STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Reports,

Recommendations,

and Studies

Volume 45

(2017-18)

California Law Revision Commission
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PREFACE

Bound Volume 45 contains the Commission's *2017-2018 Annual Report,* three Commission recommendations to the Legislature approved in 2017, the Commission's *2018-2019 Annual Report*, and three Commission recommendations to the Legislature approved in 2018.

Legislative histories of Commission measures enacted in the 2017 legislative year are contained in the *2017-2018 Annual Report,* beginning on page 310.

Legislative histories of Commission measures enacted in the 2018 legislative year are contained in the *2018-2019 Annual Report,* beginning on page 499.

The *Cumulative Table of Sections Affected by Commission Recommendations,* following this preface, lists all sections of the Constitution, codes, and session laws that have been adopted, amended, or repealed on recommendation of the Commission, except as otherwise noted.

The annual reports and recommendations contained in Volume 45 are also available on the Commission's website at *www.clrc.ca.gov*.

CUMULATIVE TABLE OF SECTIONS AFFECTED BY COMMISSION RECOMMENDATIONS

Instructions for Use of Table

The table starting on page T.3 lists constitutional provisions, code sections, and uncodified sections that have been adopted, amended, or repealed as a result of Commission recommendations.[1] The table is cumulative through December 31, 2018.[2]

For each entry, the table uses the following codes to indicate the legislative action that was taken:

"(A)" for an amendment.
"(N)" for a new provision.
"(R)" for a repealed provision.
"(C)" for a change to a Commission Comment.
"(#)" for a change to Section numbering.

When a code section has been renumbered, both the old and new section numbers appear in the table with a (#) code. If the text of the renumbered section was amended, the old section number also appears as a separate entry, with an (A) code.

Each entry also provides a citation to the Commission report that recommended the listed enactment, followed by a citation to any subsequent Commission report relating to that recommendation.

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1. Sections are listed in decimal order regardless of their order within the codes (e.g., Government Code Section 26625.10 precedes Section 26625.2 in the table).

2. The Commission did not publish reports concerning the following codifications enacted on Commission recommendation: *Partial Revision of Education Code* (1955 Cal. Stat. chs. 799 & 877); *Fish and Game Code* (1957 Cal. Stat. ch. 456); *Codification of Laws Relating to Grand Juries* (1959 Cal. Stat. ch. 501). No references to these codifications are contained in the cumulative table. In addition, the repeal of the Probate Code is not indicated for each section of the repealed code. See the note at the beginning of the listing for the repealed Probate Code.

Citations to Commission reports are given in the form "vv:pp," where "vv" is the volume number and "pp" is the page number (e.g., 32:1 refers to page one of volume 32).[3]

> **Example**: The table entry for Business and Professions Code Section 4160 reads:
>
> **4160 (A).....25:55, 25:636, 25:711**
>
> The entry indicates that Section 4160 was amended pursuant to a Commission recommendation. The Commission recommendation that proposed the amendment begins on page 55 of volume 25. Legislative history on the enactment begins on pages 636 and 711 of volume 25.

For a cumulative listing of legislative action on Commission recommendations, see Appendix 3 of the *2018-2019 Annual Report* (at page 517 of this volume).

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3. References to "LH" are to the Legislative History section of the cited volume. "AR" refers to the Annual Report for the year and volume cited. Entries such as "N7" are page numbers in early bound volumes.

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(Repealed by 1990 Cal. Stat. ch. 79, § 13, operative July 1, 1991)

This table does not include citations to 1990 legislation repealing sections that are continued in the new Probate Code. Accordingly, citations to sections repealed by the following are omitted: 1990 Cal. Stat. ch. 79, § 13 (1851 sections), 1990 Cal. Stat. ch. 140, §§ 19-34 (16 sections), 1990 Cal. Stat. ch. 324, § 4 (1 section), 1990 Cal. Stat. ch. 1307, § 6 (11 sections).

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STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Revocable Transfer on Death Deed: Recordation

April 2017
(with revisions approved in April 2018)

California Law Revision Commission
c/o UC Davis School of Law
Davis, CA 95616
www.clrc.ca.gov

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

Cite this report as *Revocable Transfer on Death Deed: Recordation,* 45 Cal. L. Revision Comm'n Reports 1 (2017).

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION
c/o UC Davis School of Law
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April 13, 2017

To: The Honorable Edmund G. Brown, Jr.
Governor of California, and
The Legislature of California

Under existing law, a revocable transfer on death deed ("RTODD") must be recorded. It is not entirely clear whether that requirement applies to the "Common Questions" instructional page that is part of the statutory RTODD form (the "FAQ").

Ambiguity on that point is a problem.

At worst, it could lead to the invalidation of an otherwise valid deed, simply because the transferor failed to record the FAQ.

Even if the validity of such a deed is eventually upheld by a court, any uncertainty as to the validity of the RTODD would itself be problematic. If the legal validity of the deed is in question, a beneficiary may be unable to obtain title insurance. A quiet title action may then be required to obtain clear title. That would defeat the purpose of the RTODD as a means of transferring real property on death without the cost and delay of a judicial proceeding.

The Commission recommends that the law be revised to make clear that recordation of the FAQ is not required and that failure to record the FAQ has no effect on the validity of an RTODD. This rule would apply retroactively, if the transferor is still alive when the new law takes effect.

This recommendation was prepared pursuant to Section 21 of Chapter 293 of the Statutes of 2015.

Respectfully submitted,

Susan Duncan Lee
Chairperson

REVOCABLE TRANSFER ON DEATH DEED: RECORDATION

The Commission has been directed to study the law that authorizes the use of a revocable transfer on death deed ("RTODD") to transfer real property on death, outside of probate.[1] As part of that study, the Commission is to recommend changes to the RTODD statute to make it more effective and avoid misunderstanding.

The deadline for completion of the report is January 1, 2020. However, the Commission has learned of one problem that warrants more immediate action. An ambiguity in the provision that requires recordation of an RTODD could have serious problematic consequences. This recommendation proposes revisions to resolve the ambiguity.

THE PROBLEM

In order to be legally effective, an RTODD must be recorded, within 60 days of the date that it was executed.[2]

The RTODD must be executed using a specified statutory form.[3] That form has two parts:

(1) A "deed" page with fillable fields, which must be completed, signed by the transferor, and notarized.[4] This page provides all of the necessary information and authentication required for an effective property conveyance.

(2) An "FAQ" page that provides answers to common questions about the effect of an RTODD and the

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1. 2015 Cal. Stat. ch. 293, § 21.

2. Prob. Code § 5626(a) ("A revocable transfer on death deed is not effective unless the deed is recorded on or before 60 days after the date it was executed.").

3. Prob. Code § 5642.

4. Prob. Code § 5642(a).

> procedure for executing one.[5] This page is purely instructional.

It is not entirely clear whether the provision that requires recordation of an RTODD only requires recordation of the deed page, or instead requires recordation of both the deed and FAQ pages.

Any uncertainty on that point could cause serious problems. First, if a court construes the statute as requiring recordation of the FAQ, any RTODD that was recorded without the FAQ could be invalidated. The property would then presumably be subject to probate, exactly what the transferor intended to avoid by executing an RTODD. Furthermore, the property could transfer to someone other than the intended beneficiary (by operation of an otherwise inapplicable will or rules of intestate succession).

Even if the failure to record an FAQ does not invalidate an RTODD, it could cast a problematic cloud on the title of property conveyed by an RTODD. If there is any uncertainty as to the validity of such an RTODD, the beneficiary may be unable to obtain title insurance. In that situation, the beneficiary may need to pursue a quiet title action in order to obtain clear title. This judicial proceeding would add cost and delay, which the transferor specifically intended to avoid through execution of an instrument that would transfer the property on death outside of probate.

RECOMMENDATION

The FAQ page provides beneficial information to persons who are considering executing an RTODD. It explains the legal consequences and limitations of the RTODD, and gives instructions on how to successfully execute one. A person who carefully reads the FAQ will make a more informed choice about whether to proceed and will be less likely to make a procedural mistake.

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5. Prob. Code § 5642(b).

Theoretically, requiring recordation of the FAQ would increase the likelihood that a transferor will see the FAQ and have an opportunity to read it. This could reduce the incidence of error and misuse.

However, that possible benefit seems to be outweighed by the severity of the harm that could result if recordation of the FAQ is required as a precondition for the validity of an RTODD. No matter how prominently the statutory form warns that recordation of the FAQ is required, it seems inevitable that some transferors would erroneously fail to record the FAQ. That technical error, which would not be directly related to the effect of the RTODD or the transferor's intentions, would result in the invalidation of an otherwise valid RTODD. This would defeat the transferor's clearly expressed intentions.

For that reason, the Commission recommends that the law be revised to make clear that recordation of the FAQ is not required. That rule should be made retroactive, to deeds that have not yet operated when the new law takes effect. This would remove any doubt about the validity of an RTODD that was recorded, without the FAQ, before the new law goes into effect.

PROPOSED LEGISLATION

Prob. Code § 5626 (amended). Recordation, delivery, and acceptance

SECTION 1. Section 5626 of the Probate Code is amended to read:

5626. (a) A revocable transfer on death deed is not effective unless the deed is recorded on or before 60 days after the date it was executed.

(b) The transferor is not required to deliver a revocable transfer on death deed to the beneficiary during the transferor's life.

(c) The beneficiary is not required to accept a revocable transfer on death deed from the transferor during the transferor's life.

(d)(1) Subdivision (a) does not require the recordation of the "Common Questions" language that is specified in subdivision (b) of Section 5642. The failure to record that part of the statutory form has no effect on the effectiveness of a revocable transfer on death deed.

(2)(A) This subdivision applies to a revocable transfer on death deed executed on or after the effective date of the act that added this subdivision.

(B) This subdivision applies to a revocable transfer on death deed executed before the effective date of the act that added this subdivision only if the transferor was alive on the effective date of the act that added this subdivision.

Comment. Section 5626 is amended to expressly provide that recordation of the "Common Questions" portion of the statutory revocable transfer on death deed form is not required. This rule applies retroactively to revocable transfer on death deeds that were recorded before the effective date of the new law, if the transferor is still alive when the new law takes effect.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Homestead Exemption: Dwelling

September 2017

California Law Revision Commission
c/o UC Davis School of Law
Davis, CA 95616
www.clrc.ca.gov

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

Cite this report as *Homestead Exemption: Dwelling,* 45 Cal. L. Revision Comm'n Reports 11 (2017).

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September 28, 2017

To: The Honorable Edmund G. Brown, Jr.
Governor of California, and
The Legislature of California

The California Constitution has long provided for a homestead exemption, to shield a person's principal dwelling from the enforcement of a money judgment.

Under existing law, an attempt by a judgment creditor to force the sale of a dwelling to satisfy a judgment must be authorized by court order. The purpose of that judicial review is to determine whether the property at issue is subject to a homestead exemption and, if so, to effectuate the exemption.

The statutes that establish and govern the judicial review requirement are phrased in a way that seems to presuppose that the property is, in fact, a dwelling. That phrasing could cause confusion about how to proceed when a judgment creditor believes that the property at issue is not a dwelling.

The Commission recommends that the law be revised to make clear that a judgment creditor may dispute whether property is a dwelling, as part of the existing process for judicial review of the proposed sale of a purported dwelling. The Commission believes that this would be a clarification of existing law, rather than a substantive change.

This recommendation was prepared pursuant to Resolution Chapter 150 of the Statutes of 2016.

Respectfully submitted,

Susan Duncan Lee
Chairperson

HOMESTEAD EXEMPTION: DWELLING

BACKGROUND

The California Constitution provides for a homestead exemption to protect certain real property from forced sale by creditors: "The Legislature shall protect, by law, from forced sale a certain portion of the homestead and other property of all heads of families."[1] Although constitutional in origin, the homestead exemption is defined and effectuated by statute.[2]

In general terms, a "homestead" is the principal dwelling of a judgment debtor or the judgment debtor's spouse.[3] A "dwelling" is any "place where a person resides," which can include (but is not limited to) a house, mobilehome, or boat.[4] Notably, the definition of "dwelling" focuses on how property is used (to reside), rather than on the existence of any particular kind of residential structure.

