NCAT, SCCA, UCON, WACA, and Western Line Constructors. Together, those groups “comprise a significant number of all commercial, industrial and infrastructure contractors and subcontractors in California.” *Id.* at 1.

24. See Memorandum 2015-54, Exhibit pp. 1-2 (expressing “opposition to any changes in the confidentiality provisions for mediations as set forth in the California Evidence Code”); see also First Supplement to Memorandum 2013-47, Exhibit pp. 2-3; Memorandum 2015-39, Exhibit pp. 1-2 (opposition to AB 2025).

ADRNC was founded in 1983. Memorandum 2015-54, Exhibit p. 1. It “is a member based organization which promotes alternative dispute resolution in the courts, the community and the broader society.” *Id.* According to ADRNC, “[h]undreds of practitioners have been among our membership over the years.” *Id.*

25. See note 23 *supra*.

26. See note 23 *supra*.

27. See note 23 *supra*.

28. See note 23 *supra*.

- Collaborative Practice California (“CP Cal”).<sup>30</sup>
- Community Boards Program.<sup>31</sup>
- Construction Employers Association (“CEA”).<sup>32</sup>
- Contra Costa County Bar Association (“CCCBA”).<sup>33</sup>
- Family Law Attorney Mediators Engaged in Study (“FLAMES”).<sup>34</sup>
- Judicate West.<sup>35</sup>
- Loyola Law School Center for Conflict Resolution.<sup>36</sup>

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29. See First Supplement to Memorandum 2015-46, Exhibit p. 1 (“We oppose the Commission’s August 7th decision to draft recommended legislation removing our current confidentiality protections when a mediation participant alleges lawyer misconduct.”). CAMM says it is “a group of ten family law attorneys who have years of experience in mediation and collaborative law as well as litigation.” See <http://www.cammofmarin.com/about.html>.

30. See Memorandum 2015-54, Exhibit p. 3 (“I would like to express on behalf of Collaborative Practice California our very strong opposition to the Commission’s August 7 decision to draft legislation that removes current confidentiality protections when a mediation participant alleges lawyer misconduct.”). Collaborative Practice California is “a statewide organization involved in the promotion of Collaborative Practice throughout the state.” *Id.* It “represent[s] hundreds of Collaborative practitioners most of whom are members of the State Bar of California.” *Id.*

31. See Memorandum 2015-46, Exhibit p. 4 (“We at Community Boards ... oppose the Commission’s August 7th decision to draft recommended legislation removing our current confidentiality protections when a mediation participant alleges lawyer misconduct.”); see also Memorandum 2015-46, Exhibit p. 5 (input from SF Resident, Community Boards Staff); First Supplement to Memorandum 2013-47, Exhibit p. 26 (input from Darlene Weide, Executive Director of Community Board).

According to its website:

Founded in 1976, Community Boards is the oldest public conflict resolution center in the United States. Our services include mediation, conflict coaching, and facilitation. Mediations are provided citywide in English, Spanish, Mandarin, and Cantonese — Mondays through Saturdays. We maintain a pool of 350+ volunteer Community Mediators. We provide an array of year-round introductory and advanced conflict resolution trainings. We are a 501(c)(30 tax exempt organization.

See <http://communityboards.org>.

32. See note 23 *supra*.

33. See Second Supplement to Memorandum 2013-47, Exhibit p. 2 (CCCBA “urges the ... Commission to recommend no weakening of mediation confidentiality protections (Evidence Code sections 1115-1128) ...”). For information on CCCBA, see <https://www.cccbba.org/community/about/index.php>.

34. See First Supplement to Memorandum 2015-54, Exhibit p. 1 (“The decision of the California Law Revision Commission (CLRC) to draft legislation to provide an exception to mediation confidentiality in the event of a malpractice claim is taking California law in a seriously regrettable about-face of a policy that has served California and its families in transition well for over thirty years.”); see also Third Supplement to Memorandum 2015-54, Exhibit pp. 19-21 (comments of Fern Topas Salka). FLAMES appears to be a group of at least 17 family law attorney mediators who are interested in the Commission’s study. See *id.* at Exhibit p. 3.

35. See Second Supplement to Memorandum 2016-30, Exhibit p. 1 (“Judicate West wishes to add its strenuous objection to any weakening of mediation confidentiality and privilege as currently provided by California law.”). Judicate West “is a California State-wide private ADR provider with a panel of over 100 highly qualified affiliated neutrals who conduct thousands of mediations each year at our six facilities around the state.” *Id.*

36. See Memorandum 2016-58, Exhibit p. 14 (“Please don’t let any possible mediation confidentiality exception apply to ... DRPA-Funded Community-Based Mediation Programs.”).

- Marin County Bar Association.<sup>37</sup>
- Northern California Allied Trades (“NCAT”).<sup>38</sup>
- Public Employment Relations Board (“PERB”).<sup>39</sup>
- Southern California Contractors Association (“SCCA”).<sup>40</sup>
- Southern California Mediation Association (“SCMA”).<sup>41</sup>
- United Contractors (“UCON”).<sup>42</sup>
- Wall and Ceiling Alliance (“WACA”).<sup>43</sup>
- Western Line Constructors.<sup>44</sup>

Although their comments were not directed to the precise proposal in the tentative recommendation, it seems likely that they would oppose it.

About 375 individuals provided similar input before the Commission issued the tentative recommendation (including the seven people who also sent a comment opposing the tentative recommendation). The staff does not know how many of those individuals belong to one or more of the organizations listed above, nor do we know how much overlap there is between the membership of the different organizations.

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“Los Angeles County alone serves around 20,000 people each year in its DRPA-Funded Community-Based Mediation Programs ....”). For information on the Loyola Center for Conflict Resolution, see <http://www.lls.edu/academics/centers/loyolacenterforconflictresolution/>.

37. See Memorandum 2016-19, Exhibit p. 13 (“The Marin County Bar Association urges the California Law Revision Commission to recommend no weakening of mediation confidentiality protections (Evidence Code § 1115-1128), and to uphold current law without exceptions.”). For information about the Marin County Bar Association, see <https://www.marinbar.org>.

38. See note 23 *supra*.

39. See Third Supplement to Memorandum 2015-46, Exhibit p. 7 (PERB “urges the Commission to preserve the confidentiality afforded to PERB’s mediators, as a weakening of mediator confidentiality will adversely affect their ability to resolve labor disputes.”); see also First Supplement to Memorandum 2015-55, pp. 1-2; First Supplement to Memorandum 2015-39, Exhibit pp. 30-31 (opposition to AB 2025). PERB “is a quasi-judicial agency created by the Legislature to oversee public sector collective bargaining in California.” Third Supplement to Memorandum 2015-46, Exhibit p. 7. For further information on PERB, see *id.*; see also <https://www.perb.ca.gov>.

40. See note 23 *supra*.

41. See Second Supplement to Memorandum 2015-54, Exhibit p. 1 (SCMA “urges the California Law Revision Commission to recommend against any changes to the California Evidence code that would further erode the protections of mediation confidentiality.”); see also First Supplement to Memorandum 2015-55, pp. 1-2; First Supplement to Memorandum 2015-39, Exhibit pp. 30-31 (opposition to AB 2025).

SCMA says that since 1989 it has been “the leading organization in Southern California supporting the practice of mediation ....” Second Supplement to Memorandum 2015-54, Exhibit p. 1.

