

First Supplement to Memorandum 2017-62

**Relationship Between Mediation Confidentiality and Attorney Malpractice
and Other Misconduct: Public Comment**

The Commission¹ just received a new letter from the Chair of the Civil and Small Claims Advisory Committee of the Judicial Council. The letter is attached as an Exhibit.

The committee “was very disappointed to learn of the Commission’s decision to proceed with the general approach reflected in its tentative recommendation despite the considerable, multi-faceted opposition to this approach expressed by both organizations and individuals from a wide variety of viewpoints.”² The committee elaborates on why its members “*unanimously* voted to oppose that recommendation based on the conclusion that implementing the statutory changes proposed in that recommendation would likely benefit few people while possibly harming many.”³

The committee “acknowledges that this potential harm would be reduced if the Commission were to narrow its recommended exception ... to focus exclusively on attorney disciplinary proceedings and possibly State Bar fee arbitrations”⁴ According to the committee, that “is primarily because there would be far fewer cases in which mediation communications might actually be disclosed.”⁵ More specifically, “if the proposed exception ... were limited to State Bar disciplinary proceedings, mediation communications would likely become public in only a few cases in which serious attorney misconduct may have occurred.”⁶

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). 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.

2. Exhibit p. 1.

3. Exhibit pp. 1-2, 3.

4. *Id.*

5. Exhibit pp. 2-3.

6. *Id.*

The committee cautions, however, that “[n]arrowing the exception in this way would not eliminate the potential harm”⁷ In particular, the committee points out that disputants contemplating mediation “would still have less assurance in advance that their communications will be confidential and more risk that they will be required to participate in interviews with State Bar investigators or be called to testify in a subsequent proceeding as a result of participating in mediation.”⁸ The committee believes this could discourage some disputants from mediating and cause others to be less candid when mediating.⁹ Consequently, the committee’s position is that “even in this narrowed form, the potential risks of making these statutory changes outweigh the potential benefits.”¹⁰

The committee closes by again urging the Commission to reconsider its policy choice, which deviates from the views expressed in “the vast majority of the comments that the Commission has received on its tentative recommendation.”¹¹ The committee believes the Commission’s “time and effort was well-spent regardless of whether the Commission recommends a change in the current mediation confidentiality laws”¹² It explains:

The Commission has done a great service by gathering and analyzing all the available information relevant to this topic, identifying the gaps in available empirical information, clearly laying out the competing policy interests at stake, and soliciting public input on a variety of policy approaches to this issue. All of this has enabled a more informed and robust discussion of this issue.¹³

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

7. Exhibit p. 3.
8. *Id.*
9. *Id.*
10. *Id.*
11. Exhibit p. 3.
12. *Id.*
13. *Id.*



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November 29, 2017

California Law Revision Commission
4000 Middlefield Road, Room D-2
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Re: Tentative Recommendation Regarding the Relationship between
Mediation Confidentiality and Attorney Malpractice and Other
Misconduct

Dear Members of the Law Revision Commission:

I am writing to you as chair of the Civil and Small Claims Advisory Committee of the Judicial Council of California about the Commission's tentative recommendation regarding the relationship between mediation confidentiality and attorney malpractice and other misconduct. As we indicated in our previous letter regarding this tentative recommendation, the committee is charged by the Judicial Council with identifying issues and concerns affecting court administration in civil and small claims proceedings and making recommendations to the Council for improving the administration of justice in these proceedings. With the Council's permission, the committee is providing additional comments on the tentative recommendation in light of the Commission's decision, as reflected in the Commission staff memorandum 2017-61, to proceed with the general approach reflected in that tentative recommendation but to explore the possibility of narrowing the proposed exception.

The committee was very disappointed to learn of the Commission's decision to proceed with the general approach reflected in its tentative recommendation despite the considerable, multi-faceted opposition to this approach expressed by both organizations and individuals from a wide variety of viewpoints.

