

Memorandum 2018-14

2018 Legislative Program (Status Report)

There have been two new developments that relate to Commission-recommended¹ legislation. They are described briefly below. A supplement to this memorandum will be presented closer to the meeting date, to provide a more complete status report on the Commission's legislative program.

SENATE CONCURRENT RESOLUTION 91 (ROTH AND CHAU)

Senate Concurrent Resolution 91 (Roth and Chau) was introduced to comply with Government Code Section 8293, which provides:

The commission shall file a report at each regular session of the Legislature that shall contain a calendar of topics selected by it for study, including a list of the studies in progress and a list of topics intended for future consideration. The commission shall confine its studies to those topics set forth in the calendar contained in its last preceding report that have been or are thereafter approved for its study by concurrent resolution of the Legislature. The commission shall also study any topic that the Legislature, by concurrent resolution or statute, refers to it for study.

Typically, this kind of resolution simply continues the Commission's prior study authority without change. That is the case with SCR 91; as introduced it would make no change to the authority granted by the last such resolution.²

Occasionally, such a resolution will make changes to the Commission's calendar of topics authorized for study, either authorizing a new study or deleting unnecessary authority.

Historically, the Commission and the Legislature have been conservative about deleting elements of the Commission's study authority. Often, it becomes

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. 2016 Cal. Stat. res. ch. 150; ACR 148 (Chau).

necessary for the Commission to return to a former topic to address new developments in the law. It is easier to do so if the Commission retains the necessary authority from year to year, rather than needing reauthorization when a topic requires revisiting. For example, the Commission is currently examining issues raised in connection with existing procedures for the disposition of a decedent's estate without formal probate administration. The Commission was able to turn to that topic promptly, because its resolution of authority includes a broad and recurring grant of authority to study any matter addressed by the Probate Code.

That is why SCR 91 continues the Commission's existing authority on mediation confidentiality, even though the Commission has completed its work on that topic and has no present plans for further work.

Mediator Ron Kelly has written Senator Jackson, the Chair of the Senate Committee on Judiciary, opposing SCR 91 unless it is amended. His letter is attached as an Exhibit.

Mr. Kelly requests two alternative amendments.³ Both of the alternatives would include the following three elements:

- (1) The Commission's authority to study mediation confidentiality would be deleted.
- (2) The Commission would be barred from spending further resources on the topic.
- (3) The Legislature would declare its rejection of the Commission's recommendation.⁴

Mr. Kelly's second alternative amendment would also memorialize his description of certain aspects of the history of the Commission's mediation confidentiality study.

The staff does not recommend that the Commission respond in any formal way to Mr. Kelly's efforts. The Legislature is free to make whatever changes to the Commission's authority that it wishes.

However, the staff would like to clear up two points of apparent misunderstanding:

- (1) Mr. Kelly writes: "Unless it is now clearly rejected by the Legislature, the Commission's recommended legislation will remain on record."⁵

3. See Exhibit p. 2.

4. *Id.*

The Commission's recommendation on mediation confidentiality is the product of a public deliberative process and is a government publication. It is already "on record" and will remain so, regardless of whether the Legislature decides against enacting the proposed legislation. **Mr. Kelly's proposal would have no effect on the recommendation's status as a record of the Commission's conclusions.**

- (2) Mr. Kelly writes: "Supporters have indicated their intent to try again and again to get it enacted in successive future legislative sessions."⁶

Any legislator, in any future session of the Legislature, is free to introduce any measure, including the Commission's proposed legislation on mediation confidentiality. This is true even if the Commission has nothing further to do with the matter. **Mr. Kelly's proposal would have no effect on whether supporters can seek introduction of the Commission's recommendation in the future.**

REVOCABLE TRANSFER ON DEATH DEED

Assembly Member Kiley has introduced Assembly Bill 3004, which would make the following changes to the revocable transfer on death deed statutes:

- (1) Repeal the sunset date (January 1, 2021).
- (2) Amend the definition of "beneficiary" to include nonprofit entities.
- (3) Provide that failure to record the instruction (FAQ) page does not affect the validity of the deed. This is substantively similar to the effect of AB 1739 (Chau), which would implement the Commission's recommendation on *Revocable Transfer on Death Deed: Recordation* (April 2017).
- (4) Add language declaring that the three-year statute of limitations on beneficiary liability to the transferor's estate "shall not be construed to operate as a three-year waiting period for the transfer of property pursuant to a properly executed revocable transfer on death deed."

The staff will monitor this bill and keep the Commission informed of its progress.

