APPROVED MINUTES OF MEETING

CALIFORNIA LAW REVISION COMMISSION

DECEMBER 1, 2016

LOS ANGELES

A meeting of the California Law Revision Commission was held in Los Angeles on December 1, 2016.

Commission:

Present: Susan Duncan Lee, Chairperson

Thomas Hallinan, Vice Chairperson

Damian Capozzola Taras Kihiczak Victor King Jane McAllister

Crystal Miller-O'Brien

Absent: Diane F. Boyer-Vine, Legislative Counsel

Assembly Member Ed Chau Senator Richard D. Roth

Staff: Brian Hebert, Executive Director

Barbara Gaal, Chief Deputy Counsel

Kristin Burford, Staff Counsel

Other Persons:

Bart J. Carev

John P. Chamberlain, Chamberlain & Viau, a plc

Suzanne V. Chamberlain, Chamberlain & Viau, a plc

Jill Cohen

Mary B. Culbert, The Loyola Law School Center for Conflict Resolution

Robert Flack

Fred Glassman, LACFLA

Donn Hoffman, Los Angeles District Attorney Cyber Investigation Response Team

Suanne Honey Janet Kaplan

Nora Kavner

Ron Kelly

Jeff Kichaven

David Kuroda

Kelly Cohen Leider

Hon. David W. Long (ret.), California Judges Association

Judith C. Nesburn
Phyllis Pollack, PGP Mediation
Ray Regalado, LA County Commission on Human Relations
Lynette Berg Robe, LA Family Law Mediators
Karen Rosin, Southern California Mediation Association
Fern Topas Salka
Ana Sambold, San Diego County Bar Association
Darlene Wanger
Alan Weinfeld, Parker Milliken

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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 below.

MINUTES OF SEPTEMBER 22, 2016, COMMISSION MEETING

Memorandum 2016-51 presented a draft of the Minutes of the September 22, 2016, Commission meeting. The Commission approved the Minutes as submitted.

(Commissioners Capozzola and Miller-O'Brien were not present when this decision was made. Commissioner King abstained.)

ADMINISTRATIVE MATTERS

13 **Report of Executive Director**

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The Executive Director reported:

- 1 (1) He will be meeting with newly-elected legislators to provide them with an overview of the Commission's work.
 - (2) He will be making a presentation on the Commission's work to a visiting delegation of lawmakers from China.

Commissioner Suggestions

6 No new Commissioner suggestions were made.

Annual Report

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- The Commission considered Memorandum 2016-52, presenting a draft of the 2016-2017 Annual Report. The Commission approved the report, subject to conforming revisions described in the memorandum, for publication and distribution to the Legislature and the Governor.
- 12 (Commissioners Capozzola and Miller-O'Brien were not present when this decision was made.)

New Topics and Priorities

- The Commission considered Memorandum 2016-53, presenting the status of the Commission's current program of work, the new topics suggestions received in 2016, and discussing work priorities for 2017.
- The Commission accepted the staff recommendations made in Memorandum 2016-53, including the following priorities for work in 2017:
- Manage the 2017 legislative program.
 - Continue the study on fish and wildlife law.
 - Continue the study on the relationship between mediation confidentiality and attorney malpractice and other misconduct.
 - Begin the study on the California Public Records Act and related laws.
 - Clarify the recordation requirement for transfer on death deeds.
- As staff resources permit, the Commission will also begin studies of the following topics, in descending order of priority:
 - Creditor claims against nonprobate assets, focusing on the narrow issue previously identified for initial study.
- The civil discovery issue raised by Commissioner Capozzola (see pages 33-35 of Memorandum 2016-53) and perhaps other previously suggested civil discovery topics. The staff should prepare a list of the previous suggestions for the Commission to examine.

Trial court restructuring.

- Codification of the California Supreme Court's reformation of the pre-condemnation statute (to provide a jury trial option).
- Other topics discussed in Memorandum 2016-53.

5 (Commissioners Capozzola and Miller-O'Brien were not present when those decisions were made.)

2016 LEGISLATIVE PROGRAM

The Commission considered Memorandum 2016-54, discussing the final status of its 2016 Legislative Program. No Commission action was required or taken.

STUDY G-301 — GOVERNMENT INTERRUPTION OF COMMUNICATION SERVICES

The Commission considered Memorandum 2016-56 and its First Supplement, presenting a revised draft recommendation regarding government interruption of communication services.

The Commission approved the draft as its final recommendation, with one revision. The preliminary part should make clear that the Commission received a comment asserting that cell-site simulators can disrupt communications, but the Commission has no position on whether those devices should be specially regulated for that reason. The staff should submit draft language to that effect to the Chair, for her approval.

