

## Second Supplement to Memorandum 2017-62

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

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The Commission<sup>1</sup> just received a new letter from Lexi Howard on behalf of the California Judges Association (CJA). The letter is attached as an Exhibit.

CJA agrees with the Civil and Small Claims Advisory Committee of the Judicial Council that even if the Commission narrowed proposed Evidence Code Section 1120.5 to apply only in a State Bar disciplinary proceeding, “the potential risks of making these statutory changes outweigh the potential benefits.”<sup>2</sup>

CJA “remains deeply concerned that any incursion into the present statutory standards of mediation confidentiality must be avoided.”<sup>3</sup> It warns:

Doing otherwise will seriously impair the frankness and candor needed for successful mediations. Candid and confidential mediation discussions are critical efforts to resolve disputes outside of court. The potential impact of having the many cases now being settled in mediation each year come back to the civil trial calendars of California courts is staggering at a time when the people of California continue to suffer from an ongoing lack of adequate and stable court funding.<sup>4</sup>

Respectfully submitted,

Barbara Gaal  
Chief Deputy Counsel

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

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

2. Exhibit p. 1.

3. *Id.*

4. *Id.*



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November 30, 2017

California Law Revision Commission  
4000 Middlefield Road, Room D-2  
Palo Alto, CA 94303-4739

*via email: bgaal@clrc.ca.gov*

Re: Study K-402: Tentative Recommendation Regarding the Relationship between  
Mediation Confidentiality and Attorney Malpractice and Other Misconduct

Dear Chair and Members:

The California Judges Association (CJA) appreciates the work of the Commission on this matter and the opportunity to provide further comments. When we were last before you at the September 28, 2017 meeting, we expressed our willingness to examine any narrowed proposals and provide supplemental comments.

Having reviewed Memorandum 2017-61 proposing narrowing the mediation confidentiality exception to focus exclusively on specified State Bar proceedings, we agree with the opinion expressed by the Civil and Small Claims Advisory Committee of the Judicial Council of California in their letter dated November 29, 2017, that “even in this narrowed form, the potential risks of making these statutory changes outweigh the potential benefits.”

CJA remains deeply concerned that any incursion into the present statutory standards of mediation confidentiality must be avoided. Doing otherwise will seriously impair the frankness and candor needed for successful mediations. Candid and confidential mediation discussions are critical efforts to resolve disputes outside of court. The potential impact of having the many cases now being settled in mediation each year come back to the civil trial calendars of California courts is staggering at a time when the people of California continue to suffer from an ongoing lack of adequate and stable court funding.

We agree with the Commission’s statement that “the degree of opposition to the Commission’s proposal suggests that careful reexamination of the competing considerations is in order.” We commend the Commission on its diligent efforts to examine the scope of this issue, and appreciate the opportunity to provide further comments.

Sincerely,

Lexi Howard, Legislative Director  
California Judges Association