42. See note 23 *supra*.

43. See note 23 *supra*.

44. See note 23 *supra*.

Aside from CCBA, the only sizable organization<sup>45</sup> to express support for creating an attorney misconduct exception to the mediation confidentiality statute is Citizens Against Legalized Malpractice, the group of individuals who signed an online petition on the subject.<sup>46</sup> As of September 24, 2017, that group had approximately 1,205 members, including some from California and many from other states and countries.<sup>47</sup>

About 40 individuals provided supportive comments directly to the Commission before it issued the tentative recommendation (including the eight people who also sent a comment supporting the tentative recommendation). The staff does not know how many of those individuals are affiliated with CCBA, nor do we know how many of them signed the online petition (we are aware of at least some overlap).

Neither the State Bar of California nor any of its sections or committees expressed a view on the tentative recommendation. That might be due to the ongoing restructuring of that organization.<sup>48</sup>

The preparation of a Commission recommendation is not a popularity contest, but rather a quest to develop an analytically sound proposal that will serve the citizens of California well. Nonetheless, the degree of opposition to the Commission's proposal suggests that **careful reexamination of the competing considerations is in order.**

As an initial step, the staff suggests that the Commissioners **re-read pages 9-23 of the tentative recommendation**, which describe the key policy considerations at stake in this study. With that background in mind, the next two sections of this memorandum explore the reasons given by those who commented on the tentative recommendation. We start with the reasons given by those who oppose or have serious concerns about the proposal; then we discuss the reasons given by those who generally support the proposal.

Before turning to that discussion, however, it is important say one more thing about the input on the tentative recommendation. Many of the comments simply

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45. In listing the organizations that have taken positions during this study, the staff only included what appear to be sizable organizations (at least ten members), not small law firms or mediation practices. This involved some line-drawing and guesswork, in part because it was not always clear whether a comment was submitted on behalf of a group as opposed to an individual. We regret any mistakes we may have made in categorizing the comments.

46. The online petition is available at <[www.change.org](http://www.change.org)>. The text of the petition is also reproduced in Memorandum 2015-46, Exhibit pp. 210-11.

47. See <https://www.change.org/p/the-california-law-revision-commission-change-the-statutes-that-legalize-malpractice>.

48. See SB 36 (Jackson), which is pending before the Governor.

oppose the Commission's proposal, without discussing any alternative to it. There are some, however, that do mention one or more alternatives. In particular,

- Some commenters say that if the Legislature creates an attorney misconduct exception to mediation confidentiality (which they do not necessarily support), then that exception should be limited to private attorney-client discussions, as CCBA proposed in AB 2025, the bill that led to this Commission study.<sup>49</sup> The Consortium for Children<sup>50</sup> and CDRC<sup>51</sup> fall into this category, as do Gillian Brady,<sup>52</sup> Lynne Higgs,<sup>53</sup> Richard Huver,<sup>54</sup> Prof. A. Marco Turk,<sup>55</sup> and Kirk Yake.<sup>56</sup>
- Ron Kelly essentially suggests combining the Commission's proposed new exception (which is subject to many limitations)<sup>57</sup> with CCBA's proposal. More specifically, he urges the Commission to add a new paragraph to proposed Section 1120.5, which would limit the exception to "a communication directly

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49. As introduced in 2012, AB 2025 would have added a paragraph to Evidence Code Section 1120 stating that the chapter on mediation confidentiality does not limit "the admissibility in an action for legal malpractice, an action for breach of fiduciary duty, or both, or in a State Bar disciplinary action, of *communications directly between the client and his or her attorney during mediation* if professional negligence or misconduct forms the basis of the client's allegations against the attorney." (Emphasis added.)

50. The Consortium for Children says:

We strongly urge the Law Revision Commission to take the recommendation of Conference of California Bar Association's original proposal as set forth in Resolution 10-6-2011. Specifically, to enact legislation that would make admissible mediation "communications directly between the client and his or her attorney only," not all mediation communications among all other parties and the mediator.

Memorandum 2017-51, Exhibit pp. 5-6; see also *id.* at Exhibit pp. 23-67 (comments from individuals associated with the Consortium for Children). The Consortium for Children "fully support[s] the notion that clients should be able to pursue redress in the case of potential attorney malpractice (even pertaining to the mediation process)," but "disagree[s] with the methodology" of the tentative recommendation. *Id.* at Exhibit p. 5.

51. CDRC says:

If the Commission decides to recommend legislation to allay public concern about mediation confidentiality immunizing lawyers from claims of malpractice in connection with mediation, then the CDRC urges the creation of the narrowest available exception be recommended. This would be in the form of legislation like AB2025 introduced in 2012 that would have limited the exception from confidentiality by making only mediation communications between a lawyer and client admissible in a legal malpractice case involving the lawyer or a State Bar disciplinary proceeding based on professional negligence and would only involve the malpractice plaintiff, not other parties to the mediation.

*Id.* at Exhibit p. 17.

52. *Id.* at Exhibit p. 73.

53. *Id.* at Exhibit pp. 89, 90.

54. *Id.* at Exhibit pp. 91-92.

55. *Id.* at Exhibit p. 118.

56. *Id.* at Exhibit p. 121.

57. See pages 133-40 of the tentative recommendation.

between a client and his or her attorney only.”<sup>58</sup> Family mediator Michael Jonsson agrees with Mr. Kelly’s suggestion.<sup>59</sup>

- Plaintiffs’ legal malpractice attorney Raymond Ryan criticizes the tentative recommendation and urges the Commission to instead focus on revising the statute of limitations for legal malpractice,<sup>60</sup> which he says “is in desperate need of attention.”<sup>61</sup>
- The LACBA Family Law Section recommends “that actual figures and statistics be collected and published by the CLRC, to determine whether there is, in fact, a problem with attorney malpractice in the mediation context, that would justify such a complete change to mediation confidentiality.”<sup>62</sup>
- Several commenters suggest an informed consent (mandatory pre-mediation disclosure) approach of one kind or another. These include Robert Flack,<sup>63</sup> Howard Franco,<sup>64</sup> and Elizabeth Strickland,<sup>65</sup> who oppose the tentative recommendation. Also expressing such views are CCBA<sup>66</sup> and Nancy Yeend,<sup>67</sup> who support the tentative recommendation.

#### REASONS FOR OPPOSITION OR SERIOUS CONCERNS

Commenters gave many different reasons for opposing the Commission’s proposal or expressing serious concerns about it. The Commission has heard a lot of these points before, but it should take a fresh look at them now.

Repeating all of the input would make this memorandum overly long and burdensome. Instead, we just (1) list the key concerns, (2) provide one or more samples of the comments regarding each concern, and (3) give citations to any additional comments expressing the same type of concern, in case readers want further information.

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58. See Memorandum 2017-51, Exhibit p. 98.

59. See *id.* at Exhibit p. 93.

60. Code Civ. Proc. § 340.6.

61. Memorandum 2017-51, Exhibit p. 107-08.

62. *Id.* at Exhibit p. 20.

63. See *id.* at Exhibit pp. 77, 78, 81, 83-85 (proposed “Standard Pre-Mediation Agreement Outline of Issues”).

64. See *id.* at Exhibit pp. 87-88 (proposed disclosure emphasizing voluntary nature of mediation).

65. See *id.* at Exhibit p. 112 (“Make counsel responsible for warning their clients. Make counsel pay the price if they don’t. Leave mediation settlements and other parties out of the problem.”).

66. See *id.* at Exhibit p. 123 (“If this right to recourse is to be taken away in the name of confidentiality, it only should be done so with the consumer’s knowledge and informed consent.”).

67. See *id.* at Exhibit p. 154 (“Informed consent must not be discarded, and the present practice of protecting both mediator and attorney malpractice committed during mediation must not continue.”).