Under existing law, the interest of a natural person in a dwelling may not be sold to satisfy a money judgment without first obtaining an authorizing court order.[5] If a judgment creditor seeks to execute a writ of execution against a dwelling, to force its sale, the levying officer will notify the judgment creditor that the sale will not proceed without court authorization.[6]

The purpose of that judicial review is to determine whether the dwelling is a homestead. If so, the court will determine the amount of the homestead exemption and how to effectuate it.[7]

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1. Cal. Const. art. XX, § 1.5.

2. Code Civ. Proc. §§ 704.710-704.995.

3. Code Civ. Proc. § 704.710(c).

4. Code Civ. Proc. § 704.710(a).

5. Code Civ. Proc. § 704.740(a). For exemptions not relevant to this discussion, see Code Civ. Proc. § 704.740(b).

6. Code Civ. Proc. § 704.750.

7. Code Civ. Proc. § 704.780.

PROBLEM

The judicial review requirement described above is triggered when the levying officer determines that the property at issue is a dwelling and notifies the judgment creditor that an authorizing court order is required. From that point forward, the statutory procedure seems to presuppose that the levying officer's determination was correct, that the property at issue is, in fact, a dwelling. All of the relevant provisions refer to the property as a "dwelling."[8]

If the judgment creditor believes that the levying officer was not correct, because the property is not a dwelling, there is no obvious way for the judgment creditor to raise that issue. This can lead to confusion, with judges and practitioners unsure of how to proceed. That confusion can create cost and delay.

RECOMMENDATION

In order to avoid the problem described above, the Commission recommends that the law be revised to expressly state that a judgment creditor may dispute the existence of a homestead exemption on the ground that the property at issue is not a dwelling.

This would not be a substantive change, as the homestead exemption is only available for property that is a dwelling. It would instead be a clarification, dispelling any confusion as to whether the wording or structure of existing law precludes that issue being raised.

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8. See Code Civ. Proc. §§ 704.740(a) ("dwelling" may not be sold without court order), 704.750 (levying officer will not proceed with sale of "dwelling" without court order), 704.760 (judgment creditor's application for court order shall describe the "dwelling"), 704.770(b)(2) (service of documents on occupant of "dwelling"), 704.780 (determination of whether "dwelling" is homestead), 704.790 (order of sale of "dwelling" after non-appearance of specified persons).

PROPOSED LEGISLATION

Code Civ. Proc. § 704.755 (added). Dispute as to whether property is a dwelling

SECTION 1. Section 704.755 is added to the Code of Civil Procedure to read:

704.755. Notwithstanding any other provision of this article, a judgment creditor may dispute that the property at issue is a homestead, on the ground that the property is not a dwelling.

Comment. Section 704.755 is added to provide clarification. Although the language and structure of this article seems to presuppose that the property at issue is a dwelling, it does not prevent a judgment creditor from arguing to the contrary. This section makes that point express. This is not a substantive change. See Section 704.710(a) ("dwelling" defined), (c) ("homestead" defined).

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct

December 2017

California Law Revision Commission
c/o UC Davis School of Law
Davis, CA 95616
www.clrc.ca.gov

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

Cite this report as *Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct,* 45 Cal. L. Revision Comm'n Reports 19 (2017).

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December 1, 2017

To: The Honorable Edmund G. Brown, Jr.
Governor of California, and
The Legislature of California

Mediation is a popular, widely-used dispute resolution technique, in which a neutral person facilitates communication between disputants to assist them in reaching a mutually acceptable agreement. Many sources maintain that robust, uninhibited discussions are crucial to effective mediation.

To promote such discussions, existing law makes mediation communications and writings confidential and generally precludes the use or disclosure of a mediation communication or writing in a subsequent noncriminal case. This gives mediation participants some degree of assurance that what they say in a mediation will not later come back to hurt them.

Occasionally, however, a mediation participant alleges that the participant's attorney committed malpractice or engaged in other misconduct during a mediation. The law protecting mediation communications and writings might impede a court in evaluating such a claim and rendering a just decision.

By resolution (2012 Cal. Stat. res. ch. 108), the Legislature directed the Commission to analyze "the relationship under current law between mediation confidentiality and attorney malpractice and other misconduct …." The Legislature asked the Commission to address "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 ….”

The Legislature also instructed the Commission to consider certain Evidence Code provisions and their predecessors, the availability and propriety of contractual waivers, the law in other jurisdictions (including the Uniform Mediation Act and other statutory acts), scholarly commentary, judicial decisions in California and elsewhere, and any data regarding the impact of differing confidentiality rules on the use of mediation. The Legislature authorized the Commission to “make any recommendations that it deems appropriate for the revision of California law to balance the competing public interests between confidentiality and accountability.”

Part I of this report summarizes the Commission’s research for this study, including its work on the matters requested by the Legislature. Part II explains the Commission’s conclusions, which are the basis for the proposed legislation presented in Part III of the report.

Based on its review of the relevant law, policy considerations, and empirical evidence, the Commission recommends the creation of a new exception to mediation confidentiality. The proposed new exception is designed to hold attorneys accountable for misconduct in the mediation process, while also allowing attorneys to effectively rebut meritless misconduct claims.

This recommendation was prepared pursuant to Resolution Chapter 150 of the Statutes of 2016.

Respectfully submitted,

Thomas Hallinan
Chairperson

ACKNOWLEDGMENTS

Many individuals and organizations participated in the Commission's work on this study. The Commission would like to acknowledge the assistance provided by those who voiced support for all or part of its proposal, as well as those who expressed objections to the proposal.

Participation of a broad spectrum of knowledgeable persons aids the Commission in exploring a topic and evaluating ideas. The Commission benefits greatly from the public service the participants perform.

The persons who submitted comments, provided testimony, or otherwise helped with this study are listed below. *Inclusion of an individual or organization in this list in no way indicates that person's view on the proposed legislation.*

The Commission regrets any errors or omissions made in compiling these acknowledgments.

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RELATIONSHIP BETWEEN MEDIATION CONFIDENTIALITY AND ATTORNEY MALPRACTICE AND OTHER MISCONDUCT

California's court system is one of the largest in the world, handling millions of cases every year.[1] Many of those cases are resolved through mediation (court-connected or private),[2] a process in which a neutral person facilitates communication between disputants to assist them in reaching a mutually acceptable agreement.[3] Mediation is also widely used to resolve disputes without resorting to litigation.[4]

There is broad consensus that open and frank discussion among mediation participants is critical to effective mediation.[5] To

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1. Judicial Council of California, *2016 Court Statistics Report: Statewide Caseload Trends (2005-2006 Through 2014-2015),* at Preface & xvii. California courts processed about 6.8 million cases in fiscal year 2014-2015, the most recent year for which data is available.

2. See discussion of "Empirical Evidence" *infra*.

3. Evid. Code § 1115.

4. See, e.g., CLRC Staff Memorandum 2016-58, Exhibit p. 12 (comments of Mary B. Culbert, on behalf of Loyola Law School Center for Conflict Resolution) ("Los Angeles County alone serves around 20,000 people each year in its DRPA-Funded Community-Based Mediation Programs, which we estimate accounts for approximately 1/5 of all those served by DRPA-Funded Mediation Programs throughout the state (100,000 people total — this number is an extrapolation from Los Angeles County data).").

All staff memoranda and other Commission materials cited in this report are available on its website (www.clrc.ca.gov).

5. See, e.g., Blackmon-Malloy v. United States Capitol Police Bd., 575 F.3d 699, 711 (D.C. Cir. 2009) ("Congress understood what courts and commentators acknowledge, namely, that confidentiality plays a key role in the informal resolution of disputes."); Sheldone v. Pennsylvania Turnpike Comm'n, 104 F. Supp. 2d 511, 513 (W.D. Pa. 2000) ("Both federal and state courts have recognized that confidentiality is essential to the mediation process.… The need for confidence and trust in the mediation process is further evidenced by federal statute, the local rules of federal district courts …, and state statutes from across the country."); National Conference of Commissioners on Uniform State Laws,

promote such discussion, existing California law provides strong protection for mediation communications and writings: They are considered "confidential" and they are generally inadmissible and protected from disclosure in a noncriminal case.[6] This gives mediation participants some degree of assurance that what they say in mediation will not later be used to their detriment.[7]

Suppose, however, that a mediation participant wants to prove that the participant's attorney committed malpractice or engaged in other misconduct during a mediation.[8] In that situation, the statutory protection for mediation communications and writings may make it difficult for a court to properly assess the merits of the participant's claim and render a just decision.

Due to these competing considerations, the Legislature directed the Commission to analyze "the relationship under current law between mediation confidentiality and attorney malpractice and

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Uniform Mediation Act (2001) (hereafter, "UMA"), at Prefatory Note ("Candor during mediation is encouraged by maintaining the parties' and mediators' expectations regarding confidentiality of mediation communications.… Virtually all state legislatures have recognized the necessity of protecting mediation confidentiality."); Sarah Rudolph Cole, *Secrecy and Transparency in Dispute Resolution: Protecting Confidentiality in Mediation: A Promise Unfulfilled?,* 54 Kan. L. Rev. 1419, 1425 (2006) ("Legislators, courts, and commentators generally agree that maintaining confidentiality of mediation communications and documents prepared for mediation is essential to the success of the mediation process.").

6. See Evid. Code § 1119; see also Evid. Code §§ 703.5, 1115-1128.

7. See, e.g., Cassel v. Superior Court, 51 Cal. 4th 113, 131, 244 P.2d 1080, 119 Cal. Rptr. 3d 437 (2011) (principal purpose of mediation confidentiality statutes "is to assure prospective participants that their interests will not be damaged, first by attempting this alternative means of resolution, and then, once mediation is chosen, by making and communicating the candid disclosures and assessments that are most likely to produce a fair and reasonable mediation settlement.").

8. See, e.g., *id.* at 118.

other misconduct ….”[9] The Legislature requested extensive background research on the topic, in specific areas.[10]

Part I of this report summarizes the Commission’s research for this study, including its work on the matters requested by the Legislature. Part II presents the Commission’s conclusions, which are the basis for the proposed legislation presented in Part III of the report.

Based on its review of the relevant law, policy considerations, and empirical evidence, the Commission recommends the creation of a new exception to California’s mediation confidentiality law. The proposed new exception is designed to hold attorneys accountable for misconduct in the mediation process, while also allowing attorneys to effectively rebut meritless misconduct claims.

9. ACR 98 (Wagner), 2012 Cal. Stat. res. ch. 108.

10. See *id*.

PART I. RESEARCH FINDINGS

In this part of its report, the Commission provides some background information and then describes the extensive research it has conducted for this study. The discussion is organized as follows:

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ASSEMBLY BILL 2025 AND THE INCEPTION OF THE COMMISSION'S STUDY

In *Cassel v. Superior Court,*[11] the California Supreme Court held that California's mediation confidentiality statutes must be strictly construed and are not subject to a judicially-crafted exception where a client sues for legal malpractice and seeks disclosure of private attorney-client discussions relating to a mediation.[12] The Court said that the statutory terms "must govern, even though they may compromise" a client's ability to prove legal malpractice.[13]

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11. 51 Cal. 4th at 118-19.

12. See *id.* at 123-33.

13. *Id.* at 119. For further information on *Cassel,* see discussion of "California Supreme Court Decisions on Mediation Confidentiality" *infra.*

Reaction to the *Cassel* ruling in 2011 was decidedly mixed. Some groups and individuals praised the decision, while others sharply criticized it.

In particular, the Conference of California Bar Associations ("CCBA")[14] concluded that the mediation confidentiality statutes should be amended to overturn the *Cassel* result.[15] At CCBA's urging, a bill was introduced to create a new statutory exception.[16] The proposed exception stated that the mediation confidentiality statutes *do not limit* the

> admissibility, in a State Bar disciplinary action, an action for legal malpractice, and/or an action for breach of fiduciary duty, of communications directly between the client and his or her attorney, only, where professional negligence or misconduct form the basis of the client's allegations against the client's attorney.[17]

The bill immediately prompted significant opposition.[18] It was therefore amended to direct the Commission to conduct this study.[19] The amended content of the bill was later transferred to the Commission's biennial resolution of authority, which was passed by the Legislature.[20]

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14. CCBA is a non-profit corporation comprised of numerous local, minority, statewide and specialty voluntary bar associations in California. See http://calconference.org/about_facts.html.