Many commentators, including the committee, raised concerns about the potential that implementation of the Commission's tentative recommendation could result in reducing the number of disputes that are mediated and/or reducing the efficacy of mediation, causing harm to those who currently benefit from mediation, including many disputants,

the court system, and society as a whole. A few commentators who support the Commission's tentative recommendation, however, suggested that these potential risks are illusory because mediation also takes place in jurisdictions that have different, less strict mediation confidentiality laws. The Commission's own tentative recommendation indicates, however, that it would be inappropriate to draw such conclusions from the fact that mediation takes place in these other jurisdictions. The tentative recommendation contains a detailed discussion of how the variations in mediation program design and other factors make it virtually impossible to isolate the impact of varying mediation confidentiality laws on mediation usage and efficacy across jurisdictions. It is important to note that the Commission was not able to examine any empirical information on the impact of reducing the confidentiality of mediation communications in a manner similar to that embodied in the Commission's tentative recommendation because it was not able to identify any other jurisdiction that has made such a change. We simply do not know if more mediations might occur in other jurisdictions if their confidentiality laws were more like those currently in effect in California. Nor do we know whether participants in mediations in other jurisdictions are less open in their discussions or if more disputes would be resolved if the confidentiality laws in those jurisdictions were stricter. Given this, the committee's view is that it is inappropriate to rely on the fact that mediation occurs in other jurisdictions to dismiss the potential that reducing California's mediation confidentiality as suggested in the Commission's tentative recommendation could reduce the use and/or efficacy of mediation in California.

In its tentative recommendation, the Commission itself also acknowledges that attorney misconduct in mediation appears to be relatively infrequent. As indicated in its prior letter, the committee's view is that this acknowledgement by the Commission, reinforced by the personal experience of court ADR program administrators in receiving no or very few complaints regarding such misconduct, supports a conclusion that there is not enough information showing that attorney misconduct in mediation is frequent enough to justify taking the potential risks presented by the Commission's tentative recommendation. The members of the committee—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 cases—after reviewing the Commission's tentative recommendation, unanimously voted to oppose that recommendation based on the conclusion that implementing the statutory changes proposed in that recommendation would likely benefit few people while possibly harming many.

The committee acknowledges that this potential harm would be reduced if the Commission were to narrow its recommended exception to mediation confidentiality to focus exclusively on attorney disciplinary proceedings and possibly State Bar fee arbitrations, as discussed in memorandum 2017-61. This is primarily because there would be far fewer cases in which mediation communications might actually be disclosed. As noted in the Commission memorandum, State Bar disciplinary proceedings are generally confidential until formal charges are filed and most complaints to the State Bar do not result in the filing of formal charges. Thus, if the proposed exception to mediation confidentiality were limited to State Bar disciplinary

proceedings, mediation communications would likely become public in only a few cases in which serious attorney misconduct may have occurred.

Narrowing the exception in this way would not eliminate the potential harm, however. Disputants contemplating participating in mediation would still have less assurance in advance that their communications will be confidential and more risk that they will be required to participate in interviews with State Bar investigators or be called to testify in a subsequent proceeding as a result of participating in mediation. 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. Given the lack of information indicating that attorney misconduct in mediation is a frequent problem, the committee's view is that, even in this narrowed form, the potential risks of making these statutory changes outweigh the potential benefits.

California's current mediation confidentiality laws reflect a policy choice favoring the potential benefits of mediation confidentiality over allowing individuals to use mediation communications for purposes of holding attorneys (or any other mediation participant) accountable for their conduct in mediation. Although this policy choice does make it difficult, and perhaps impossible in some circumstances, to hold an attorney accountable if there is an instance of professional misconduct in mediation, the effect of this law is not unlike the effect of other privileges embodied in the California Evidence Code. Privileges of this type restrict the use of evidence that would otherwise be available, making it difficult or impossible to pursue particular claims, based on a conclusion that the benefits of protecting other values or relationships outweigh the potential harm to those who want to use this evidence. The Commission has tentatively recommended making a different policy choice, one that would favor allowing individuals to use mediation communications for purposes of holding attorneys accountable for their conduct in mediation over the potential benefits of mediation confidentiality. The committee believes that the vast majority of the comments that the Commission has received on its tentative recommendation indicate that the commentators – many different organizations and individuals with diverse interests – do not think that the new policy choice tentatively recommended by the Commission is the right one, at least given the information available at this time.

The committee understands and appreciates all of the time and effort that Commission has put into its study of this issue and that the Commission does not want this time and effort to have been wasted. The committee believes that this time and effort was well-spent regardless of whether the Commission recommends a change in the current mediation confidentiality laws at this time. The Commission has done a great service by gathering and analyzing all the available information relevant to this topic, identifying the gaps in available empirical information, clearly laying out the competing policy interests at stake, and soliciting public input on a variety of

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policy approaches to this issue. All of this has enabled a more informed and robust discussion of this issue.

Thank you for this opportunity to submit comments on the Commission's tentative recommendation.

Sincerely,

A handwritten signature in blue ink, appearing to read "Ann I. Jones". The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

Hon. Ann I. Jones, Chair