## **Mediation is an Important Means of Resolving Disputes, Confidentiality is Critical to Effective Mediation, and the Proposed Exception Will Undermine Confidentiality**

Throughout this study, the Commission has heard over and over again that confidentiality is crucial in promoting candid mediation discussions and such discussions are the key to effective mediation. Many of the comments on the tentative recommendation make that point in one way or another, stressing that the Commission's proposed new exception would undermine confidentiality and thus impede the mediation process and attainment of its benefits.

For example, the Civil and Small Claims Advisory Committee writes:

In the experience of committee members, California's current statutory scheme relating to mediation confidentiality, which the Commission helped craft 20 years ago, provides the benefits articulated on pages 9-16 of the Commission's tentative recommendation: it promotes candid discussion in mediation which, in turn, promotes the resolution of disputes in mediation, and resolution of disputes in this way is beneficial to disputants, the court system, and society. Focusing in narrowly on the benefits to the court system, the committee believes that resolution of civil cases, or disputes that would otherwise become civil cases, through mediation, whether in court-connected mediation programs, community mediation programs, or private mediation, reduces the civil cases pending in the courts and frees up court resources to focus on those cases that are in most need of court attention.

The Committee is concerned that the statutory changes tentatively recommended by the Commission could discourage both participation and candid discussion in mediation, which could, in turn, reduce the number of disputes resolved through mediation. These statutory changes would permit mediation communications to be disclosed in the three additional types of subsequent proceedings identified in the recommendation. Although mediators would still generally be incompetent to testify in most proceedings, other mediation participants would not be protected from being called to testify in the proceedings identified in the recommendation. Thus disputants contemplating participating in mediation will have less assurance in advance that their communications will be confidential and more risk that they will be called to testify in a subsequent proceeding as a result of participating in mediation. They will also not necessarily be in control of what happens; another disputant or mediation participant could trigger the disclosure or requirement to testify by the filing of a malpractice action or State Bar complaint against his or her attorney. The committee is concerned that this uncertainty and risk could make some disputants opt not to participate in mediation. The committee is also concerned that this uncertainty

and risk could make some disputants who do participate in mediation less willing to be open and candid during the process.<sup>68</sup>

Similarly, APFM says that confidentiality is “the single most important concern of clients electing to participate in a mediated process to resolve their issues,”<sup>69</sup> and CAOC and CDC jointly say:

Confidentiality promotes candor, which in turn leads to successful mediation. This is the fundamental reason for strong mediation confidentiality. Successful mediation encourages the widespread use of mediation, and the use of mediation is critical to successful out of court resolution of disputes. Therefore, we urge the Commission to reconsider its tentative recommendation.<sup>70</sup>

Many other comments echo these sentiments.<sup>71</sup>

### **The Proposed Approach Could Harm Mediation Participants Who Are Not Parties to an Attorney-Client Dispute**

Some commenters stress that the proposed new exception could be harmful to mediation participants other than the parties to an attorney-client dispute over alleged mediation misconduct. For example, attorney and mediator Richard Huver warns:

Although extensive efforts were made to maintain a narrow scope of discoverable and admissible evidence, I am gravely concerned by the phrase “relevant to prove or disprove ...” alleged attorney malpractice (or fee billing disputes). Despite the rather narrow scope of the proposed exception, this phrase gives trial courts wide discretion to decide what is and what is not “relevant” to prove or disprove the pertinent issue. *By requiring courts to make separate, subjective determinations of relevance, evidence and people outside the scope of the attorney client relationship — including adverse parties, their attorneys or others — could be unwittingly dragged into a legal malpractice lawsuit between the client and attorney.*<sup>72</sup>

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68. *Id.* at Exhibit p. 2.

69. *Id.* at Exhibit p. 11.

70. *Id.* at Exhibit p. 7.

71. See *id.* at Exhibit pp. 5 (comments of Consortium for Children), 12-13, 14 (comments of CJA), 15, 16, 18 (comments of CDRC), 19 (comments of LACBA Family Law Section), 23-67 (comments of individuals associated with Consortium for Children), 68, 69, 70 (comments of Lisa Bass), 71 (comments of Cari S. Baum), 72 (comments of Jeanne Behling), 73 (comments of Gillian Brady), 74 (comments of Daniel J. Cooper), 75 (comments of Gwen Earle), 76, 77, 78, 79, 80 (comments of Robert Flack), 86, 87 (comments of Robert Franco, Jr.), 89, 90 (comments of Lynne Higgs), 93, 94, 95, 96 (comments of Michael Jonsson), 97 (comments of Elizabeth Jones), 98, 99, 100 (comments of Ron Kelly), 102 (comments of Neil J. Moran), 111 (comments of Elizabeth Strickland), 114 (comments of Jill Switzer), 118 (comments of Prof. A. Marco Turk), 120-21 (comments of Kirk Yake).

72. *Id.* at Exhibit p. 91 (emphasis added).



Along the same lines, Elizabeth Strickland (attorney-mediator for Santa Clara County Superior Court) says:

If any party seeks disclosure of confidential mediation communications, it requires uninvolved parties to become involved parties, potentially at significant expense to themselves, to defend against unwarranted disclosures. And that will in turn prolong the litigation process for more people, bringing opposing parties and counsel into the fray.<sup>73</sup>

Other commenters share these concerns.<sup>74</sup>

### **The Proposed Approach Will Overburden the Courts**

Many of the commenters express concern about the potential impact of the Commission's proposal on the court system. For example, CDRC states:

If the Commission creates any exception to mediation confidentiality, the Commissioners also need to recognize that such action will increase the burden on the already stressed court system in three ways.

For one, there is likely to be an increase in claims of lawyer malpractice, even if there is no increase in meritorious cases. Parties tend to have unrealistic expectations about the outcome of litigation, and a party who is persuaded to settle on realistic terms in mediation, but who, as is often the case, is unable to accept responsibility for their agreement, would now be free to try imposing responsibility on its lawyer.

Secondly, the cases that would be deterred from going to mediation and the cases that would not settle in mediation because of exceptions to mediation confidentiality would remain in the courts.

And finally, the courts would be confronted with disputes over whether proposed evidence was or was not admissible pursuant to an exception to mediation confidentiality.<sup>75</sup>

Along the same lines, CJA warns that the exception will add many cases to already over-loaded civil calendars:

The potential impact of having the hundreds, if not thousands of cases, now being settled in mediation each year coming back to the civil trial calendars of the courts of our state is staggering. Those courts don't have the economic funding to handle the work load they have now and can see little likelihood of any significant changes in the foreseeable future.

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73. *Id.* at Exhibit p. 110.

74. See, e.g., *id.* at Exhibit pp. 2 (comments of Civil and Small Claims Advisory Committee), 102 (comments of Neil J. Moran), 120 (comments of Kirk Yake).

75. *Id.* at Exhibit p. 16.

The Civil and Small Claims Advisory Committee further cautions that applying the proposed exception in attorney-client disputes would be burdensome:

[T]he recommendation would ... place a burden on courts both in potential additional litigation but more importantly in implementation of the recommended provisions, which could require in camera reviews, protective orders, discovery motions, evidence code 402-3 hearings, sealing orders, and other proceedings. This is a complex measure which is likely to require substantial judicial supervision. The very nuanced approach taken, understandably to ameliorate potential problems, means more judicial involvement.<sup>76</sup>

The Consortium for Children,<sup>77</sup> DCBA,<sup>78</sup> the LACBA Family Law Section,<sup>79</sup> and many others also express concern about overloading the courts.<sup>80</sup>

### **The Benefits of the Proposed Exception are Minimal as Compared to the Downsides**

Another recurring theme in the comments is that mediation misconduct is rare, so the potential benefits of the proposed exception are far outweighed by the potential detriments. For example, CAOC and CDC say that “after reviewing the Commission’s lengthy tentative recommendation, we do not believe the report provides empirical evidence of widespread abuse which compels statutory change.”<sup>81</sup> Similarly, the Civil and Small Claims Advisory Committee writes:

The Committee’s view is that there has not been a sufficient showing that attorney misconduct in mediation is frequent enough to justify taking the risks presented by the Commission’s tentative recommendation. The Commission made a great effort to identify any empirical information about the scope of attorney misconduct in mediation, but found little such information. Based on what was available, the Commission acknowledges that mediation misconduct appears to be relatively infrequent. This is consistent with information reported by several administrators of court-connected mediation programs. Participants in these programs often raise any concerns that they might have with the mediation program or process with the program administrator. These

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76. *Id.* at Exhibit p. 3.