15. See CCBA Resolution 10-06-2011 (reproduced in CLRC Staff Memorandum 2013-39, Exhibit pp. 10-12).

16. See AB 2025 (Wagner), as introduced on Feb. 23, 2012.

17. See *id*. at 2.

18. When the Commission began working on this study, mediator Ron Kelly provided the Commission with a set of the support and opposition letters pertaining to AB 2025 (Wagner), as introduced on Feb. 23, 2012. His cover letter and enclosures are available on the Commission's website (see http://www.clrc.ca.gov/pub/Misc-Report/AM-K402-9:21:12.pdf).

19. See AB 2025 (Gorell), as amended in Assembly, May 10, 2012.

20. See ACR 98 (Wagner), 2012 Cal. Stat. res. ch. 108.

The resolution states in pertinent part:

> *Resolved,* That the Legislature approves for study by the California Law Revision Commission the new topic listed below:
>
> (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:
>
> (1) 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.
>
> (2) The availability and propriety of contractual waivers.
>
> (3) 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.[21]

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21. See *id.* at 4.

SCOPE OF STUDY

The legislative resolution asks the Commission to analyze "the relationship under current law between mediation confidentiality and *attorney malpractice and other misconduct* …." To determine the proper scope of this study, the Commission had to resolve (1) which types of misconduct to consider and (2) whether to focus only on misconduct *in a mediation context,* as opposed to misconduct more generally.

Many different types of bad behavior could theoretically occur during a mediation.[22] In addition, mediation communications

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22. At one extreme, a mediation participant could commit a criminal act while attending a mediation session (such as assaulting another participant or stealing something from another participant's unattended briefcase). Importantly, the code provisions that restrict the admissibility and disclosure of mediation communications and writings only apply in a noncriminal proceeding (see Evid. Code § 1119(a), (b)), and only apply to conduct that is intended as an assertion (see, e.g., Radford v. Shehorn, 187 Cal. App. 4th 852, 857, 114 Cal. Rptr. 3d 499 (2010)).

At another extreme, a mediation participant might be faulted for failing to comply with a court order requiring mediation. Some types of noncompliance with such an order (such as failing to attend a mediation or bring a required representative) might be subject to proof without delving into mediation communications. See, e.g., Foxgate Homeowners' Ass'n v. Bramalea California, Inc., 26 Cal. 4th 1, 15, 25 P.3d 1117, 128 Cal. Rptr. 2d 642 (2001). Other times, a charge of noncompliance might be based on a participant's failure to make a settlement offer. Such a charge would be groundless, because a mediated settlement agreement must be voluntary and a mediation participant is entitled to withdraw from mediation at any time. See Evid. Code § 1115(a); Cal. R. Ct. 3.853; see generally Gaines v. Fidelity Nat'l Title Ins. Co., 62 Cal. 4th 1081, 1103, 365 P.3d 904, 199 Cal. Rptr. 3d 137 (2016); Jeld-Wen, Inc. v. Superior Court, 146 Cal. App. 4th 536, 540-41, 53 Cal. Rptr. 3d 115 (2007); 6 B. Witkin, Cal. Procedure *Proceedings Without Trial* § 486, p. 942 (5th ed. 2008).

In between these extremes, a mediation participant might engage in nonviolent behavior that could be subject to criminal penalties but usually is only pursued civilly (e.g., fraud or some types of extortion). A mediation participant could also engage in noncriminal misconduct at a mediation, such as negligence.

might provide evidence relating to misconduct that occurred earlier than, or separate and apart from, the mediation process.[23]

The legislative resolution directing this study contains several references to attorneys, attorney misconduct, and attorney organizations. It also refers specifically to "professional ethics" and "client rights," suggesting a focus on misconduct in a professional capacity.[24] In addition, the resolution refers to Evidence Code Section 958, which relates to "an issue of breach, by the *lawyer* or by the client, of a duty arising out of the *lawyer*-client relationship."[25]

Importantly, the resolution singles out *Cassel* and two other California cases for particular attention. Each of those cases involved the intersection of mediation confidentiality and alleged *attorney* misconduct in a *professional* capacity in a *mediation context*.[26]

Of particular note, a professional attending a mediation might violate a professional duty or rule, or fail to comply with a professional standard of care. Depending on the applicable professional requirements, this type of misconduct could be committed by any type of professional: The mediator, the attorneys representing clients at the mediation, or a doctor, accountant, insurer, contractor, engineer, or other professional providing advice or otherwise acting in a professional capacity.

23. See, e.g., Rinaker v. Superior Court, 62 Cal. App. 4th 155, 74 Cal. Rptr. 2d 464 (1998).

24. For the text of the resolution with the pertinent terms italicized, see CLRC Staff Memorandum 2015-34, pp. 5-6.

25. Evid. Code § 958 (emphasis added).

26. In *Cassel,* the plaintiff "sued his attorneys for malpractice, breach of fiduciary duty, fraud, and breach of contract" in representing him in a mediation. 51 Cal. 4th at 118. He alleged that "by bad advice, deception, and coercion, the attorneys, who had a conflict of interest, induced him to settle for a lower amount than he had told them he would accept, and for less than the case was worth." *Id.*

Similarly, in *Porter v. Wyner,* the plaintiffs sued their law firm for "legal malpractice, breach of fiduciary duty, constructive fraud, negligent misrepresentation, breach of fee agreement, rescission, unjust enrichment and liability for unpaid wages." 107 Cal. Rptr. 3d 653, 658 (2010) (footnote omitted)

The history of the resolution provides further insight into the intended scope of study. Like the cases just discussed, that history suggests that the Commission should study and provide a recommendation on the relationship between mediation confidentiality and alleged *attorney* misconduct in a *professional* capacity in a *mediation context* (including, but not limited to, legal malpractice).[27]

This report focuses on that topic. In taking that approach, the Commission recognized that the Legislature gave it wide rein to choose the best means of addressing the topic.[28] Because the area is controversial, it seemed prudent to stick closely to the assigned topic.

Of necessity, however, the Commission's research for this study has been more wide-ranging. The available research materials are not organized in a manner facilitating a focus on alleged professional misconduct of attorneys in a mediation setting. In addition, materials involving other types of mediation misconduct

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(formerly published at 183 Cal. App. 4th 949). The plaintiffs claimed that the firm gave them incorrect tax advice in connection with a mediated settlement agreement, failed to pay them part of the attorney fee portion of the settlement proceeds as promised during the mediation, and failed to compensate one of the plaintiffs for services rendered as a paralegal. See *id*. at 655-57.

The third case cited in the legislative resolution is *Wimsatt v. Superior Court,* 152 Cal. App. 4th 137, 61 Cal. Rptr. 3d 200 (2007). This was another attorney-client dispute relating to a mediation. The plaintiff alleged that his law firm breached its fiduciary duty by making a low settlement demand against his wishes on the eve of a mediation, which ultimately compromised the plaintiff's ability to obtain a satisfactory settlement. See *id*. at 202-04, 206.

These cases are described in greater detail later in this report. See the discussions of "California Supreme Court Decisions on Mediation" and "Other Decisions on the Intersection of Mediation Confidentiality and Attorney Misconduct Under California Law" *infra*.

27. See CLRC Staff Memorandum 2015-34 & sources cited therein.

28. The last sentence of the legislative resolution authorizes the Commission to "make *any recommendations that it deems appropriate* for the revision of California law to balance the competing public interests between confidentiality and accountability." See ACR 98 (Wagner), 2012 Cal. Stat. res. ch. 108 (emphasis added).

(such as alleged mediator misconduct or alleged misconduct by other mediation participants, particularly professionals) are sometimes instructive by way of analogy. Thus, this report describes some research in those areas, as well as research on the specific topic at hand.[29]

METHODOLOGY

In this study, the Commission used its traditional study process, which is careful, deliberative, and transparent.[30] All of its meetings were open to the public, interested persons were encouraged to participate in the discussions, written comments were welcome at any time, and the Commission's written materials were and are freely available on its website.[31]

In the resolution requesting this study, the Legislature asked the Commission to seek input from a broad range of sources, "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,

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29. For further analysis regarding the scope of this study, see CLRC Staff Memorandum 2015-34.

30. Information on the Commission's study process is available on the Commission's website at http://www.clrc.ca.gov/Menu5_about/process.html. See also CLRC Staff Memorandum 2012-1; B. Gaal, *Evidence Legislation in California,* 36 Southwestern Univ. L. Rev. 561 (2008). For a detailed discussion about the use of Commission materials to determine legislative intent, see *2013-2014 Annual Report,* 43 Cal. L. Revision Comm'n Reports 253, 266-73 (2013) & sources cited therein.

31. See http://www.clrc.ca.gov/K402.html. At the bottom of that webpage, interested persons were able to electronically subscribe to receive new materials relating to the study as they were generated.

The Commission did not hire a consultant or select an expert advisor for this study. It was clear from the outset that the Commission would receive abundant input from persons with expertise in the area. Selecting a particular person to provide expert assistance would have been divisive and counterproductive. Instead, the Commission's staff did the background research and analysis.

and mediation trade associations."[32] That is consistent with how the Commission normally conducts its studies; input from a wide spectrum of knowledgeable sources is invaluable in the Commission's study process.

The Commission is fortunate to have received extensive input in this study, from persons with a wide variety of views.[33] The Commission much appreciates that input.

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32. 2012 Cal. Stat. res. ch. 108.

33. All of the comments are available in staff memoranda on the Commission's website (see http://www.clrc.ca.gov/K402.html). Of particular note, the comments on the Commission's tentative recommendation are collected in CLRC Staff Memorandum 2017-51 and its First Supplement. As these materials reflect, the Commission received numerous comments from professionals with relevant expertise, including mediators, attorneys, judges, and legal scholars.

Mediation parties typically lack expertise in the field, but they also have an important perspective to offer. Among other things, they are less likely to be self-interested in this area than mediation professionals.

The Commission made special efforts to obtain input from mediation parties, because they are not organized in cohesive, well-established stakeholder groups like mediation professionals. See CLRC Minutes (Sept. 2014), p. 4; CLRC Staff Memorandum 2014-60, pp. 2-4. In seeking such comments, the Commission made clear that describing a mediation in hypothetical terms was sufficient for its purposes; it was neither necessary nor desirable to give a detailed description of actual mediation events. Depending on the circumstances, such a description could have affected pending litigation or been deemed a violation of existing mediation confidentiality restrictions.

Many mediation parties provided comments. See, e.g., CLRC Staff Memorandum 2017-9, Exhibit pp. 27-28 (comments of Angela Spanos); CLRC Staff Memorandum 2016-50, Exhibit pp. 1-2 (comments of Eddie Bernacchi, et al., on behalf of Air Conditioning Sheet Metal Ass'n, California Chapters of the National Electrical Contractors Ass'n, California Legislative Conference of the Plumbing, Heating & Piping Industry, Northern California Allied Trades, Wall & Ceiling Alliance, Associated General Contractors, California Building Industry Ass'n, Construction Employers Ass'n, Southern California Contractors Ass'n, United Contractors & Western Line Constructors); CLRC Staff Memorandum 2015-46, Exhibit pp. 234-35 (comments of Bonnie P. Harris); First Supplement to CLRC Staff Memorandum 2013-47, Exhibit pp. 5 (comments of Bill Chan), 17-23 (comments of Deborah Blair Porter); Second

Many of the comments stress the importance of protecting mediation confidentiality, rather than ensuring attorney accountability for mediation misconduct.[34] While the Commission balanced the competing considerations differently than many of the commenters, all of the input was important in shaping the Commission's recommendation.

TERMINOLOGY

A few words about terminology may be helpful before turning to the substance of this study. In particular, there are some complexities relating to the terms "mediation confidentiality" and "mediation privilege."

"Mediation Confidentiality"

Courts and commentators often use the term "mediation confidentiality" loosely, to refer to one or more of the following types of protection for mediation communications (oral or written):

(1) A statute or rule making mediation communications inadmissible in a legal proceeding.

