A meeting of the California Law Revision Commission was held in Davis on October 8, 2015.

Commission:

Present: Taras Kihiczak, Chairperson
        Crystal Miller-O’Brien, Vice Chairperson
        Diane F. Boyer-Vine, Legislative Counsel
        Damian Capozzola
        Victor King
        Susan Duncan Lee

Absent: Assembly Member Ed Chau
        Senator Richard D. Roth

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

Consultants: None

Other Persons:

Heather Anderson, Judicial Council
Andrea Bari, CLRC law student extern
J. Felix De La Torre, Public Employment Relations Board
Paul Dubow
Rachel Ehrlich, Ehrlich Mediation
Jim Ewert, California Newspaper Publishers Association
Brian Flemmer, Office of Senator Roth
Heather Falkenthal, Office of Senator Wieckowski
Daniel Felizzatto, Los Angeles County District Attorney’s Office
Robert Flack, California Dispute Resolution Council
Ron Kelly
Erin King, California Self Storage Association
Janet Martinez, Stanford Law School
Nicole Moore, California Newspaper Publishers Association
Nancy Peverini
Patricia Prince, Prince Law & Mediation
Barbara Proctor, California Dispute Resolution Council
Kimberly Siclari, California Self Storage Association
Harold M. Thomas, Butte County District Attorney’s Office
Loretta van der Pol, Public Employment Relations Board
John S. Warnlof, California Dispute Resolution Council

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APPROVAL OF ACTIONS TAKEN

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

MINUTES OF AUGUST 7, 2015, COMMISSION MEETING

Memorandum 2015-29 presented a draft of the Minutes of the August 7, 2015, Commission meeting. The Commission approved the Minutes, without change.

ADMINISTRATIVE MATTERS

Report of Executive Director

The Executive Director reported that proposed Memorandum 2015-39 had been removed from the agenda. The matters addressed in that memorandum will be considered at a future meeting.

The Executive Director introduced Andrea Bari, a second-year law student at King Hall School of Law, currently serving the Commission as an extern.
The Commission decided to move the location of its December 2015 meeting to Los Angeles. (Commissioner Miller-O’Brien voted against this decision.)

**Election of Officers**

The Commission considered Memorandum 2015-26, relating to the election of Commission officers. The Commission elected Taras Kihiczak as Chairperson and Crystal Miller-O’Brien as Vice Chairperson, for terms commencing immediately and ending August 31, 2016. The Commission waived the fourth paragraph of Rule 1.1 of the *Handbook of Commission Practices and Procedures* (relating to consecutive terms).

**2015 Legislative Program**

The Commission considered Memorandum 2015-42, reporting on the Commission’s 2015 legislative program. No Commission action was required or taken.

**Study D-1200 — Recognition of Tribal and Foreign Court Money Judgments**

The Commission considered Memorandum 2015-38, discussing the degree of judicial discretion afforded to courts when deciding whether to recognize a foreign judgment under the Uniform Foreign-Country Money Judgments Recognition Act.

With respect to the issues discussed in the memorandum, the Commission decided not to make any changes to the related California statutes.

The staff will contact the Uniform Law Commission to discuss the different considerations that may bear on how a court decides to exercise its discretion. When the staff prepares a draft tentative recommendation for this study, the staff will include Comment language that discusses the exercise of judicial discretion.

**Study J-1314 — Trial Court Unification: Publication of Legal Notice**

The Commission considered Memorandum 2015-44, presenting a staff draft recommendation on *Trial Court Unification: Publication of Legal Notice*.

The Commission decided to replace the district descriptions for San Bernardino and San Diego counties with the district descriptions set out on pages 10-12 of Memorandum 2015-44.
With those changes and any necessary conforming revisions, the Commission approved the draft as a final recommendation.

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

The Commission considered Memorandum 2015-45 and its First Supplement (drafting issues) and Memorandum 2015-46 and its First and Second Supplements (public comment). The Commission also considered the three communications attached to the Third Supplement to Memorandum 2015-46, which the staff distributed at the meeting along with the Second Supplement to Memorandum 2015-46.

The staff mentioned the recent publicity relating to this study and apparent confusion regarding the status of the study. The Commission considered but did not pursue the possibility of submitting a short written statement to media sources to clarify the status of the study. *(Chairperson Kihiczak, Vice Chairperson Miller-O’Brien, and Commissioner Capozzola voted to take that step; Commissioners Boyer-Vine, King, and Lee voted against it.)*

For purposes of preparing a draft of a tentative recommendation, the Commission made the following decisions:

**General Concept**

Commissioner King moved for reconsideration of the Commission’s August 7 decision “to begin the process of preparing a draft of a tentative recommendation that would propose an exception to the mediation confidentiality statutes (Evid. Code §§ 1115-1128) to address ‘attorney malpractice and other misconduct.’” See Minutes (Aug. 7, 2015), p. 5. His motion failed because it was not seconded.