77. *Id.* at Exhibit p. 5.

78. *Id.* at Exhibit p. 8.

79. *Id.* at Exhibit p. 19.

80. See *id.* at Exhibit pp. 72 (comments of Jeanne Behling), 78 (comments of Robert Flack), 86-87 (comments of Howard J. Franco, Jr.), 98 (comments of Ron Kelly), 102 (comments of Neil J. Moran), 120 (comments of Kirk Yake).

81. See *id.* at Exhibit p. 7.

administrators, many with decades of experience, reported, however, they had received few if any complaints about attorney misconduct in mediations conducted within their programs during their careers.

The Committee acknowledges that the risks it has identified above as potentially flowing from the Commission's tentative recommendation are theoretical. As discussed in the Commission's tentative recommendation, there is essentially no way to empirically test the impact of creating an exception to mediation confidentiality on the use and efficacy of mediation and we are not aware of any other jurisdiction in which mediation confidentiality was reduced in this way to which we could look to for its experience. However, *it seems clear that the universe of situations in which the changes tentatively recommended by the Commission would be helpful — mediations in which attorneys are committing misconduct that currently cannot be addressed because of mediation confidentiality laws — is much smaller than the universe of situations in which the implementation of these changes presents a risk of harm — all other mediations in which attorneys are representing a participant. Given this, the Committee believes that the potential risks of making the statutory changes tentatively recommended by the Commission are likely to outweigh the potential benefits.*<sup>82</sup>

The Consortium for Children,<sup>83</sup> APFM,<sup>84</sup> CJA,<sup>85</sup> and CDRC<sup>86</sup> make similar statements, as do a number of the individuals who commented on the tentative recommendation.<sup>87</sup>

### **The Proposed Exception Provides Insufficient Protection for Mediator Communications and Will Cause Mediators to Quit and Mediator Malpractice Insurance Rates to Rise**

A number of commenters warn that the Commission's proposal will discourage mediators from serving in future cases. For example, DCBA says:

[T]he proposed recommendation would have a detrimental effect on the ability of community-based mediation programs to recruit, and keep vital volunteers. Community-based mediation programs often run on "shoe-string" budgets with the help of numerous volunteer mediators. These volunteers consist of attorneys, judges, and other Samaritans that wish to serve the community. If

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82. *Id.* at Exhibit pp. 3-4 (emphasis added).

83. See *id.* at Exhibit p. 5.

84. See *id.* at Exhibit p. 11.

85. See *id.* at Exhibit p. 12.

86. See *id.* at Exhibit p. 16.

87. See *id.* at Exhibit pp. 77 (comments of Robert Flack), 87 (comments of Howard J. Franco, Jr.), 94 (comments of Michael Jonsson), 98 (comments of Ron Kelly), 101 (comments of Neil J. Moran), 111-12 (comments of Elizabeth Strickland), 120 (comments of Kirk Yake).

subjected to subpoenas and possible court proceedings, citizens who would otherwise volunteer may not do so.<sup>88</sup>

The Civil and Small Claims Advisory Committee explains the basis for this type of concern in greater detail:

The Committee is also concerned that the tentatively recommended statutory changes could discourage individuals from serving as mediators, particularly in court-connected mediation programs. The Committee appreciates the Commission's effort to protect mediators from being called to testify by included language in proposed Evidence Code Section 1120.5(e) making clear that a mediator is incompetent either to testify or to produce documents. The Committee is concerned, however, that despite this effort, the creation of the new exception to mediation confidentiality may result in more mediators being subpoenaed. Currently, the confidentiality of mediation communications serves as a secondary defense against any effort to elicit mediator testimony about what happened at mediation; not only is the mediator incompetent to testify under Evidence Code section 703.5, but sections 1115-1128 prevent a mediator from revealing or reporting on what happened. The Commission's tentative recommendation would remove this secondary defense in the three types of proceedings subject to the confidentiality exception. The Committee is concerned that this would embolden more attempts to subpoena mediators. If this occurs, it will place additional burdens on mediators who must seek to quash these subpoenas. Since many mediators in court-connected mediation programs serve on either a pro bono or reduced-fee basis, the risk of such an additional burden could discourage some individuals from providing their services as mediators in these programs. Several administrators of court-connected mediation programs reported that some mediators on their panels indicated that they would resign from the panel if the changes tentatively recommended by the Commission were enacted. This could harm the ability of these programs to serve litigants and the courts.<sup>89</sup>

The comments of Lynne Higgs<sup>90</sup> and Elizabeth Strickland<sup>91</sup> contain similar but briefer warnings about a reduction in mediator availability.

CJA does not go so far as to say that mediators will leave the field if the proposed exception is enacted, but does say that the Commission's proposal fails to adequately protect mediator communications.<sup>92</sup> In its view,

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88. *Id.* at Exhibit pp. 8-9.

89. *Id.* at Exhibit pp. 2-3.

90. See *id.* at Exhibit pp. 89, 90.

91. See *id.* at Exhibit p. 111.

92. *Id.* at Exhibit p. 13.

Statutory protections of confidentiality, to be effective, must be articulated unambiguously so that the legislative intent as to the scope of those protections is not subject to reasonable debate. The current *Tentative Recommendation* fails to meet any such standard of specificity.<sup>93</sup>

The Center for Conflict Resolution voices a different concern relating to mediators. It says that if the Commission's proposal is enacted, "insurance premiums will potentially go up for all mediators in California," because each mediation where a party is represented by counsel would carry the potential that the participants would be brought into "a legal or adjudicative setting where potential documents or testimony would have to be given."<sup>94</sup>

The Center for Conflict Resolution primarily handles cases in which the disputants are unrepresented, but it nonetheless fears that its malpractice premiums "will increase exponentially."<sup>95</sup> It says the underwriter "might still require we pay a larger premium comparable to all mediators if we are not able to point to a carve out or an exception."<sup>96</sup> Consequently, although it does not expressly oppose the tentative recommendation, the Center for Conflict Resolution wants the Commission to understand that

for many Community Mediation organizations throughout the State, each organization will have to deeply consider whether or not they can service any case where representation of litigants is present. As administrators of community programs our budgets and time are already stretched so thin that the scope of service might have to be limited in order to respond to the outlying exposures.<sup>97</sup>

### **The Proposed Exception Will Threaten the Stability of Mediated Settlements**

A further concern is that the Commission's proposal would make a mediated settlement agreement less stable, even though the Commission "does not intend" that the proposed exception "be used to re-open settlement."<sup>98</sup> The Civil and Small Claims Advisory Committee acknowledges that intent,<sup>99</sup> but warns that the exception might "increase the number of malpractice claims brought, *as*

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93. *Id.* at Exhibit pp. 13-14 (boldface in original). Like CJA, Jeanne Behling says that the proposed changes to mediation confidentiality "are vague." *Id.* at Exhibit p. 72. She does not elaborate.