(2) A statute or rule preventing compelled discovery or disclosure of mediation communications in a legal proceeding.

(3) A statute or rule providing that mediation communications must be kept confidential and not disclosed to anyone (i.e., true confidentiality).

(4) A statute or rule precluding a mediator from testifying about a mediation that the mediator conducted.

Supplement to CLRC Staff Memorandum 2013-39, Exhibit pp. 1-2 (comments of Kazuko Artus); CLRC Staff Memorandum 2014-36, Exhibit pp. 3-4 (comments of Jullie Doyle), 5-8 (comments of Karen Mak).

34. See, e.g., Memorandum 2017-52 (analyzing comments on the Commission's tentative recommendation).

(5) A contractual agreement between mediation participants to keep mediation communications confidential to a specified extent.[35]

Such usage may result in confusion about the type of protection at stake.[36]

Ideally, it might be best to use the term "mediation confidentiality" only for a true confidentiality requirement (Item #3 or Item #5). In practice, however, the looser usage is so widespread, engrained, and comparatively convenient that it is hard to avoid.[37]

For that reason, this report often uses the term "mediation confidentiality" in the broader sense. Nonetheless, the Commission tried to be mindful of the potential for confusion and to employ more precise language when that appeared necessary.

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35. Among other things, such an agreement might prohibit a mediator from telling other mediation participants what a person said during a private caucus with the mediator.

36. For example, the New York State Bar Association's Committee on Alternative Dispute Resolution had the following comments about the Uniform Mediation Act:

> Despites its name, the UMA is an Act that addresses only whether mediation communications are discoverable or admissible in legal proceedings. Other than preserving the rights of parties to contract for confidentiality, it does not prescribe any rules governing confidentiality generally. Although it is debatable whether the UMA should be more comprehensive, the important fact for legislators and others in the legal community to remember is that the UMA is a very narrow Act addressing only the issue of privilege. *That many of those who would be impacted by the Act had and likely still have a misperception about the scope and purpose of the Act, was one of the first indications to the ADR Committee that a thorough and detailed analysis of the Act was needed.*

N.Y. State Bar Ass'n Committee on ADR, *The Uniform Mediation Act and Mediation in New York,* p. 3 (Nov. 1, 2001) (emphasis added).

37. There does not seem to be another commonly-accepted, shorthand way to refer to Items #1-#5. The phrase "protection of mediation communications" is a possible alternative, but it can be prohibitively cumbersome.

"Mediation Privilege"

A second terminological issue concerns references to a "mediation privilege." In California, Division 8 of the Evidence Code[38] contains the state's evidentiary privileges, such as the lawyer-client privilege and the physician-patient privilege. Certain general rules apply to those privileges.[39]

Importantly, the statutory provisions protecting mediation communications are not located with the evidentiary privileges. Rather, most of them are located in Division 9 of the Evidence Code,[40] which is entitled "Evidence Affected or Excluded by Extrinsic Policies."[41]

Consequently, it is improper to refer to those provisions as California's "mediation privilege."[42] Likewise, the general rules that apply to California's evidentiary privileges do not necessarily apply to its mediation confidentiality provisions.[43]

In some contexts, however, California's mediation confidentiality provisions are functionally equivalent to an evidentiary privilege and are treated as such. For example, federal

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38. Evid. Code §§ 900-1070.

39. For example, there is an implied waiver provision, under which almost every evidentiary privilege is implicitly waived if the holder of the privilege voluntarily discloses, or consents to disclosure of, a significant part of an otherwise privileged communication. See Evid. Code § 912. For additional examples, see Evid. Code §§ 911, 913-920.

40. Evid. Code §§ 1100-1161.

41. See Evid. Code §§ 1115-1128. The provision governing a mediator's competency to testify (Evid. Code § 703.5) is located in Division 6 of the Evidence Code, which is entitled "Witnesses."

42. See, e.g., *Cassel,* 51 Cal. 4th at 132 ("[T]he mediation confidentiality statutes do not create a 'privilege' in favor of any particular person."); *Wimsatt*, 152 Cal. App. 4th at 150 n.4 ("[T]he mediation confidentiality rules are not 'privileges' in the traditional sense ….").

43. For example, a waiver of mediation confidentiality under California law must be express, not implied. See Simmons v. Ghaderi, 44 Cal. 4th 570 187 P.3d 934, 80 Cal. Rptr. 3d 83 (2008).

courts have taken that approach in analyzing choice-of-law issues under Federal Rule of Evidence 501.[44]

It is also important to bear in mind that the consequences of being classified as an evidentiary "privilege" may vary from jurisdiction to jurisdiction. In jurisdictions using the Uniform Mediation Act, for example, the protection for mediation communications is denominated a "privilege,"[45] yet the circumstances under which it can be implicitly waived by disclosure are more limited than the circumstances for implicitly waiving one of the privileges in Division 8 of the Evidence Code.[46] It is thus necessary to use great care in describing and discussing the effects of a "privilege" in the mediation context.

KEY POLICY CONSIDERATIONS

Before examining existing law on mediation confidentiality, it may be helpful to identify some of the key policy considerations at stake in this study of the relationship between mediation confidentiality and attorney misconduct. This section of the Commission's report describes some of those policy considerations, without attempting to weigh them or otherwise assess their merits. A later section of the report focuses on the availability of empirical evidence relating to the pertinent policy

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44. See, e.g., Olam v. Congress Mortgage Co., 68 F. Supp. 2d 1110, 1120 n.15 (N.D. Cal. 1999) ("We decline to accept … the notion that the proviso of F.R.E. 501 does not apply whenever a state fails formally to label the protection it offers to mediation communications a 'privilege' using instead language that promises and mandates confidentiality. We would view such an analytical out as little more than a semantic [sleight] of hand.").

45. See UMA § 4 & Comment.

46. *Compare* UMA § 5 & Comment (UMA privilege cannot be implicitly waived by disclosure unless disclosure prejudices another mediation participant) *with* Evid. Code § 912 (establishing less stringent standard for waiver by disclosure, as described in *supra* note 39).

In contrast to those provisions, California's mediation confidentiality protections cannot be implicitly waived, regardless of the circumstances. See *supra* note 43.

considerations (or lack thereof).[47] At the end of this report (Parts II and III), the Commission explains its balancing and proposed treatment of the competing considerations.

Key Policy Underlying Mediation Confidentiality

It is first important to understand the policy basis underlying the existing protections for mediation confidentiality. The main policy argument for mediation confidentiality rests on four key premises:

(1) Confidentiality promotes candor in mediation.

(2) Candid discussions lead to successful mediation.

(3) Successful mediation encourages future use of mediation to resolve disputes.

(4) The use of mediation to resolve disputes is beneficial to society.

Each premise is discussed in order below.

Confidentiality Promotes Candor in Mediation

Like the constitutional guarantees of free speech, mediation confidentiality is meant to foster productive debate and discussion, but only in a particular setting among a select group of participants. As the Uniform Law Commission ("ULC") explains in the Uniform Mediation Act,

> mediators typically promote a candid and informal exchange regarding events in the past, as well as the parties' perceptions of and attitudes toward these events, and … encourage parties to think constructively and creatively about ways in which their differences might be resolved. This frank exchange can be achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes.[48]

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47. See discussion of "Empirical Evidence" *infra*.

48. UMA, *supra* note 5, at Prefatory Note.

Numerous other sources likewise maintain that assurance of confidentiality is crucial to promote frank discussion among mediation participants.[49] They explain that without such assurance, participants may be reluctant to speak freely, for fear of later having their words used against them.[50]

Candid Discussions Lead To Successful Mediation

It is also widely believed that the more candid and open parties are during a settlement discussion, the more likely a successful settlement becomes.[51] Talking freely may help disputants

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49. See, e.g., Fair v. Bakhtiari, 40 Cal. 4th 189, 194, 147 P.3d 653, 51 Cal. Rptr. 3d 871 (2006) (mediation confidentiality provisions of Evidence Code "were enacted to encourage mediation by permitting the parties to frankly exchange views, without fear that disclosures might be used against them in later proceedings"); *Foxgate*, 26 Cal. 4th at 15 (purpose of confidentiality is to promote candid and informal exchange regarding past events); Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 Geo. L.J. 2663, 2663-64 (1995) (when representatives in dispute have constituencies with widely different views of case, and meeting with "enemy" itself is considered signal of weakness, negotiations will not occur unless they can be held in privacy); CLRC Staff Memorandum 2015-54, Exhibit pp. 1-2 (comments of Donald Proby, on behalf of Ass'n for Dispute Resolution of Northern California) (Mediation confidentiality provisions "allow the parties to be open and transparent during negotiations without fear of later repercussions.").

50. "If participants cannot rely on the confidential treatment of everything that transpires during [mediation] sessions then counsel of necessity will feel constrained to conduct themselves in a cautious, tight-lipped manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution of a civil dispute." Sheldone v. Pennsylvania Turnpike Comm'n, 104 F. Supp. 2d 511, 513 (W.D. Pa. 2000), *quoting* Lake Utopia Paper Ltd. v. Connelly Containers, Inc., 608 F.2d 928, 930 (2d Cir. 1979).

51. See, e.g., *Cassel,* 51 Cal. 4th at 132-33 (Mediation confidentiality assures mediation participants that "their interests will not be damaged … by making and communicating the candid disclosures and assessments that are most likely to produce a fair and reasonable mediation settlement."); Brazil, *Protecting the Confidentiality of Settlement Negotiations,* 39 Hastings L.J. 955, 959 (1988) (hereafter, "Brazil (1988)") ("Rationality promotes settlement and respect for the system, and openness of communication is essential to rationality.");

understand each other's position, which may in turn promote settlement.[52] Similarly, a forthright apology or other honest gesture of conciliation may help lead to a settlement.[53]

It might not be enough for parties to communicate frankly with the mediator; it might also be necessary for them to be frank with each other.[54] Unless they can overcome their wariness about disclosing information to each other, they might not be able to find common ground and resolve their dispute.[55]

Similarly, reaching a resolution might require candid, robust discussion from other mediation participants. For example, an attorney might learn new information in a mediation or see a client

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Kerwin, Note, *The Discoverability of Settlement and ADR Communications: Federal Rule of Evidence 408 and Beyond,* 12 Rev. Litig. 665, 665 (1983) ("It is only natural that the more candid and open parties are during settlement proceedings, the more likely their efforts are to be successful.").

52. See, e.g., *Admissibility, Discoverability, and Confidentiality of Settlement Negotiations,* 29 Cal. L. Revision Comm'n Reports 345, 351 (1999) ("A frank settlement discussion can help disputants understand each other's position and improve prospects for a successful, mutually satisfactory settlement of the dispute."); see also Brazil (1988), *supra* note 51, at 959 (broad protection of settlement negotiations may "enhance the rationality of the negotiation process and improve the likelihood that litigants will understand the basis for the proposals that are put on the table; litigants would thus feel good about the terms they finally accept.").

53. See, e.g., *Admissibility, Discoverability, and Confidentiality*, *supra* note 52, at 351; CLRC Staff Memorandum 2015-45, Exhibit p. 26 (comments of Shawn Skillin) ("Mediated settlements often come about after discussion of issues that would be inadmissible and prejudicial in court. For instance, a party may make an admission, or make an apology in order to move toward settlement. An attorney would not advise that in another setting, but in mediation it may be appropriate.").

54. See, e.g., *Foxgate,* 26 Cal. 4th at 14, *quoting* Note, *Protecting Confidentiality in Mediation,* 98 Harv. L. Rev. 441, 445 (1984) (hereafter, "Harvard Note") ("'Mediation demands … that the parties feel free to be frank not only with the mediator but also with each other.'")

55. See, e.g., *Foxgate,* 26 Cal. 4th at 14, *quoting* Harvard Note, *supra* note 54, at 445 ("'Agreement may be impossible if the mediator cannot overcome the parties' wariness about confiding in each other during these sessions.'").

start to accept unpleasant realities. When caucusing in private, the attorney might encourage the client to settle for less than what the client thought was reasonable before the mediation. Such blunt advice might lead the client to accept a settlement that is in the client's best interest.[56] Without assurance of confidentiality, however, the attorney might be reluctant to recommend such a settlement,[57] for fear that the client will later have buyer's remorse and blame the attorney.[58]

Mediation confidentiality might also embolden an attorney to disclose a sensitive personal matter in a mediation, in hopes of

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56. See, e.g., CLRC Staff Memorandum 2015-46, Exhibit p. 205 (comments of Daniel Yamshon) ("Confidentiality allows experienced counsel to give sound advice that clients may not want to hear.").