Respectfully submitted,

Brian Hebert
Executive Director

5. See Exhibit p. 1.

6. *Id.*

February 26, 2018

Senator Hannah Beth Jackson, Chair
Senate Judiciary Committee
State Capitol, Room 2187
Sacramento, CA 95814

Re: SCR-91 – Oppose Unless Amended

The Judiciary Committee will be considering SCR-91 to reauthorize the Law Revision Commission's work. Each session for the past six years, this authorizing resolution has contained the wording in the current Section 23 (introduced version dated 1/23/18). This section is now inappropriate for the reasons described below. I respectfully request you oppose SCR-91 unless section 23 is deleted and amended per the attached request.

1. The Commission has already completed the authorized study as directed. It has already approved its Final Recommendation with proposed legislation.
2. The recommended legislation had overwhelming opposition from stakeholder groups, including joint opposition from the Consumer Attorneys of California and the California Defense Counsel, and unanimous opposition from the relevant committee of the Judicial Council. Taken together, the stakeholder organizations on record in opposition represented mediation users, the courts, public agencies, lawyers, and mediators, with millions of hours of direct experience with mediations across all sectors.
3. Every member of both the Assembly and Senate Judiciary Committees was approached by Commission staff and requested to carry the Commission's proposed legislation. No member agreed to carry it due to its nearly unanimous rejection by all affected stakeholder organizations.
4. Unless it is now clearly rejected by the Legislature, the Commission's recommended legislation will remain on record. Supporters have indicated their intent to try again and again to get it enacted in successive future legislative sessions.
5. SCR-91 is the appropriate vehicle for the Judiciary Committee to indicate that it is rejecting the Commission's proposed legislation in Study K-402.

Please see the attached list of 32 stakeholder organizations on record opposing the Commission's proposed approach and the attached requested amendment to SCR-91.

Yours respectfully,



Ron Kelly
2731 Webster St.
Berkeley, Ca 94705
<ronkelly@ronkelly.com>
(510-843-6074)

Requested Amendment to SCR-91

(23) The Commission's Recommendation in study K-402 is deemed rejected and the Commission is directed to expend no further resources on this study.

OR

(23) (A) After four years of study the Commission in June 2017 formally published and circulated for public comment its Tentative Recommendation in Study K-402.

(i) Commission staff then analyzed the public comment and advised the Commission in Staff Memorandum 2017-52 that "The opposition to the Commission's tentative recommendation can only be described as overwhelming." (page 33). This memo (beginning page 6) lists ten stakeholder organizations formally in opposition, and twenty-two other stakeholder organizations and hundreds of individual stakeholders already on record as opposing the approach the Commission had selected. This included joint opposition from the Consumer Attorneys of California and the California Defense Counsel, and unanimous opposition from the relevant committee of the Judicial Council. Stakeholder organizations on record in opposition represented mediation users, the courts, public agencies, lawyers, and mediators, with millions of hours of direct experience with mediations across all sectors. The only stakeholder organization listed in support was the original sponsor.

(ii) The Commission declined to substantively modify its approach and instead proceeded to approve its Final Recommendation with proposed legislation at its December 1, 2017 meeting.

(iii) The Executive Director then reported to the Commission at its February 8, 2018 meeting that staff had approached every member of the Assembly and Senate Judiciary Committees requesting the member carry the Commission's recommended legislation, and found no member willing to do so.

(B) The Commission's recommendation legislation in study K-402 is deemed rejected and the Commission is directed to expend no further resources on this study.

~~(23) (A) Analysis of the relationship under current law between mediation confidentiality and attorney malpractice and other misconduct, and the purposes for, and impact of, those laws on public protection, professional ethics, attorney discipline, client rights, the willingness of parties to participate in voluntary and mandatory mediation, and the effectiveness of mediation, as well as any other issues that the commission deems relevant. Among other matters, the commission shall consider the following:~~

~~(i) Sections 703.5, 958, and 1119 of the Evidence Code and predecessor provisions, as well as California court rulings, including, but not limited to, Cassel v. Superior Court (2011) 51 Cal.4th 113, Porter v. Wyner (2010) 183 Cal.App.4th 949, and Wimsatt v. Superior Court (2007) 152 Cal.App.4th 137.~~

~~(ii) The availability and propriety of contractual waivers.~~

~~(iii) The law in other jurisdictions, including the Uniform Mediation Act, as it has been adopted in other states, other statutory acts, scholarly commentary, judicial decisions, and any data regarding the impact of differing confidentiality rules on the use of mediation.~~