94. *Id.* at Exhibit p. 21.

95. *Id.*

96. *Id.* at Exhibit p. 22.

97. *Id.*

98. *Id.* at Exhibit p. 3 (comments of Civil and Small Claims Advisory Committee).

99. *Id.*

*possible means of providing leverage to change settlement agreements reached in mediation.*"<sup>100</sup>

Similarly, DCBA says that the proposed exception "creates opportunities for "buyer's remorse," and will be *used as a loop-hole for parties to recant their agreement to stipulate.*"<sup>101</sup> Likewise, Robert Flack anticipates that the proposed exception will lead to "'Settlor's Remorse' impacting the stability of legitimate settlements,"<sup>102</sup> and Elizabeth Strickland says:

Of course attempts will be made to use this code section to undo settlements, the text of the proposal notwithstanding.

....

Even in the past, with confidentiality being well protected, there have been egregious attempts to undermine mediation settlements. This proposed exception will encourage people to prolong the fight, rather than protect settlements reached in good faith. It is shortsighted to think otherwise.<sup>103</sup>

### **It Will Be Necessary to Warn Mediation Participants About the Proposed Exception and That Will Create Problems**

Ron Kelly states that if the proposed exception is enacted, mediation participants "will need to be warned that 'everything you say or write now may be used in court later.'"<sup>104</sup> That is to some extent an exaggeration, because it tends to imply that there are no safeguards and it is a foregone conclusion that any mediation statement could be used in court if proffered.

Other commenters raise the same concept, however, without framing it precisely the same way as Mr. Kelly. For example, Jill Switzer asks:

Whose obligation will it be to advise mediation participants that confidentiality is not guaranteed? Will it be the mediator who must advise the participants that mediation confidentiality will not exist among the participants should one party or another sue their lawyer for malpractice? Will that be the responsibility of parties' counsel? At what point should that advisement be given? In advance of the mediation date?<sup>105</sup>

CJA makes clear that it considers a disclosure about the new exception necessary but highly problematic:

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100. *Id.* (emphasis added).

101. *Id.* at Exhibit p. 8 (emphasis added).

102. *Id.* at Exhibit p. 78.

103. *Id.* at Exhibit p. 112.

104. *Id.* at Exhibit p. 98.

105. *Id.* at Exhibit p. 113.

California Rules of Court, Rule 3.854(b) currently requires mediators to, "... *At or before the outset of the first mediation session, a mediator **must** provide the participants with a general explanation of the confidentiality of mediation proceedings.*" (Emphasis ours.) It seems obvious that mediators will now, if your proposal is adopted, have to provide an additional explanation to parties at the outset of the mediation that whatever they or their lawyers say in the process of the mediation is **no longer confidential and can be used in a legal malpractice case against their lawyer!**

Rhetorically we ask, "*What lawyer in his right (self-defensive mind) will want to bring clients to a civil mediation when the first thing their client is told is a reminder of their right to sue that very lawyer, that confidentiality of that communication does not apply, and they are being told that by a significant authority figure, whether a retired judge or other mediator?* And imagine the questions such a mediator is likely going to have to try and answer when the client asks questions about that admonition.<sup>106</sup>

The Consortium for Children, which works with birth and adoptive families in the welfare system, raises a different set of concerns regarding the need to inform mediation participants about the new exception:

At the outset, in light of full disclosure, mediators will have to inform parties to mediation that if anyone should decide to allege misconduct of their attorney, that any and all other parties could become part of a court process that may involve depositions, testimony in court, and the disclosure of their private mediation communications.

....

For the safety of the traumatized children involved in child welfare, confidentiality is legally and morally mandatory for the parties to our mediations. If a birth parent feels that their court appointed attorney has misled them in this process and decides to sue, the identities of all the parties will become known, placing children in potential danger as well as further victimizing the families (both birth and adoptive) involved.

If we have to tell parties that their ability to have a frank, open and confidential mediation discussion about the future of their children was out of their control in the event that one of the other parties alleged attorney malpractice, our clients' confidence, trust, and willingness to share important information with us and each other for the benefit of their children would be damaged. Ultimately, this hurts families, and protects very few attorney clients from a harm that is extremely rare, if existent at all.<sup>107</sup>

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106. *Id.* at Exhibit p. 14 (boldface, underscore, and italics in original).

107. *Id.* at Exhibit p. 5.

### **The Proposed Exception Will Hurt Vulnerable Groups**

Like the Consortium for Children, APFM and the LACBA Family Law Section express particular concern regarding the impact of the proposed exception in the family law context. APFM stresses the importance of mediation in helping divorcing couples communicate effectively with one another, and the need for confidentiality as “the *single most desired characteristic* of the [mediation] process for clients who seek the benefits it brings to their children and to their own custom-designed outcome.”<sup>108</sup>

The LACBA Family Law Section makes a different point. It warns that “[c]reating an exception to mediation confidentiality for alleged attorney malpractice will ... end family law mediation as we know it.”<sup>109</sup> It explains that family law clients are often unhappy and likely to suffer buyer’s remorse, so their attorneys “will be loath to make recommendations of compromise at their peril.”<sup>110</sup>

There are also concerns that the proposed exception will cause special harms to community-based mediation programs and the groups they serve. We have already described the Center for Conflict Resolution’s concern relating to malpractice insurance.<sup>111</sup> DCBA raises another issue. It says that the exception “will be particularly detrimental to community mediation programs because one of the benefits of community mediation is the avoidance of the court system,” yet the exception “would subject parties to court proceedings despite resolving their dispute through mediation.”<sup>112</sup>

### **The Proposed Exception Will Have a Disproportionate Impact on Attorneys**

There are also a few comments suggesting that the proposed exception would disproportionately affect attorneys. In particular, CDC says it is unclear “whether the proffered language of Evidence Code 1120.5 is drafted in an even handed manner to permit contrary evidence that would allow attorneys to appropriately defend themselves.”<sup>113</sup> CDC does not explain that point. Perhaps the concern is that as compared to a client, an attorney is more likely to be

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108. *Id.* at Exhibit pp. 10-11 (emphasis in original).

109. *Id.* at Exhibit p. 19.

110. *Id.*

111. See discussion of “The Proposed Exception Provides Insufficient Protection for Mediator Communications and Will Cause Mediators to Quit and Mediator Malpractice Insurance Rates to Rise” *supra*.

112. Memorandum 2017-51, Exhibit p. 8.

113. *Id.* at Exhibit p. 7.



adversely affected by Section 1120.5's proposed limitations on obtaining evidence from a mediator.

Although CDC is concerned about a potential negative impact on attorneys, Ron Kelly suggests that the exception "will probably be used more often by defense attorneys to defend their lawyer clients from claims than by the client/consumers the proponents [of the exception] claim to be championing."<sup>114</sup> He explains that if a lawyer is accused of overbilling for mediation services, defense counsel "will likely want to get details of the various positions taken, information shared, settlement proposals made and rejected, etc. to put together a defense based on the time the attorney needed to research and/or respond to all of these."<sup>115</sup>

Like Ron Kelly, Raymond Ryan warns that "the proposed law will protect lawyers far more often than clients."<sup>116</sup> His concern is tied to the use of a specific phrase ("professional requirement") in Section 1120.5(a)(1), so we will discuss it in a future memorandum on fine-tuning the Commission's proposal, if the Commission decides to go forward with its current approach.

### **The Proposed Exception is a Trap for the Unwary**

Robert Flack advances yet another reason for opposing the Commission's proposal. He views it as a trap for the unwary.