57. An attorney cannot rely on the attorney-client privilege, because the attorney is not a holder of that privilege. See Evid. Code §§ 953, 954.

58. See, e.g., CLRC Staff Memorandum 2015-46, Exhibit p. 205 (comments of Daniel Yamshon) ("I can imagine a disputant, a few days after settlement, getting sage advice from their next-door neighbor, great uncle or astrologer about how they settled too low, immediately creating buyer's remorse and immediately seeking representation to sue the original lawyer for misconduct, malpractice or worse. The public reads headlines; not every slip and fall is a multi-million dollar case."); CLRC Staff Memorandum 2015-46, Exhibit p. 58 (comments of Paul Glusman) ("[W]ith the prospect of any dissatisfied litigant suing a lawyer for malpractice over what happened in mediation, it's going to be very hard to get any lawyers to bring cases to mediators if they can no longer be candid."); CLRC Staff Memorandum 2015-45, Exhibit p. 26 (comments of Shawn Skillin) (Attorneys "should be able to represent their clients in mediation and assist them in exploring strategies that can lead to settlement without being concerned that advice appropriate under mediation conditions, can later be used against them in a malpractice action.").

As the Court stated in *Cassel,*

> the Legislature might reasonably believe that protecting [private attorney-client conversations] facilitates the use of mediation as a means of dispute resolution by allowing frank discussions between a mediation disputant and the disputant's counsel about the strengths and weaknesses of the case, the progress of negotiations, and the terms of a fair settlement, without concern that the things said by either the client or the lawyers will become the subjects of later litigation against either.

51 Cal. 4th at 136.

helping achieve a favorable settlement for the client. For example, an attorney might tell the mediator about a stupid mistake the attorney once made, to help persuade the mediator that the mediation opponent might have made a similar stupid mistake in the dispute at hand. Absent mediation confidentiality, the attorney might prefer to keep quiet about this embarrassing personal experience.

Similar considerations might apply to a mediator, an expert attending the mediation (e.g., a tax accountant or a doctor), or a party's spouse or other mediation participant. A mediator with many years of experience put it this way:

> There is a magic involved in how mediated disputes resolve — and the resolutions can only occur when the participants believe their discussions are confidential and positions will be handled with respect and thoughtfulness …. It is extremely important to the process that participants understand that when they make suggestions and proposals that their ideas will not come back to bite them ….[59]

Successful Mediation Encourages Future Use of Mediation to Resolve Disputes

Another premise underlying mediation confidentiality is that successful mediation of a dispute will promote future use of mediation to resolve other disputes. This premise is often left unstated, but it is an implicit assumption of the many rules and statutes protecting mediation communications.

The idea is that whether disputants choose to mediate is tied to what they know about mediation success rates. If disputants view mediation as a costly, useless procedure, few disputants will want to mediate;[60] if disputants view mediation as an effective means of

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59. CLRC Staff Memorandum 2015-46, Exhibit p. 80 (comments of Vivian Holly); see also *id*. at Exhibit p. 145 (comments of Larry Rosen).

60. See generally CLRC Staff Memorandum 2015-46, Exhibit pp. 80 (comments of Vivian Holly) ("Losing confidentiality protections will turn into the death knell for mediation."), 182 (comments of Monika Tippie)

achieving a satisfactory settlement, many disputants will choose to mediate. Perceptions of the effectiveness of mediation (or lack thereof) presumably correlate with actual success rates, and thus with the volume of future mediations.

The Use of Mediation To Resolve Disputes Is Beneficial to Society

The final premise underlying mediation confidentiality is a widespread belief that encouraging mediation is beneficial to the public.[61] In establishing a mediation pilot project, the Legislature succinctly explained this point:

> In the case of many disputes, litigation culminating in a trial is costly, time consuming and stressful for the parties involved. Many disputes can be resolved in a fair and equitable manner through less formal processes.
>
> … Alternative processes for reducing the cost, time, and stress of dispute resolution, such as mediation, have been effectively used in California and elsewhere. In appropriate cases mediation provides parties with a simplified and economical procedure for obtaining prompt and equitable resolution of their disputes and a greater opportunity to participate directly in resolving these disputes. Mediation may also assist to reduce the backlog of cases burdening the judicial system.[62]

Mediation is thus thought to have multiple benefits:

- *Self-determination*. Mediation is consistent with democratic ideals of self-determination, because disputants directly participate in the process and strive to reach a mutually acceptable agreement.[63] Although

("[E]liminating confidentiality will mean that the number of people who choose mediation will plummet.").

61. See, e.g., Code Civ. Proc. § 1775(c) ("It is in the public interest for mediation to be encouraged and used where appropriate by the courts.").

62. Code Civ. Proc. § 1775(b), (c); see also *Wimsatt,* 152 Cal. App. 4th at 150.

63. See Evid. Code § 1115(a).

a court can compel disputants to mediate,[64] any settlement must be voluntary.[65]

- *Party satisfaction*. Because parties participate in mediation and have control over the result, they tend to be well-satisfied with the process.[66] The resolution is amicable, so mediation may be less stressful than litigation, further enhancing party satisfaction.[67] This stress reduction effect may be especially important in family disputes, particularly ones involving children.[68] Mediation also allows for creativity that may result in a win-win solution for the disputants, in

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64. See, e.g., Code Civ. Proc. §§ 1775-1775.15.

65. See Evid. Code § 1115(a); Cal. R. Ct. 3.853; see generally Gaines v. Fidelity Nat'l Title Ins. Co., 62 Cal. 4th 1081, 1103, 365 P.3d 904, 199 Cal. Rptr. 3d 137 (2016); Jeld-Wen, Inc. v. Superior Court, 146 Cal. App. 4th 536, 540-41, 53 Cal. Rptr. 3d 115 (2007); 6 B. Witkin, Cal. Procedure *Proceedings Without Trial* § 486, p. 942 (5th ed. 2008).

66. UMA, *supra* note 5, at Prefatory Note.

67. See, e.g., CLRC Staff Memorandum 2015-45, Exhibit p. 16 (comments of Bruce Edwards, past Chairman of the Board of JAMS) ("We can all agree that we live in a world with increasing stressors and conflict …. We desperately need any and all processes that encourage dialogue, find compromise and ultimately resolve conflict."); CLRC Staff Memorandum 2015-46, Exhibit p. 84 (comments of Betsy Johnson) (mediation "de-escalates conflict").

68. See, e.g., CLRC Staff Memorandum 2015-54, Exhibit p. 3 (comments of Collaborative Practice California) ("Family law matters hold a special place in jurisprudence in that traditional adversarial litigation is clearly harmful to families and children."); First Supplement to CLRC Staff Memorandum 2015-54, Exhibit p. 17 (comments of Hon Isabel Cohen (ret.)) ("The advantages of even a bad settlement … are … most importantly, to the emotional lives of children, which most recent studies now show are wrecked by the conflict between their parents, and not by the shared parenting plans."); First Supplement to CLRC Staff Memorandum 2015-46, Exhibit p. 7 (comments of Hon. Susan Finlay (ret.)) ("Mediation has been particularly helpful to divorcing parents since it enables them to preserve their co-parent relationship which benefits the children. If they do not have this option, then they are forced to litigate which destroys families, seriously damaging the children in the process.").

which both sides are able to attain their key objectives and thus are likely to be satisfied.[69]

- *Cost reduction*. A successful mediation allows disputants to avoid prohibitive litigation expenses.[70] As the Legislature has noted, mediation "can have the greatest benefit for the parties in a civil action when used early, before substantial discovery and other litigation costs have been incurred."[71] Cost savings attributable to mediation may further contribute to party satisfaction.
- *Delay reduction*. Through mediation, parties may be able to resolve a dispute more quickly than through the litigation process.[72] The early elimination of disputes might not only contribute to party satisfaction, but might also be beneficial to society generally.
- *Conservation of judicial resources and alleviation of court congestion*. Each successful mediation may conserve judicial resources and help to reduce court congestion. This in turn may allow judges to resolve the remaining cases more promptly and with a greater degree of care, thus promoting equitable results.[73]

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69. R. Fisher & W. Ury, Getting to Yes 56-80 (2d ed. 1991).

70. See, e.g., Third Supplement to CLRC Staff Memorandum 2015-46, Exhibit p. 5 (comments of Amy Newman, on behalf of Alternative Dispute Resolution Centers) (Mediation "clearly mitigates the costs of protracted litigation.").

71. Code Civ. Proc. § 1775(d).

72. See, e.g., Code Civ. Proc. § 1775(b), (c).

73. See, e.g., CLRC Staff Memorandum 2015-46, Exhibit pp. 1 (comments of Ron Kelly) ("Our budget-starved courts rely on confidential mediation to resolve a large part of their pending civil cases."), 141 (comments of Hon. Diane Ritchie (ret.)) ("Mediation drastically reduces the number of cases that go to trial. If part of the … confidentiality for mediation is removed, this will not be possible.… The courts cannot take on the burden of a massive increase in the number of trials without increasing the time a case gets to trial by many years.");

Attaining these societal benefits is the ultimate goal of, and justification for, provisions that protect mediation confidentiality.

Special Considerations Relating to Mediator Testimony

One final point is worth noting before turning to the countervailing policy interests in this study. Specifically, mediator testimony and mediator communications trigger special considerations with respect to mediation confidentiality, because it is critical for a mediator to be perceived as impartial.[74]

The concern is that no one will want to use a mediator who appears to be biased against them, yet it might be impossible for a mediator to maintain a reputation for impartiality if the mediator is forced to testify against a party, or the mediator's statements are used at a trial.[75] This effect may be particularly pronounced where

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Second Supplement to CLRC Staff Memorandum 2015-46, Exhibit p. 5 (comments of Daniel J. Kelly) ("The actual effect of [mediation] confidentiality is that it has served us well in the mediation process and, indeed, is the linchpin in bringing disputes to resolution prior to going to Court. Doing away with confidentiality in mediation will result in fewer resolutions and will ultimately mean hanging one more albatross around the neck of an already strained and grossly underfunded judicial apparatus.").

74. See, e.g., Third Supplement to CLRC Staff Memorandum 2015-46, Exhibit p. 7 (comments of Loretta Van Der Pol and J. Felix De La Torre, on behalf of Public Employment Relations Board (hereafter, "PERB")) ("While confidentiality serves the important role of fostering candid dialogue between the parties and the mediator, it is also a critical element for maintaining a mediator's impartiality. Were SMCS to lose the promise of absolute confidentiality, it risks losing its neutrality in the eyes of our constituents."); Second Supplement to CLRC Staff Memorandum 2014-60 (comments of Hon. Paul Aiello (ret.)) ("[A]ny possibility that a mediator might be called to testify in subsequent proceedings affects and diminishes the vital appearance of impartiality that must be preserved if the integrity of the ADR processes is not to be compromised.").

75. See, e.g., *In re* Anonymous, 283 F.3d 627, 639 (4th Cir. 2001) ("[G]ranting of consent for the mediator to participate in any manner in a subsequent proceeding would encourage perceptions of bias in future mediation sessions involving comparable parties and issues …."); N.L.R.B. v. Macaluso, 618 F.2d 51, 55 (9th Cir. 1980), *quoting* Tomlinson of High Point, Inc., 74

the same attorneys and parties repeatedly use a particular mediation service to resolve disputes of a certain type.[76]

A further concern is that the potential burdens of having to testify or provide evidence about a mediation may deter some mediators from continuing to serve as such. This is perhaps most likely to occur when mediators serve on a pro bono or poorly-compensated basis, as in some court-connected or community-based programs.[77]

The problem could also arise in other settings, however. As a federal court put it, forcing mediators to "give evidence that hurts

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N.L.R.B. 681, 688 (1947) ("'[C]onciliators must maintain a reputation for impartiality.… If conciliators were permitted or required to testify about their activities, or if the production of notes or reports of their activities could be required, not even the strictest adherence to purely factual matters would prevent the evidence from favoring or seeming to favor one side or the other.'"); Third Supplement to CLRC Staff Memorandum 2015-46, Exhibit p. 8 (comments of Loretta Van Der Pol and J. Felix De La Torre, on behalf of PERB), *quoting* Ellen Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?,* 85 Marquette L. Rev. 79, 82 (2001) (hereafter, "Deason (2001, re quest for uniformity)") ("'A mediator who testifies will inevitably be seen as acting contrary to the interests of one of the parties, which necessarily destroys her neutrality.'").