~~(B) In studying this matter, the commission shall request input from experts and interested parties, including, but not limited to, representatives from the California Supreme Court, the State Bar of California, legal malpractice defense counsel, other attorney groups and individuals, mediators, and mediation trade associations. The commission shall make any recommendations that it deems appropriate for the revision of California law to balance the competing public interests between confidentiality and accountability;~~

Coming Bill to End Mediation Confidentiality - 32 Stakeholder Organizations Oppose. 1 Supports. Commission Votes to Proceed Anyway

In June 2017, the California Law Revision Commission asked for public comment on a Tentative Recommendation for legislation. Their bill will **remove current mediation confidentiality protections** if someone **later alleges** misconduct or overbilling by an attorney advocate. **Thirty-two stakeholder organizations** with direct experience in mediation wrote **in opposition**, or had already written the Commission in the course of its Study K-402. **One** wrote **in support**. Commission staff stated in Memo 17-52, "**The opposition to the Commission's tentative recommendation can only be described as overwhelming.**" (page 33)

Ignoring the overwhelming stakeholder opposition, on December 1 the Commission voted to submit the bill in the 2018 session as circulated, with only minor technical revisions. Bill text starts on page 145 at <<http://www.clrc.ca.gov/pub/Printed-Reports/RECpp-K402.pdf>>. The bill will end our current right to choose confidential mediation, in effect since 1985.

Taken together, the stakeholder organizations weighing in represented millions of hours of direct experience with mediations across all sectors. The quotes below summarize the reasons for the nearly unanimous stakeholder opposition.

The **Consumer Attorneys of California and the California Defense Council** explained in a rare **joint letter of opposition** "**Confidentiality promotes candor**, which in turn leads to successful mediation...and **the use of mediation is critical** to successful out of court resolution of disputes."

The **California Judges Association's** opposition statement pointed out that "California Rules of Court, Rule 3.854(b) currently requires...'**a mediator must** provide the participants with a general explanation of the confidentiality of mediation proceedings.'...mediators will now, **if your proposal is adopted**, have to provide an additional explanation to parties...that **whatever they or their lawyers say in the process of mediation is no longer confidential...**"

The **Judicial Council's** relevant committee wrote in opposition: "resolution of disputes in this way is **beneficial to disputants, the court system, and society**...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...mediation misconduct appears to be relatively infrequent...several administrators of court-connected mediation programs...many with decades of experience, reported...**few if any complaints about attorney misconduct in mediations conducted within their programs during their careers.**"

The statewide **Consortium for Children's** opposition letter warned "For the safety of the traumatized children involved in child welfare, **confidentiality is legally and morally mandatory** for the parties to our mediations."

(All quotes above from <http://www.clrc.ca.gov/pub/2017/MM17-51.pdf>)

Commission Memo 17-52, starting at page 6, lists the following 32 organizations in opposition. (Source: <http://www.clrc.ca.gov/pub/2017/MM17-52.pdf>)

Stakeholder organizations specifically opposing the Tentative Recommendation:

- 1. Judicial Council of California/Civil and Small Claims Advisory Committee**
- 2. Consumer Attorneys of California**
- 3. California Defense Counsel**

(list continues next page)

(Opposed organizations continued)

4. Academy of Professional Family Mediators
5. California Dispute Resolution Council
6. California Judges Association
7. Center for Conflict Resolution
8. Consortium for Children
9. Los Angeles Department of Consumer and Business Affairs
10. Los Angeles County Bar Association Family Law Section

Previously on record opposed to weakening confidentiality protections:

11. Air Conditioning Sheet Metal Association
12. Association for Dispute Resolution of Northern California
13. Associated General Contractors
14. California Building Industry Association
15. California Chapters/National Electrical Contractors Association
16. California Legislative Conference of the Plumbing, Heating, and Piping Industry
17. Collaborative Attorneys and Mediators of Marin
18. Collaborative Practice California
19. Community Boards Program
20. Construction Employers Association
21. Contra Costa County Bar Association
22. Family Law Attorney Mediators Engaged in Study
23. Judicate West
24. Loyola Law School Center for Conflict Resolution
25. Marin County Bar Association
26. Northern California Allied Trades
27. Public Employment Relations Board
28. Southern California Contractors Association
29. Southern California Mediation Association
30. United Contractors
31. Wall and Ceiling Alliance
32. Western Line Constructors

Organizations supporting weakening our current protections:

1. Conference of California Bar Associations (original source of proposal)

Imagine you're a party just starting a serious mediation. How candid are you going to be if the mediator warns you as follows?

Warning!

Anything you say in mediation you may be subpoenaed to repeat under oath if any of the other parties later complains against their lawyer. You may also have to turn over any confidential briefs or documents you create in mediation, and any texts or emails you send.