While Mr. Flack raises numerous arguments in support of that characterization, we quote just a couple of examples here:

- B. The current proposal requires the disclosure of confidential information on the mere accusation of malfeasance. Accusations have a low threshold. They need not be based in fact. The purported solution to maintain confidentiality is to get a "protective order." Of course, to get the protection of such an order, wouldn't you have to disclose something that should be confidential? GOTCHA! And, what does that cost? GOTCHA! And, who pays? GOTCHA!
- C. Those not involved in the accusation are also subject to a GOTCHA! Confidential information owned by other than a Party to this new dispute risk having their private information exposed. GOTCHA! Of course, they can also request a protective order after they disclose what they want to protect. GOTCHA! And, what does that cost? And, who pays? GOTCHA! GOTCHA! And, they

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114. *Id.* at Exhibit p. 100 (underscore in original); see also *id.* at Exhibit p. 95 (comments of Michael Jonsson).

115. *Id.* at Exhibit p. 100; see also *id.* at Exhibit p. 95 (comments of Michael Jonsson).

116. *Id.* at Exhibit p. 105.

get a chance to protect themselves after they receive notice; by the way, there is no real requirement to give notice. GOTCHA!<sup>117</sup>

Commissioners and other interested persons can find further details in Mr. Flack's letter.<sup>118</sup>

### **The Proposed Exception Will Yield Unpredictable Results and Unpredictable Protection for Mediation Communications**

Elizabeth Strickland voices a further concern: She warns that the proposed new exception "will not be applied uniformly, which will lead to mistrust of mediation."<sup>119</sup> She explains:

The proposed amendment appears to be based on a belief that every judge in the state is equally supportive of mediation. But this is not the case. Our bench officers in this state have a spectrum of experience regarding the mediation process, as well as a breadth of judicial opinion on the utility of mediation in a litigated case.

There is also no universal agreement on whether mediation confidentiality should be protected, as witnessed by the differences in rulings in past attempts by counsel to break confidentiality in order to access otherwise unobtainable information....

As a result of the variance in judicial viewpoints, the proposed amendment has the potential to create a variety of rulings when the approximately 2000 judges across California ... are faced with the questions of relevance and necessity. This will lead to confusion and distrust regarding the reliability of mediation confidentiality.<sup>120</sup>

Ron Kelly similarly warns of unpredictable protection and a resulting chilling effect on mediation candor.<sup>121</sup> He reminds the Commission<sup>122</sup> that the United States Supreme Court has said that "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."<sup>123</sup>

### **The Proposed Exception Would Be the First Step on a Slippery Slope**

Lastly, Ron Kelly cautions that the Commission's proposed exception for attorney misconduct "is just one of many that will be coming if the current

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117. *Id.* at Exhibit pp. 77-78.

118. See *id.*

119. See *id.* at Exhibit p. 110.

120. *Id.*

121. See *id.* at Exhibit p. 100; see also *id.* at Exhibit pp. 95-96 (comments of Michael Jonsson).

122. See *id.* at Exhibit p. 100; see also *id.* at Exhibit pp. 95-96 (comments of Michael Jonsson).

123. *Jaffee v. Redmond*, 518 U.S. 1, 18 (1996), *quoting* *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

Tentative Recommendation is enacted.”<sup>124</sup> He views the situation as a slippery slope, and warns that that there will “be a dozen more exceptions proposed.”<sup>125</sup>

The comments of Prof. Peter Robinson (Strauss Institute for Dispute Resolution, Pepperdine School of Law) and Nancy Yeend tend to reinforce that perspective. Both of them support the tentative recommendation and advocate creation of an additional exception addressing mediator misconduct.<sup>126</sup>

#### REASONS FOR SUPPORT

As discussed above, there are far fewer comments in support of the tentative recommendation than there are in opposition to it. Some of those comments are short, apparently because the sender chose to rely on the content of the tentative recommendation, prior submissions, and the extensive record in this study rather than offering any additional explanation of the sender’s views.

For example, Prof. Richard Zitrin (UC Hastings College of the Law) says simply: “Based on my early involvement through articles and letters, I add my strong individual support.”<sup>127</sup> Similarly, attorney David J. Habib, Jr., states only that he “support[s] adoption of the proposed new Evidence Code section, excepting attorney-client communications in mediation from the confidentiality rule under limited, very specific, circumstances dealing with attorney misconduct.”<sup>128</sup>

Attorney Jerome Sapiro, Jr., wrote a longer comment, which focuses on requesting a specific revision of the Commission’s proposal. We will discuss that issue in a future memorandum, if the Commission decides to proceed with its proposal.<sup>129</sup> Regarding the tentative recommendation as a whole, Mr. Sapiro says simply that the Commission and its staff “have accomplished a thorough and thoughtful recommendation.”<sup>130</sup>

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124. See Memorandum 2017-51 at Exhibit p. 100; see also *id.* at Exhibit p. 96 (comments of Michael Jonsson).

125. See *id.* at Exhibit p. 100; see also *id.* at Exhibit p. 96 (comments of Michael Jonsson).

126. See *id.* at Exhibit pp. 151 (comments of Peter Robinson), 154 (comments of Nancy Yeend).

127. *Id.* at Exhibit p. 155.

128. *Id.* at Exhibit p. 126.

129. Mr. Sapiro urges the Commission to revise its exception to permit mediator testimony in some circumstances. See *id.* at Exhibit pp. 152-53. Jeff Kichaven makes a similar request. See *id.* at Exhibit pp. 131-32. We will discuss that request in a follow-up memorandum as well, if the Commission goes forward with its current proposal.

130. *Id.* at Exhibit p. 152.

We describe the reasoning of the remaining supportive comments below. As before, we proceed reason-by-reason, rather than describing each comment separately.

### **The Proposed Exception Is Needed to Protect Clients From Unscrupulous and Incompetent Attorneys**

Most of those supporting the tentative recommendation stress the importance of protecting clients from attorney misconduct in the mediation process. They point out that current law makes it difficult, or even impossible, to hold an attorney accountable for such misconduct, because the mediation confidentiality statute precludes proof of what was said during the mediation.

For example, Nancy Yeend states that “the present practice of protecting both mediator and attorney malpractice committed during mediation must not continue.”<sup>131</sup> Similarly, Elizabeth Moreno says:

I support the Commission’s effort in creating an exception to confidentiality in mediation. The tentative recommendation upholds the intent of my original CCBA resolution to protect mediation clients from incompetent attorneys, while maintaining confidentiality to the maximum extent possible. The Commission’s research has been exhaustive and it has reached a well drafted tentative recommendation. Some mediators and attorneys feel The Commission has gone too far in creating an exception but they lose sight of the consumer, the public. Thank you for doing a job well done.<sup>132</sup>

Along the same lines, CCBA comments that the tentative recommendation is “absolutely consistent” with CCBA’s objective to protect clients “from unethical and incompetent attorneys.”<sup>133</sup> CCBA notes that existing law “robs unsuspecting consumers of their right to recourse against dishonest or incompetent attorneys when mediation is involved.”<sup>134</sup> It says that the right to recourse should not be taken away absent informed consent, and lack of recourse “should never be the default under statute, as it is under current law.”<sup>135</sup> In its view, the tentative recommendation “provides necessary protection to victims of attorney malpractice or malfeasance during a mediation, while still protecting the

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131. *Id.* at Exhibit p. 154.

132. *Id.* at Exhibit p. 134.

133. *Id.* at Exhibit p. 122.

134. *Id.* at Exhibit p. 123.