76. See Third Supplement to CLRC Staff Memorandum 2015-46, Exhibit p. 9 (comments of Loretta Van Der Pol and J. Felix De La Torre, on behalf of PERB) ("In the context of PERB's mediations, the damage to a mediator's neutrality is exacerbated because our mediators routinely work with many of the same labor attorneys and/or representatives for labor and management.").

77. See, e.g., *Olam,* 68 F. Supp. 2d at 1133 ("[O]rdering mediators to participate in proceedings arising out of mediations imposes economic and psychic burdens that could make some people reluctant to agree to serve as a mediator, especially in programs where that service is pro bono or poorly compensated."); CLRC Staff Memorandum 2016-58, Exhibit p. 13 (comments of Mary B. Culbert, on behalf of Loyola Law School Center for Conflict Resolution) ("[S]ubjecting mediators to subpoena disrupts the delivery of services and is particularly detrimental to community mediation programs because of their shoe-string budgets and reliance on volunteer mediators.… [T]he costly, time-consuming, and anxiety-provoking activity of fighting off subpoenas, for organizations with limited funding, could significantly impact the availability of volunteers to staff these community mediation programs.").

someone from whom they actively solicited trust … rips the fabric of their work and can threaten their sense of the center of their professional integrity."[78]

In many jurisdictions, concerns like the ones described above have led to special rules governing mediator testimony and mediator communications.[79] California is among these.[80]

Key Reasons For Permitting Disclosure of Mediation Communications To Establish Attorney Misconduct

The policy analysis for permitting disclosure of mediation communications bearing on attorney misconduct has several key components:

- Mediation confidentiality may deprive a party of evidence that would help prove that an attorney committed malpractice or engaged in other misconduct.
- Because mediation confidentiality may result in exclusion of relevant evidence, attorney misconduct may go unpunished.
- Allowing attorney misconduct to go unpunished may chill future use of mediation and deprive the public of its benefits.
- Allowing attorney misconduct to go unpunished may undermine attorney-client relations and the administration of justice.

Each point is discussed in order below.

Exclusion of Evidence of Attorney Misconduct

By accepting employment to provide legal advice or other legal services, an attorney "impliedly agrees to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly

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78. *Olam,* 68 F. Supp. 2d at 1133.

79. See discussion of "Law of Other Jurisdictions" *infra*.

80. See Evid. Code §§ 703.5, 1121.

possess and exercise in the performance of the tasks which they undertake."[81] The attorney-client relationship is a fiduciary relationship "of the very highest character," in which the attorney must serve the client with the "most conscientious fidelity."[82] An attorney is also "an officer of the court and is bound to work for the advancement of justice."[83]

In representing a client at a mediation, an attorney might not always comply with those professional duties.[84] Sometimes an attorney may make a significant mistake in the course of a mediation, one stemming from failure to exercise due care on a client's behalf.[85] For example, an attorney might give a client erroneous advice on the tax implications of a particular settlement approach,[86] or might inadvertently disclose a trade secret or

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81. Lucas v. Hamm, 56 Cal. 2d 583, 591, 364 P.2d 685, 15 Cal. Rptr. 821 (1961).

82. Cox v. Delmas, 99 Cal. 104, 123, 33 P. 836 (1892).

83. Hickman v. Taylor, 329 U.S. 495, 511 (1947).

84. See, e.g., CLRC Staff Memorandum 2015-36, Exhibit pp. 1-2 (comments of Gwire Law Firm) (estimating that about 50-150 potential clients contact law firm each year "about attorney conduct issues or communications that occurred during a mediation").

85. See, e.g., Horner v. Carter, 981 N.E.2d 1210 (Ind. S.Ct. 2013) (husband sought to use mediation communications to prove mistake in drafting of mediated settlement agreement, but mediation confidentiality requirement barred use of such evidence); *Wimsatt*, 152 Cal. App. 4th at 142-44 (mediation party sought to use mediation brief to prove attorney made unauthorized settlement demand and thus impaired party's ability to obtain satisfactory settlement, but mediation confidentiality requirement barred use of that brief); Gossett v. St. John, 2011 Cal. App. Unpub. LEXIS 3586, at *12 (2011) (client alleged that his attorneys failed to inform him that he would be personally liable under mediated settlement agreement).

In citing to *Gossett* and other unpublished or superseded decisions in this report, the Commission does not mean to imply that those decisions have any precedential value. Rather, the Commission is merely citing them for illustrative purposes in assessing the optimal legislative approach.

86. See, e.g., *Porter,* 107 Cal. Rptr. 3d at 955 (superseded opinion) (after mediation, dispute arose between attorney and clients over attorney's "alleged

damaging evidence. An attorney might also fail to exercise due care in recommending that a client accept a settlement offer made during a mediation, causing the client to settle a dispute for less than it is worth, or on unduly unfavorable terms.[87]

An unscrupulous attorney might even be dishonest in a mediation, to a client's detriment.[88] For example, an attorney might promise to reduce a client's fee to convince the client to settle a case, and then later renege on that promise.[89] Alternatively, an

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rendering of incorrect tax advice to the [clients] regarding settlement proceeds"); CLRC Staff Memorandum 2015-36, Exhibit p. 5 (comments of Gwire Law Firm) (potential client sought to bring malpractice suit alleging that in mediation "[l]awyer claimed, without having any valid basis for doing so, that settlement proceeds would be nontaxable").

87. See, e.g., Amis v. Greenberg Traurig LLP, 235 Cal. App. 4th 331, 185 Cal. Rptr. 3d 322 (2015) (client contended that his former attorney failed to adequately advise him of risks of mediated settlement agreement); *Cassel,* 51 Cal. 4th at 118 (plaintiff alleged that "by bad advice, deception, and coercion, the attorneys, who had a conflict of interest, induced him to settle for a lower amount than he had told them he would accept, and for less than the case was worth.").

88. See, e.g., Hadley v. The Cochran Firm, 2012 Cal. App. Unpub. LEXIS 5743 (2012) (plaintiffs claimed that their former attorneys had "tricked them into settling their claims against [a third party] by inducing them to sign a supposed confidentiality agreement at a mediation, and later appending the signature sheet to a settlement agreement.").

89. See, e.g., *In re* Bolanos, Case No. 12-O-12167 (Review Dep't of State Bar Ct., filed May 18, 2015), pp. 4-5 (*available at* http://www.statebarcourt.ca.gov/Portals/2/documents/opinions/Bolanos.pdf). In this unpublished opinion, the Review Department of the State Bar Court says:

> [The attorney/defendant] admits he agreed to modify his fee agreement at the mediation so that [the client/plaintiff] would receive $250,000, rather than a percentage, from the settlement.…
>
> The hearing judge found that, after the mediation, [the attorney/defendant] "came to the conclusion that the modification was invalid because there was no consideration for the alteration of the … fee agreement."

Id.

See also *Porter,* 107 Cal. Rptr. 3d at 655 (superseded opinion) ("The instant lawsuit arose as a result of [an attorney's] failure to follow through on a promise

attorney might threaten a client in a mediation or otherwise attempt to coerce a client to settle,[90] as by threatening to abandon the client on the eve of trial,[91] hounding a client's every move and unduly pressuring the client,[92] or threatening to expose embarrassing or otherwise harmful information about a client.[93]

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that was allegedly made to the [clients] during a mediation … wherein [the attorney] promised to pay the [clients] certain proceeds from their attorney fees."); CLRC Memorandum 2013-47, pp. 10-13 & Exhibit pp. 3-4 (comments of Sidney Tinberg); Second Supplement to CLRC Memorandum 2013-47, pp. 8-9 (comments of Jerome Sapiro).

By properly memorializing an attorney's promise to reduce a fee, made in the course of a mediation, a client could guard against having the attorney renege on the promise, at least in California. The mediation confidentiality statutes would not prevent proof of the attorney's promise, so long as it is properly memorialized in accordance with Evidence Code Section 1123 or 1124. An unsophisticated client may not know enough to take this step.

90. Provost v. Regents, 201 Cal. App. 4th 1299, 1302, 135 Cal. Rptr. 3d 591 (2011) (party claimed that mediated settlement agreement was unenforceable because his attorney, opposing counsel, and mediator coerced him into signing it through threats of criminal prosecution).

91. See, e.g., Chan v. Lund, 188 Cal. App. 4th 1159, 1164, 116 Cal. Rptr. 3d 122 (2011) (attorney "allegedly threatened on the eve of trial to withdraw from the case if [client] refused to participate in a further session with [the mediator] or if [client] refused to make concessions to settle the matter."); *Cassel*, 51 Cal. 4th at 120 (to convince client to accept offer made in mediation, attorneys allegedly "threatened to abandon [client] at the imminently pending trial").

92. See, e.g., *Cassel,* 51 Cal. 4th at 120 (Attorneys "even insisted on accompanying [client] to the bathroom, where they continued to 'hammer' him to settle. Finally, at midnight, after 14 hours of mediation, when he was exhausted and unable to think clearly, attorneys presented a written draft settlement agreement and evaded his questions about its complicated terms. Seeing no way to find new counsel before trial, and believing he had no other choice, he signed the agreement.").

Some clients may be able to protect themselves from such misconduct by walking out of the mediation. Other clients might be too intimidated to leave, or might not be sophisticated enough to realize that they are entitled to do so.

93. See, e.g., Rabe v. Dillard's, Inc., 214 S.W.3d 767 (Tex. Ct. App. 2006) (mediation party claimed that during mediation, opposing counsel threatened to

In the mediation process, an attorney might also say something that reveals or otherwise tends to suggest that the attorney engaged in prior misconduct.[94] For example, an attorney might admit to having lost a critical piece of evidence that the client entrusted to the attorney.

In each of these situations, a strict mediation confidentiality requirement might preclude a client from introducing evidence of the attorney's culpable or incriminating mediation communications in a later proceeding against the attorney. In other words, such a requirement might deprive a victimized client of valuable evidence of an attorney's wrongdoing.[95]

Loss of Evidence May Mean Culpable Conduct Goes Unpunished or Another Inequitable Result Occurs

In general, our justice system seeks truth by permitting parties to present all relevant evidence to the trier-of-fact.[96] Because mediation confidentiality can lead to exclusion of relevant evidence, in some instances it might mean that attorney misconduct goes unpunished or another inequitable result occurs.[97]

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contact worker's compensation carrier to advise that party had prior injury and was "doctor-shopping" for narcotics).

94. See, e.g., Fla. Mediator Ethics Advisory Committee Opin. No. 2006-005, *available at* http://www.flcourts.org/core/fileparse.php/283/urlt/MEACOpinion 2006-005.pdf (in course of mediation, attorney told mediator that attorney misspent funds held in escrow).

95. See, e.g., *Cassel,* 51 Cal. 4th at 136 (mediation confidentiality requirement may "result in the unavailability of valuable civil evidence"); see also *id*. at 135.

96. See, e.g., Evid. Code § 351; Steiny & Co. v. California Electric Supply Co., Inc., 79 Cal. App. 4th 285, 291, 93 Cal. Rptr. 2d 920 (2000).

97. See, e.g., *Olam,* 68 F. Supp. 2d at 1137 ("[R]efusing to compel the mediator to testify might well deprive the court of the evidence it needs to rule reliably on the plaintiff's contentions — and thus might either cause the court to impose an unjust outcome on the plaintiff or disable the court from enforcing the settlement.").