STUDY H-859 — COMMON INTEREST DEVELOPMENTS:

MECHANICS LIENS AND COMMON AREA

The Commission considered Memorandum 2016-55, presenting a revised draft recommendation relating to the application of mechanics lien law to common interest developments.

The Commission approved the draft as its final recommendation, with one revision. Proposed Civil Code Sections 4620 and 6660 were revised to replace the word "promptly" with language requiring notice "within 60 days."

(Commissioners Capozzola and Miller-O'Brien were not present when those decisions were made.)

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

The Commission considered Memorandum 2016-58 (Draft Legislation to Implement the Commission's Preliminary Decisions). The Commission also considered the material in the First Supplement to Memorandum 2016-60 that pertains to Memorandum 2016-58.

For purposes of a tentative recommendation, the Commission made a number of decisions relating to the "Discussion Draft" shown on pages 5-7 of Memorandum 2016-58. Those decisions are described below.

Resolution of the Underlying Mediated Dispute

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31 32 The Commission discussed the issues raised at pages 8-10 of Memorandum 2016-58, including the possible revision of proposed Evidence Code Section 1120.5 that is shown at the top of page 9. The Commission decided not to make such a revision.

(Commissioner King voted to revise proposed Evidence Code Section 1120.5 as shown at the top of page 9, or in a similar manner.)

Standard for Admissibility of Mediation Evidence

The Commission discussed which admissibility standard to use in proposed Evidence Code Section 1120.5 (see pages 10-15 of Memorandum 2016-58). The Commission decided to stick with the relevancy standard used in the Discussion Draft.

(Commissioners King and McAllister voted against this decision.)

Standard for Discovery of Mediation Evidence

The Commission discussed which disclosure standard to use in proposed Evidence Code Section 1120.5 (see pages 15-17 of Memorandum 2016-58). The Commission decided to stick with the relevancy standard used in the Discussion Draft.

(Commissioner Kihiczak was not present for this decision.)

Types of Disputes in Which the New Exception Would Apply

The Commission discussed the types of disputes in which proposed Evidence Code Section 1120.5 would apply (see pages 17-25 of Memorandum 2016-58). It made the following decisions regarding that matter:

- 1 State Bar Disciplinary Proceeding
- 2 Proposed Evidence Code Section 1120.5(a)(2)(A) in the Discussion Draft is 3 satisfactory. No revisions of it are needed.
- 4 Legal Malpractice Claim

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- Proposed Evidence Code Section 1120.5(a)(2)(B) in the Discussion Draft is satisfactory. No revisions of it are needed.
 - The corresponding Comment should be revised to incorporate the language that is quoted in the first bullet point on page 20 of Memorandum 2016-58. Put differently, the Comment should state:
 - Section 1120.5 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.
 - Attorney-Client Fee Disputes
 - Proposed Evidence Code Section 1120.5(a)(2) in the Discussion Draft is satisfactory. No revisions of it are needed to address attorney-client fee disputes.
 - (Commissioner Kihiczak was not present for this decision or any other decision regarding the types of disputes in which proposed Evidence Code Section 1120.5 would apply.)

Possible Limitations on the Scope of the Exception

- The Commission discussed whether proposed Evidence Code Section 1120.5 should be made inapplicable to (1) community-based mediation programs funded under the Dispute Resolution Programs Act and/or (2) family law mediations (see pages 25-33 of Memorandum 2016-58). The Commission decided not to make such changes to the Discussion Draft.
- 33 (Commissioner Kihiczak was not present for this decision.)

Instructions to Litigants or Other Special Rules

The Commission discussed whether to propose that the Judicial Council and/or the State Bar study and develop means of preventing improper

disclosure of mediation evidence in adjudicating a cause of action for damages against a lawyer based on mediation malpractice (see pages 33-36 of Memorandum 2016-58). The Commission decided not to propose anything along

The Commission also discussed whether to add a notice provision to proposed Evidence Code Section 1120.5, along the lines shown on page 36 of Memorandum 2016-58. The Commission decided to add such a provision, but it asked the staff to revise the language to address the possibility that a disputant might not know or be able to determine the identity of all of the mediation participants.

(Commissioner Kihiczak was not present for any of these decisions.)

Data Collection and Evaluation

those lines.

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The Commission discussed the possibility of requiring the State Bar and/or the court system to collect some data if the Commission's proposed new mediation confidentiality exception is enacted (see pages 36-38 of Memorandum 2016-58). The Commission decided not to include any such requirement in its tentative recommendation.

(Commissioner Kihiczak was not present for this decision.)

STUDY R-100 — FISH AND GAME LAW

The Commission considered Memorandum 2016-57, relating to the tentative recommendation that is currently being prepared. The Commission decided against proposing any reform of the existing procedure that governs the forfeiture of property used to violate the Fish and Game Code.

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