135. *Id.*

mediation process and the confidentiality of other participants from exposure except when absolutely necessary to promote justice.”<sup>136</sup>

Mediator and legal malpractice specialist John P. Blumberg expresses similar sentiments. He writes that since the California Supreme Court’s decision in *Cassel v. Superior Court*,<sup>137</sup>

I have represented both attorneys being sued and clients who wanted to sue their lawyers. For the attorneys, the Cassel rule proved to be an absolute immunity, regardless of whether their mediation advice was fraudulent or negligent. For the clients, I have had to advise them that they had no recourse. Regardless of my ability to prevail on behalf of my lawyer-clients, and my own self-interest in being able to avoid being sued after a settlement achieved at mediation, I believe that the statute must be amended so that lawyers are held accountable when their advice is fraudulent or negligent.<sup>138</sup>

John E. and Deborah Blair Porter (“the Porters”) likewise stress the need to protect clients:

We hope this Recommendation will lead to legislation that will result in a course correction on what has clearly become a hazardous mediation landscape, so that mediation and mediation confidentiality focus on the needs of the *persons* for whom mediations are conducted and for whom the original legislation regarding mediation confidentiality was enacted, i.e., the parties/disputants seeking to resolve their disputes over events in the past.

We hope that the proposed exception to mediation confidentiality will protect the parties/disputants who feel they have been wronged in the mediation process. It is also our hope that the adoption of such an exception will prevent the future abuse and misuse of the mediation process, including its use as a shield for the bad acts of incompetent and self-interested attorneys. At the same time we hope the adoption of this exception will allow attorneys who feel wrongly accused to properly defend themselves.<sup>139</sup>

In particular, the Porters emphasize the need for greater protection of “parents and students involved in special education disputes, who routinely use mediation as the primary means of resolving those disputes.”<sup>140</sup>

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136. *Id.*

137. 52 Cal. 4th 113, 244 P. 3d 1080, 119 Cal. Rptr. 3d 437 (2011).

138. Memorandum 2017-51, Exhibit p. 124.

139. *Id.* at Exhibit p. 136 (emphasis in original).

140. *Id.* at Exhibit p. 149.

In the same vein, mediator Jeff Kichaven explains that “[a]t heart, the rule of law is simply the principle that for every wrong — every breach of contract, violation of statute and tort — the legal system provides a remedy.”<sup>141</sup> He says that California’s mediation confidentiality statute is an “obstacle to the administration of justice”<sup>142</sup> because (1) it restricts the admissibility of evidence of mediation misconduct and (2) “without admissible evidence to support [a] claim, no matter how righteous that claim might be, it will be dismissed without a court ever considering its merits.”<sup>143</sup> In contrast, the Commission’s proposal “would allow consumers like Michael Cassel, who claim legal malpractice in a mediation, to introduce the evidence they need to prove their claims.”<sup>144</sup>

### **In the Long Run, the Proposed Exception Will Promote Mediation Better Than Existing Law**

Mediator Nancy Yeend finds it appalling that existing law does not require a disclosure to mediation participants that “attorney and mediator malpractice is protected ....”<sup>145</sup> She warns that this will ultimately hurt the mediation profession:

Once an informed consent case, arising from a mediation, winds its way to the Supreme Court, and the media makes the public aware that California’s statutes shield attorney and mediator malpractice, the mediation process will fall out of favor. This will be a stunning blow for court-connected mediation programs, and courts will lose one of their most successful case management processes. Private practice mediators will see a significant decline in cases, and community based programs will suffer as well.<sup>146</sup>

Peter Robinson supports the tentative recommendation for similar reasons. He says that “the resistance to the revision from the mediation community is short-sighted and ... mediation will be held in better esteem in the long run if the revision is approved.”<sup>147</sup>

Similarly, the Porters “hope that adoption of this new statutory exception as part of California’s Evidence Code will increase accountability for the mediation process and for attorneys in that process, and *will increase confidence in the use of*

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141. *Id.* at Exhibit p. 133.

142. *Id.*

143. *Id.* at Exhibit p. 129.

144. *Id.* at Exhibit p. 130.

145. *Id.* at Exhibit p. 154.

146. *Id.*

147. *Id.* at Exhibit p. 151.

*mediation as a whole.*"<sup>148</sup> They believe this "will not only benefit the parties/disputants who have been and continue to be at risk for harm and injury when choosing to mediate, but society as a whole."<sup>149</sup>

### **Reducing the Protection for Mediation Confidentiality Will Not Impede the Use of Mediation**

In an article in *Alternatives to the High Cost of Litigation* (which he incorporates by reference in his comments), Jeff Kichaven maintains that "there is no evidence" that California's strict approach to mediation confidentiality "is necessary for mediation to be effective."<sup>150</sup> Pointing to experience under federal law, New York law, and the Uniform Mediation Act, he is convinced that "[s]tatutory confidentiality is not necessary for effective mediation."<sup>151</sup>

Likewise, CCBA is unpersuaded that creating exceptions to mediation confidentiality "will destroy mediation in California, because no one will mediate without it." The group points out that "in four years of hearings by the CLRC, not a single mediation consumer has come forward to state that he or she would not participate in mediation absent absolute confidentiality, in contrast to dozens of consumers (at least) who support the Commission's efforts to provide protection in those rare cases involving unscrupulous or incompetent lawyers, and several of which testified to that effect." Like Mr. Kichaven, CCBA points to "[t]he fact that mediation exists and thrives in ... other states stands as solid proof that consumer protection and mediation can co-exist."<sup>152</sup>

Similarly, Nancy Yeend says:

Resisters to the Commission's recommendation claim that no one will want to say anything, because it will not be confidential. One has to ask, "*Upon what is this claim based?*" It certainly is not based on any factual evidence from the states that have adopted the Uniform Mediation Act, UMA. Malpractice is not protected, and mediation is alive, well and thriving in UMA states! How many of these naysayers have actually mediated or represented clients in mediation in any of the UMA states? What about all the other states that have not signed the UMA, but have their own statutes that do not permit malpractice from being protected by confidentiality?<sup>153</sup>

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148. *Id.* at Exhibit p. 136.

149. *Id.*

150. *Id.* at Exhibit p. 128.

151. *Id.*

152. *Id.* at Exhibit p. 123.

153. *Id.* at Exhibit p. 154.

She “encourage[s] the Commission to send their recommendation to the legislature for immediate enactment.”<sup>154</sup>

**Existing Law Was Developed Without Sufficient Input From Mediation Consumers, It is Biased Against Such Consumers, and That Should Be Changed**

The Porters make an argument that no one else raises. They state that mediation confidentiality is “presently interpreted in a manner that works to the detriment of the general public,” and that “this is due, in part, to what appears to have been a failure to involve the general public or parties/disputants in the processes undertaken in enacting past legislation, as well as a failure to consider how such legislation can impact parties/disputants and the public in general.”<sup>155</sup>

In other words, the Porters believe that the general public was “excluded” in “determining significant changes to the law and its benefits.”<sup>156</sup> Based on their review of the legislative history, “this CLRC Study appears to be the only time input of parties/disputants and the general public has been expressly sought, provided and/or considered as relevant ‘stakeholder’ input.”<sup>157</sup>

The staff appreciates the Porters’ praise for the process used in this study, but we would not characterize the legislative history of mediation confidentiality the same way they do. All of California’s mediation confidentiality laws necessarily went through the legislative process, in which any member of the public was free to comment and participate. In addition, the laws enacted in 1985 and 1997 went through the Commission’s time-tested study process (the same process used in this study) before they were introduced in the Legislature.

**The Proposed Exception Will Not Result in a Flood of Mediation Misconduct Claims**

In support of the tentative recommendation, John Blumberg makes one more point that the Commission should take into consideration. He seeks to allay fears that the proposed exception will result in a flood of mediation misconduct claims:

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154. *Id.*

155. *Id.* at Exhibit p. 136.