If an attorney misbehaves at a mediation, even a strict mediation confidentiality requirement would not prevent the client from telling others that

Excluded evidence may be critical to proving alleged misconduct, yet the bar against using it may shield an attorney from liability.[98] It is also possible that excluded mediation evidence may be critical to *disproving* alleged misconduct, yet the bar against using it could prevent such exoneration.[99]

Inequitable results like these would not necessarily occur every time a mediation confidentiality requirement precludes a client from introducing evidence against an attorney, or vice versa. In

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the attorney did not do a good job for the client and discouraging them from hiring the attorney. Likewise, the attorney could deny as much.

A strict mediation confidentiality requirement would, however, prevent both sides from using mediation communications to support and explain their positions. Without either side being able to provide some specificity, it may be difficult for market forces to properly respond to the situation. The impact on the attorney might not correlate with the attorney's degree of culpability, if any.

98. See, e.g., *Cassel,* 51 Cal. 4th at 119 (mediation confidentiality "may compromise [a client's] ability to prove his claim of legal malpractice."); *id.* at 138 (Chin, J., concurring) (mediation confidentiality "will effectively shield an attorney's actions during mediation … from a malpractice action even if those actions are incompetent or even deceptive."); *Wimsatt,* 152 Cal. App. 4th at 162 ("Preventing Kausch from accessing mediation-related communications may mean he must forgo his legal malpractice lawsuit against his own attorneys."); Kausch v. Wimsatt, 2009 Cal. App. Unpub. LEXIS 8566, at *2 ("[A]n attorney is immunized from any negligent and intentional torts committed in mediation when said torts are the result of communications made for the purpose of, in the course of, or pursuant to a mediation, or a mediation consultation. The bottom line is that Kausch is foreclosed from litigating his allegation that Magaña lowered Kausch's settlement demand without authorization, resulting in a settlement far below the reasonable value of his personal injury lawsuit.").

99. See, e.g., Grubaugh v. Blomo, 238 Ariz. 264, 359 P.3d 1008 (Ariz. Ct. App. 2015) (attorney sought to use mediation communications in defending against legal malpractice claim); *In re* Teligent, 640 F.3d 53 (2d Cir. 2011) (involving unsuccessful attempt by law firm accused of malpractice to obtain discovery of information from mediation it did not attend, which it claimed was critical to issues in malpractice case); First Supplement to CLRC Staff Memorandum 2013-47, pp. 8-9 (comments of Jeffrey W. Erdman) (explaining that "existing law, particularly as applied in *Cassel,* creates a hornet's nest for attorneys seeking to defend against professional negligence claims related to their conduct at mediation.").

some cases, the proponent of such evidence may not have a valid claim or defense; not every allegation of attorney misconduct is true or a valid basis for recovery.[100] In other cases, the proponent may be able to successfully establish a claim or defense without using the excluded mediation evidence.[101]

The most problematic situation appears to be misconduct that allegedly occurs *in a mediation context*. In that situation, much if not all of the relevant evidence for both sides may fall within the scope of a mediation confidentiality requirement and thus be

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100. See, e.g., FDIC v. White, 76 F. Supp. 2d 736 (N.D. Tex. 1999) (defendants claimed that opposing counsel and mediator threatened criminal prosecution to coerce settlement, but court rejected that claim after considering mediation communications.); Olam v. Congress Mortgage Co., 68 F. Supp. 2d 1110 (N.D. Cal. 1999) (After considering mediation communications, court concluded that there was "absolutely no basis" for finding that any action by plaintiff's attorney or defense counsel overbore plaintiff's will at mediation); *Porter,* 107 Cal. Rptr. 3d at 658 n.7 (superseded opinion) (trial court sustained demurrer to legal malpractice claim because clients "admitted they suffered no injury from [attorney's] allegedly incorrect tax advice" provided during mediation); Conwell v. Mallen, 2015 Cal. Super. LEXIS 11140 (No. CIV 488713), Aug. 18, 2015) (after considering mediation communications, court rejects legal malpractice claim, which alleged that attorneys engaged in mediation misconduct); First Supplement to CLRC Memorandum 2015-46, Exhibit p. 51 (comments of Gerald Klein) (mediation confidentiality could preclude attorney from introducing "evidence to demonstrate what really happened during the settlement process").

101. See, e.g., Benesch v. Green, 2009 U.S. Dist. LEXIS 117641, at *25 (2009) (denying summary judgment on legal malpractice claim because plaintiff had not yet had an opportunity to explore "the question of what evidence would be left after application of the mediation confidentiality statutes"); *In re* Malcolm, 2004 Cal. App. Unpub. LEXIS 10675, at *12 (2011) (husband "made no showing" that exclusion of mediation communications prejudiced his substantive rights to pursue malpractice action against his former attorneys, so husband was still "free to prosecute his malpractice action … using the property settlement and other nonconfidential evidence."); CLRC Staff Memorandum 2013-47, pp. 2-9 & Exhibit p. 2 (comments of Elizabeth Moreno & CLRC staff analysis thereof).

unavailable in resolving whether misconduct actually occurred.[102] As a result, a client may be left without a remedy for a meritorious legal malpractice claim, an unscrupulous or incompetent attorney may remain in practice without remedial measures to protect the public, or an attorney may be deprived of a valid defense to a malpractice claim or disciplinary proceeding. In contrast, if misconduct allegedly occurs before a mediation or in a non-mediation context, there appears to be a greater likelihood of properly resolving the allegation without using mediation evidence.

Allowing Attorney Misconduct to Go Unpunished May Chill Future Use of Mediation and Deprive the Public of Its Benefits

In addition to leaving a client without a remedy or allowing an unscrupulous or incompetent attorney to remain in practice without remedial measures to protect the public, a failure to provide accountability for attorney misconduct in a mediation context could have other harmful effects. If potential mediation parties learn that culpable conduct in mediation could go unpunished due to a mediation confidentiality requirement, they might become reluctant to use the mediation process. As one mediator puts it,

> protecting malpractice will not instill confidence in the mediation process. There is a greater probability that fewer people will want to mediate, when they learn malpractice is protected.[103]

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102. See, e.g., Fehr v. Kennedy, 2010 U.S. App. LEXIS 16953, at *4 (9th Cir. 2010) ("Without admitting confidential mediation communications, the record is devoid of any evidence of legal malpractice.").

103. CLRC Staff Memorandum 2014-6, Exhibit p. 15 (comments of Nancy Yeend); see also *Porter*, 107 Cal. Rptr. 3d at 662 (superseded opinion) ("[E]xpanding the mediation privilege to also cover communications between a lawyer and his client would … create a chilling effect on the use of mediation."); First Supplement to CLRC Memorandum 2014-60, Exhibit p. 1 (comments of Edward Mason) (disclosing that he has "serious reservations about ever utilizing the mediation process as currently constructed" because he would not be protected from malpractice and could be "left holding the 'empty

Assuming that such a chilling effect occurs to some degree, it would tend to deprive the public of the benefits of mediation previously discussed. In other words, if the effect were sufficiently significant, it would undermine the very purpose of the mediation confidentiality requirement.

Letting Culpable Conduct Go Unpunished or Other Inequitable Results Occur Undermines the Effective Administration of Justice

Letting attorney misconduct go unpunished due to mediation confidentiality can also have other ramifications. In particular, the state has an interest in enforcing the professional responsibility requirements for attorneys, because it needs to safeguard the integrity of the judiciary and protect the public from incompetent and dishonest attorneys.[104] Honesty is "absolutely fundamental in the practice of law"[105] and an attorney's good moral character is essential for the protection of clients and for the proper functioning of the judicial system itself."[106]

Whenever the judicial system fails to render justice in a case, that will tend to shake the public's faith in the system, and thus a fundamental underpinning of our form of government.[107] The more

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bag.'"); CLRC Staff Memorandum 2014-36, Exhibit p. 6 (comments of Karen Mak) (explaining that if she had been aware of possibility of not being able to introduce evidence of mediation misconduct, "there is *no conceivable way* [she] would have considered participating in mediation") (emphasis in original); First Supplement to CLRC Staff Memorandum 2013-47, Exhibit p. 5 (comments of Bill Chan) (stating that he "will never again use mediation so long as it is a 'get out of jail free' card for attorneys that commit malpractice").

104. *Wimsatt,* 152 Cal. App. 4th at 153, *quoting Foxgate,* 26 Cal. 4th at 17 n.13.

105. *In re* Glass, 58 Cal. 4th 500, 524, 316 P.3d 1199, 167 Cal. Rptr. 3d 87 (2014).

106. *Id.* at 520.

107. See, e.g., *Olam,* 68 F. Supp. 2d at 1136 ("Confidence in our system of justice as a whole, in our government as a whole, turns in no small measure on confidence in the courts' ability to do justice in individual cases. So doing justice in individual cases is an interest of considerable magnitude."); Sarah Brand, *Caution to Clients: California's Mediation Confidentiality Statutes*

often such a result occurs, and the more harsh and obvious the injustice, the greater the damage to public confidence in the judicial system.

When the unjust result favors an attorney, who is considered an officer of the court,[108] the impact may be especially damaging. The California Supreme Court has constitutional authority over the practice of law in this state.[109] Consequently, a failure to control attorney misconduct may reflect particularly badly on the Court and the entire judicial system. In this way, a strict mediation confidentiality requirement could have a severe negative impact on the administration of justice.[110]

Protect Attorneys From Legal Malpractice Claims Arising Out of Mediation, 37 T. Jefferson L. Rev. 369, 372 (2015) (inequitable result under mediation confidentiality statute "runs afoul of ensuring the administration of justice"); Wayne Brazil, *A Broad Brush Interpretive History of ADR in the United States and an Exploration of the Sources, Character, and Implications of Formalism in a Court-Sponsored ADR Program* (hereafter, "Brazil (2014)"), at 27 ("Courts who view their ADR programs and the neutrals who serve in them as instrumentalities of the system of justice understand that parties and lawyers who are ordered or encouraged to participate will draw inferences about the character and quality of that system based on how the program is designed and administered and the way the neutrals perform their roles."), *in* Joachim Zekoll, et al., eds., Formalisation and Flexibilisation in Dispute Resolution (Brill Nijhoff 2014).

108. See *Hickman,* 366 U.S. at 511.

109. *In re* Garcia, 58 Cal. 4th 440, 452, 315 P.3d 117, 165 Cal. Rptr. 3d 855 (2014).

110. See, e.g., *Wimsatt,* 152 Cal. App. 4th at 162 (California's mediation confidentiality requirement means that when clients participate in mediation "they are, in effect, relinquishing all claims for new and independent torts arising from mediation …. We believe that the purpose of mediation is not enhanced by such a result because wrongs will go unpunished and the administration of justice is not served."); see also Jonnette Hamilton, *Protecting Confidentiality in Mandatory Mediation: Lessons From Ontario and Saskatchewan,* 24 Queen's L.J. 561, 634 (1999) ("There are some circumstances where the public interest in the proper administration of justice outweighs the interests in maintaining mediation confidentiality.").

Damage to public confidence can occur not only when there is actual injustice, but also when there is an appearance of injustice or even a possibility of it.[111] For instance, if a mediation confidentiality requirement prevents a client from using mediation communications to show attorney misconduct, the public is left wondering what would have happened otherwise. It is unclear whether actual attorney wrongdoing occurred, but nevertheless there is likely to be some degree of negative impact on the administration of justice.

Clash of Key Policies

This study thus involves a direct clash between two strong policies: (1) attaining the societal benefits of mediation confidentiality and (2) furthering public confidence in the justice system and the pursuit of justice for all.[112] As a result, the area is unusually divisive and attaining a satisfactory compromise is challenging.[113]

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111. See, e.g., Offutt v. United States, 348 U.S. 11, 14 (1954) ("justice must satisfy the appearance of justice"); Rex v. Sussex Justices, 1 K.B. 256, 259 (1924) ("… a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.") (per Lord Hewart).

112. The problem of excluding evidence that might be needed to ensure justice is not unique to mediation confidentiality requirements. The same problem also arises, for example, with regard to the various evidentiary privileges recognized in the Evidence Code (Evid. Code §§ 930-1063). Each evidentiary privilege is based on a legislative determination that the societal benefits of excluding a particular type of evidence outweigh the potential for injustice stemming from exclusion of that evidence. See, e.g., Third Supplement to CLRC Staff Memorandum 2013-47, Exhibit p. 2 (comments of Paul Glusman). This type of legislative determination may be hard to accept when faced with a specific injustice occurring as a cost of the evidentiary rule.