**Types of Misconduct to Cover**

The Commission reconsidered its August 7 decision that the proposed new exception “should apply to alleged misconduct of an attorney or an attorney-mediator.” See Minutes (Aug. 7, 2015), p. 5. The Commission decided that the exception should only apply to alleged misconduct of an attorney acting as an advocate, not to alleged misconduct of an attorney-mediator. *(Vice Chairperson Miller-O’Brien voted against this decision.)*
Mediator Immunity

The Commission decided that the proposed statutory text in the tentative recommendation should include a statement along the following lines:

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

Timing of the Alleged Misconduct

The Commission reconsidered its August 7 decision that the proposed new exception “should apply regardless of whether the alleged misconduct occurred during a mediation.” See Minutes (Aug. 7, 2015), p. 5. The Commission decided that the exception should only apply to evidence of misconduct that allegedly occurred in the context of a mediation. 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, a mediation brief, a mediation-related phone call, or other mediation-related activity). The key consideration is whether the misconduct allegedly occurred in a mediation context, not the time and date of the alleged misconduct.

Types of Proceedings in Which the Exception Would Apply

Commissioner King moved for reconsideration of the Commission’s August 7 decision that the proposed new exception should apply in a State Bar disciplinary proceeding and a legal malpractice case. See Minutes (Aug. 7, 2015), p. 5. More precisely, he moved that the exception should only apply in a State Bar disciplinary proceeding. His motion failed because it was not seconded.

The Commission also specifically considered whether the proposed new exception should apply in a proceeding relating to enforcement of a mediated settlement agreement (e.g., a proceeding to rescind a mediated settlement agreement or a proceeding to enforce such an agreement). The Commission decided that the exception should not apply in that type of proceeding. (Commissioner Boyer-Vine abstained from this decision.)

The Commission deferred decision on how to handle disputes relating to attorney-client fee agreements (see Memorandum 2015-45, pp. 23-25; First Supplement to Memorandum 2015-45, p. 3 & Exhibit pp. 3, 4, 6). The Commission asked the staff to provide further analysis of that matter for another meeting.
Purpose for Invoking the Exception

The Commission considered whether the proposed new exception should refer to “reporting” of professional malfeasance, not just proving or disproving such malfeasance (see Memorandum 2015-45, pp. 26, 27). The Commission decided that a reference to “reporting” is not necessary.

Limitation on Extent of Disclosure of Mediation Communications

The Commission decided that the proposed new exception should include a provision similar to Uniform Mediation Act Section 6(d), which provides:

(d) If a mediation communication is not privileged under subsection (a) or (b), only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under subsection (a) or (b) does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.

Particular Types of Mediation Communications

The Commission considered whether to restrict the proposed new exception to a particular type of mediation communication, such as a private attorney-client discussion (see Memorandum 2015-45, pp. 31-33). The Commission decided not to impose such a restriction; the exception should apply to all types of mediation evidence.

In Camera Screening Process

The Commission did not discuss the details of the in camera screening process for the proposed new exception (see Memorandum 2015-45, pp. 27-30, 33-41). The Commission asked the staff to provide further analysis of that matter for another meeting.

Mediator Testimony

The Commission considered whether to propose any revision of Evidence Code Section 703.5, relating to mediator testimony (see Memorandum 2015-45, pp. 41-43). The Commission decided to leave Section 703.5 as is. (Commissioner Capozzola voted against this decision.)

Consequences of Invoking the New Exception and Losing

The Commission considered the possibility of specifying a sanction for a court to impose on a party who:
• seeks admission or disclosure of mediation evidence pursuant to the proposed new exception,
• causes others to incur expenses or expend effort in response, and
• ultimately fails to prevail (either because the court concludes the evidence is not admissible or subject to disclosure, or because the evidence is admitted or disclosed but the party’s claim turns out to be meritless).

See Memorandum 2015-45, pp. 43-44.

The Commission decided not to specify a particular sanction to impose in those circumstances. (Commissioner Boyer-Vine was not present for this decision.)

Retroactivity

The Commission decided that the proposed new exception should only apply to evidence from a mediation that commences after the exception becomes operative. (Commissioner Boyer-Vine was not present for this decision.)

STUDY M-301 — DEADLY WEAPONS: MINOR CLEAN-UP ISSUES

The Commission considered Memorandum 2015-43 presenting a draft tentative recommendation proposing minor clean-up of various Penal Code provisions relating to deadly weapons.

The Commission approved the draft tentative recommendation, with one revision. On page 4, line 17, “subdivision” was replaced with “subdivisions.”

STUDY R-100 — FISH AND GAME LAW

The Commission considered Memorandum 2015-40, presenting a staff draft recommendation on Fish and Game Law: Technical Revisions and Minor Substantive Improvements (Part 2). The Commission approved the staff draft as a final recommendation.

The Commission also considered Memorandum 2015-41 and its First Supplement, presenting a draft of commercial fishing provisions. The Commission made the following decisions:

• The staff should further research whether the definition of “far offshore fishery” in Fish and Game Section 8111 should be revised to eliminate possible ambiguity regarding use of the word “fishery.” The staff should also solicit public comment on the issue in a Staff Note and report on whatever is learned.
The staff should present further discussion of Fish and Wildlife Code Section 10905, on the issue raised in the Staff Note following that section, after allowing time for public comment.

Finally, the Commission decided to conduct a separate study to identify and correct cross-reference errors in Health and Safety Code Section 131052.