The Porters also criticize various aspects of the Supreme Court’s decision in *Cassel*. See *id.* at Exhibit pp. 143-48. The staff is reluctant to say anything about these matters. As best we know, the Porters’ litigation remains pending and the Commission must be careful not to interfere in it.

156. *Id.* at Exhibit p. 142.

157. *Id.* at Exhibit p. 137.



Some lawyers fear so-called “frivolous” claims against them. That is never a good reason to deprive clients of the right to justice. It is not as though an amendment would open the floodgates of litigation against lawyers. *It is very, very difficult to prevail in a “settle and sue” case.*<sup>158</sup>

To reinforce these assertions, he cites and quotes from *Namikas v. Miller*,<sup>159</sup> which discusses the requirements for recovery in a settle and sue case.<sup>160</sup>

## OPTIONS

The opposition to the Commission’s tentative recommendation can only be described as overwhelming. It is not unanimous, but it is deep and widespread. California’s mediation confidentiality statute may differ from those in other jurisdictions, providing greater protection in some respects, but a broad range of stakeholder organizations and many individuals appear to be well-satisfied with that approach and offer many reasons for their position.

In light of the generally negative input on the tentative recommendation, **the Commission should take a hard look at its options and consider how to proceed.** While the Commission should not base its policy recommendations on political considerations, neither should it ignore practical reality. The goal of a Commission study is to achieve positive reform of the law. That requires the crafting of a balanced reform that has a realistic chance of enactment. Striking that balance is often one of the most difficult aspects of the Commission’s work, particularly in a study like this one, where important interests are sharply divided. The Commission is typically not required to decide such fundamentally political matters, which are usually left to the Legislature and Governor, as the People’s elected representatives. Bearing all of that in mind, the staff sees the following possibilities for how the Commission might proceed:

- (1) **Proceed with the current proposal.** The Commission could go forward with its proposal despite the opposition. If it decides to do so, then it should consider the specific suggestions that will be discussed in a follow-up memorandum. In considering whether to take such a step, the Commission should bear in mind that it is making a recommendation to the Legislature and the Governor, and elected officials will be understandably reluctant to do something that is firmly opposed by their constituents, as well as

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158. *Id.* at Exhibit p. 124 (emphasis added).

159. 225 Cal. App. 4th 1574, 1582-83, 171 Cal. Rptr. 3d 23 (2014).

160. See Memorandum 2017-51, Exhibit pp. 124-25.

groups that speak for a sister branch of government (the Civil and Small Claims Advisory Committee and CJA). It might not even be possible to find a legislator willing to author a bill to implement the proposal. The Commission should also bear in mind that the existing mediation confidentiality statute was enacted on its recommendation and it is Commission policy not to recommend changes in laws that have been enacted on Commission recommendation “unless there is a good reason for doing so ....”<sup>161</sup>

- (2) **Informational report.** The Commission could turn its tentative recommendation into an informational report, which provides the background information requested by the Legislature but does not make any recommendation or propose any legislation. This could be done by severing Parts II and III from the tentative recommendation. The report could expressly acknowledge that this topic involves a clash of competing policy interests and is highly controversial, making it desirable for the elected representatives of the public to resolve the matter rather than the Commission to opine on it. The Commission has taken such an approach on a few occasions before, which also involved topics more controversial than the ones typically addressed by the Commission.<sup>162</sup>
- (3) **Limit the Exception to Private Attorney-Client Discussions in a Mediation Context.** The Commission could propose a mediation confidentiality exception that applies only to private attorney-client discussions in a mediation context. If it decides to do so, it could proceed in one of two ways: (a) it could prepare a revised tentative recommendation that uses the language in CCBA’s resolution, which was incorporated into AB 2025 as introduced in 2012;<sup>163</sup> or (b) it could revise its current proposal along the lines that Ron Kelly suggests.<sup>164</sup>

There appears to be some segment of the opposition that would at least tolerate, if not support, that type of approach. Richard Huver perhaps best explains the advantages:

This important limiting language keeps the evidence as it should be — between the client and his or her attorney. After all, the only one who could be liable for legal malpractice would be the client’s attorney and the only one with a claim would be the client. Therefore, the advice, communications, etc. directly between attorney and client is what would be relevant to prove or disprove the claims (and

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161. CLRC Handbook Rule 3.5.

162. See *Charter Schools and the Government Claims Act*, 42 Cal. L. Revision Comm’n Reports 225 (2012); see also *Miscellaneous Hearsay Exceptions: Forfeiture by Wrongdoing*, 37 Cal. L. Revision Comm’n Reports 443 (2007).

163. For CCBA’s language, see *supra* note 49.

164. For Mr. Kelly’s suggestion, see text accompanying note 58 *supra*.

this would include fee or billing disputes as well). Yes, I understand there could be a situation where possibly someone tangential to the client or attorney might have evidence which might help prove or disprove the allegations. But I think shielding those documents, those communications and those people — who would necessarily be opposing parties participating in a mediation — and who are not part of the attorney client relationship from onerous discovery requests is a small price to pay. This would still allow the most relevant evidence — communications directly between the client and his or her attorney — to be discovered and admissible.<sup>165</sup>

CCBA states, however, that an exception along the lines in its resolution would be unworkable:

[S]uch a limited exemption would be a one-way exception, permitting, as the majority noted in *Cassel v. Superior Court*, 51 Cal. 4th 113, “a client to support a malpractice claim with excerpts from private discussions with counsel concerning the mediation, while barring the attorneys from placing such discussions in context by citing communications within the mediation proceedings themselves.” Thus, basic fairness requires a slightly expanded exemption such as that contained in the Tentative Recommendation.<sup>166</sup>

- (4) **Develop an Informed Consent Approach and Circulate a Revised Tentative Recommendation.** Another option would be to develop an informed consent approach (mandatory pre-mediation disclosure) and circulate a revised tentative recommendation. There appears to be a certain amount of common ground on the benefits of informed consent.<sup>167</sup> Resolving the specifics would require much work, however, particularly figuring out the best way to build consensus.
- (5) **Revisit the Full Range of Options Raised in This Study.** If none of the above options appeal to the Commission, it could perhaps revisit the full range of options raised in this study, including the option of recommending that the Legislature leave California’s existing mediation confidentiality law intact. There are many possible alternatives, all of which have both potential advantages and potential disadvantages.

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165. Memorandum 2017-51, Exhibit pp. 91-92.

166. Memorandum 2017-51, Exhibit pp. 122-23.

167. See text accompanying notes 63-67 *supra*.

## DECISION TO MAKE

From the beginning, this study has been controversial and difficult. The Commission is now at a crossroads.

In deciding how to proceed, the Commission should bear in mind that California's court system is one of the largest in the world.<sup>168</sup> As CDRC points out, "there are more than 60,000 civil filings in California every year and ... it is standard practice for courts throughout the state to urge mediation upon litigants, [so] it stands to reason that thousands of mediations are conducted annually."<sup>169</sup> It is no exaggeration to say that California's approach to mediation confidentiality touches many lives and the Commission's decision on revising or retaining that approach is important.<sup>170</sup>

### **How would the Commission like to proceed?**

Respectfully submitted,

Barbara Gaal  
Chief Deputy Counsel

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168. Judicial Council of California, *2016 Court Statistics Report: Statewide Caseload Trends (2005-2006 Through 2014-2015)*, at Preface & xvii.

169. Memorandum 2017-51, Exhibit p. 15.

170. *Id.* at Exhibit p. 100 (comments of Ron Kelly); see also *id.* at Exhibit p. 96 (comments of Micahel Jonsson).