Unsurprisingly, such rules have always been controversial. Historically, that is why the Federal Rules of Evidence do not include any privileges. See Sen. Rep. No. 93-12377, 93rd Cong. 2d Session (Oct. 18, 1974) (Note on Privilege).

113. This is true not only in California, but also elsewhere. See, e.g., CLRC Staff Memorandum 2014-44, pp. 18-23 (describing controversy over UMA in

A number of other policy considerations are also important in assessing the merits of various approaches to the topic at hand. Those policy considerations are described at appropriate points in the remainder of this report.

CALIFORNIA LAW ON MEDIATION CONFIDENTIALITY

California has a well-developed statutory scheme for protection of mediation communications. The discussion below begins by briefly recounting the history of such protection in California. The Commission then describes the current statutory framework and case law interpreting those statutes.

History of California's Statutory Scheme

California's statutory scheme governing mediation confidentiality developed gradually, becoming more extensive and detailed as mediation grew in popularity. The key events are described below.

Protection of Settlement Negotiations

The California Evidence Code was enacted on Commission recommendation in 1965, a decade before the Federal Rules of Evidence were approved.[114] From its inception, the Evidence Code has included some provisions (Evidence Code Sections 1152 and 1154) that restrict the admissibility of evidence of settlement negotiations.[115]

Texas); CLRC Staff Memorandum 2014-43, pp. 4-6 (describing controversy over UMA in Pennsylvania); CLRC Staff Memorandum 2014-35, pp. 30-32 (describing controversy over UMA in Massachusetts), 36-39 (describing controversy over UMA and other mediation confidentiality proposals in New York).

114. 1965 Cal. Stat. ch. 299 (operative Jan. 1, 1967); see also *Recommendation Proposing an Evidence Code,* 7 Cal. L. Revision Comm'n Reports 1 (1965).

115. See Evid. Code §§ 1152, 1154.

Those provisions remain in place today. They are based on the public policy favoring settlement of disputes without litigation.[116] They are intended to help foster "the complete candor between the parties that is most conducive to settlement."[117]

Although Sections 1152 and 1154 are intended to promote settlement by fostering candid negotiations, they provide only limited assurance that comments a party makes in such negotiations will not later be turned against the party. The provisions make evidence of such comments inadmissible to prove or disprove liability, but an opponent can still introduce the evidence for other purposes, such as to show bias, motive, undue delay, or knowledge.[118]

The Advent of Special Evidentiary Protection for Mediation

In the early 1980's, mediation was beginning to gain acceptance as a means of resolving disputes in California. After studying means of making mediation a more useful alternative to a court or jury trial, the Commission recommended the enactment of a new evidentiary provision, which would protect oral and written

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116. See Evid. Code § 1152 Comment (1965); see also Evid. Code § 1154 Comment.

117. Evid. Code § 1152 Comment (1965); see also Evid. Code § 1154 Comment.

118. *See, e.g.,* White v. Western Title Ins. Co., 40 Cal. 3d 870, 889, 710 P.2d 309, 221 Cal. Rptr. 509 (1985); Campisi v. Superior Court, 17 Cal. App. 4th 1833, 1838, 22 Cal. Rptr. 2d 335 (1993); Young v. Keele, 188 Cal. App. 3d 1090, 1093-94, 233 Cal. Rptr. 850 (1987).

The possibility of offering a piece of evidence for a purpose other than proving liability constitutes a significant limitation on the effectiveness of Sections 1152 and 1154, because opponents can be quite creative in conceiving purposes for introduction of such evidence, and, once admitted, the evidence might influence the determination of liability despite a limiting instruction. See *Admissibility, Discoverability, and Confidentiality*, *supra* note 52, at 345, 353-54, 359-61 (1999) & sources cited therein.

information disclosed in a mediation from subsequent disclosure in a judicial proceeding.[119]

This proposed new provision would supplement, rather than replace, the existing provisions protecting settlement negotiations.[120] Unlike those provisions, it would apply regardless of the proponent's purpose in proffering mediation communications as evidence in a later case.[121] It would, however, only apply to a mediation if the participants agreed in advance and in writing that the protection would apply.[122] Further, the proposed provision could not be used to exclude evidence offered in a criminal case.[123]

The new provision was enacted as the Commission recommended.[124] Like the provisions protecting settlement negotiations, it was based on the public policy favoring settlement of disputes without litigation.[125]

A Comprehensive Scheme to Promote Use of Mediation

In 1993, a bill was enacted to establish a comprehensive scheme for promoting the use of mediation to resolve civil disputes.[126] That bill was the product of negotiations between key

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119. See *Recommendation Relating to Protection of Mediation Communications,* 18 Cal. L. Revision Comm'n Reports 241, 245 (1985) (hereafter, "CLRC Mediation Recommendation #1").

120. See *id*. at 245.

121. See *id*. at 246-47.

122. See *id*. at 245-46.

123. See *id*. at 243, 246.

124. See 1985 Cal. Stat. ch. 731, § 1 (former Evid. Code § 1152.5).

125. See former Evid. Code § 1152.5 Comment (reproduced in *Communication From California Law Revision Concerning Assembly Bill 1030,* 18 Cal. L. Revision Comm'n Reports 377, 378 (1985)).

126. See SB 401 (Lockyer), 1993 Cal. Stat. ch. 1261; Senate Committee on Judiciary Analysis of SB 401 (May 25, 1993), p. 2.

stakeholders;[127] the Commission was not involved in the process.[128]

As enacted, the bill made a number of important reforms relating to mediation.[129] In particular, the bill substantially revised the statutory provision restricting use of mediation evidence.[130] Among other things, the revisions did the following:

- Eliminated the requirement of a written agreement to invoke the statutory protection for mediation communications and documents.[131]
- Expressly protected mediation communications and documents from disclosure in civil discovery, not just from being admitted into evidence.[132]
- Made mediation communications confidential.[133]

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127. SB 401 was "the product of a series of discussions between the Judicial Council, the State Bar of California, the California Trial Lawyers Association [now known as the Consumer Attorneys of California], the California Judges Association, the California Defense Counsel, the Los Angeles County Bar Association, representatives of the mediation community, and the author's staff." Senate Committee on Judiciary Analysis of SB 401 (May 25, 1993), p. 2. All of those groups "agree[d] that mediation can be an effective tool to resolve civil disputes in a fair, timely, and cost-effective manner." *Id.*

128. The Commission's role is to make recommendations for revision of California law on topics assigned by the Legislature, not to take positions on legislation crafted by others. See Gov't Code §§ 8280-8298.

129. The bill also made some reforms relating to arbitration, which are not pertinent to this study.

130. See 1993 Cal. Stat. ch. 1261, § 6.

131. See *id.* Apparently, the requirement of a written agreement was considered onerous, particularly in disputes involving unsophisticated persons.

132. See former Evid. Code § 1152.5(a)(2), 1993 Cal. Stat. ch. 1261, § 6.

133. See former Evid. Code § 1152.5(a)(3), 1993 Cal. Stat. ch. 1261, § 6 ("When persons agree to conduct or participate in mediation for the sole purpose of compromising, settling, or resolving a dispute, in whole or in part, all communications, negotiations, or settlement discussions by and between participants or mediators in the mediation shall remain confidential.").

The 1993 bill also created a mandatory mediation pilot project, which was based on legislative findings recognizing the benefits of mediation.[134] In addition, the bill revised an evidentiary provision on competency to testify (Evidence Code Section 703.5), making it applicable to a mediator, not just to an arbitrator or person presiding at a judicial or quasi-judicial proceeding. Under that provision as so revised, a mediator is generally precluded from testifying about a mediation in any subsequent civil proceeding.[135]

The 1993 bill also revised the provision protecting mediation communications (former Evid. Code § 1152.5) to (1) expressly extend its protection to a mediation that would partially rather than fully resolve a dispute, (2) make clear that a written settlement agreement was "admissible to show fraud, duress, or illegality if relevant to an issue in dispute," (3) specify that "[e]vidence otherwise admissible or subject to discovery outside of mediation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation," and (4) add an attorney's fee provision. See 1993 Cal. Stat. ch. 1261, § 6.

134. See 1993 Cal. Stat. ch. 1261, § 4. The mandatory mediation pilot project operated in Los Angeles County, and in any other county electing to participate. The pilot project was scheduled to sunset on January 1, 1999, but the sunset provision was later repealed and the program continued in Los Angeles until it was discontinued due to budget cuts in 2013. See *id.* (former Code Civ. Proc. § 1775.16); 1998 Cal. Stat. ch. 618, § 1 (repealing former Code Civ. Proc. § 1775.16).

135. Section 703.5 currently provides:

> 703.5. No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure. However, this section does not apply to a mediator with regard to any mediation under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

No Report by a Mediator to a Court

In 1995, the Legislature enacted a new provision relating to mediation confidentiality, which prohibited a mediator from reporting to a court regarding a mediation unless the parties expressly agreed, in writing, to allow such a report before the mediation began.[136] That provision was intended to prevent a mediator from coercing a party to settle a case by threatening to tell the judge negative things about the party's behavior at a mediation (e.g., the party unreasonably refused to settle or took an untenable position on a particular issue).[137] The provision thus focused on ensuring that any settlement agreement reached in mediation was truly voluntary.

Protection of Mediation Intake Communications

The following year, the provision on admissibility, discoverability, and confidentiality of mediation communications was amended to expressly apply not only when parties agree to mediate, but also when a person consults a mediator or mediation service for the purpose of retaining the mediator or mediation

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136. See 1995 Cal. Stat. ch. 576, § 8 (former Evid. Code § 1152.6), which read as follows:

> 1152.6. A mediator may not file, and a court may not consider, any declaration or finding of any kind by the mediator, other than a required statement of agreement or nonagreement, unless all parties in the mediation expressly agree otherwise in writing prior to commencement of the mediation. However, this section shall not apply to mediation under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

137. *See* R. Kelly, *New Law Takes Effect to Protect Mediation Rights,* N. Cal. Mediation Ass'n News. (Spring 1996). There was concern that former Section 1152.5 (1993 Cal. Stat. ch. 1261, § 6) alone would not stop such conduct, because some local rules expressly deemed participation in a mediation program as a waiver of the protections of that section with regard to having the mediator submit an evaluation to the court. *See* Kelly, *supra*; Contra Costa Sup. Ct., Loc. R. 207 (1996).

service.[138] According to the author of the bill, this change was needed to fill a significant gap in coverage.[139]

Current Statutory Framework

Following a study by this Commission,[140] a bipartisan[141] bill relating to mediation confidentiality was enacted in 1997,[142]

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138. See 1996 Cal. Stat. ch. 174, § 1.

139. See Senate Committee on Judiciary Analysis of SB 1522, p. 3 (May 14, 1996):

> In order to gauge a mediator's qualifications and qualities, it may be necessary to discuss certain aspects of the case in order to assess his or her expertise and sensitivity. From a literal technical sense, those discussions are not part of a mediation proceeding and could be subject to discovery by the opposing party. Left open, the gap could significantly chill the use of mediation services.

140. Mediator Ron Kelly served as the Commission's unpaid expert advisor for that study.

141. The bill was authored by Assembly Member Ortiz (a Democrat), and co-authored by Assembly Member Ackerman (a Republican). The bill received extensive support, not a single vote was cast against it during the legislative process, and Governor Wilson signed it into law. *See* 1997 Cal. Stat. ch. 772 (AB 939 (Ortiz)); *see also* Assembly Committee on Judiciary Analysis of AB 939 (April 16, 1997); Senate Committee on Judiciary Analysis of AB 939 (Aug. 26, 1997).

Nonetheless, the proposal was not without controversy. The Commission received considerable input from a variety of sources in the course of its study, and refined its ideas throughout the process in response to suggestions received. Further revisions were made once the bill was introduced, to address concerns raised. In all, the bill was amended five times before it was enacted; the Commission made corresponding changes in its Comments. The content of the bill was closely watched by major stakeholders such as the Judicial Council, the State Bar, the California Dispute Resolution Council, the Civil Justice Association of California, the California Defense Counsel, and the Consumer Attorneys of California.

142. See 1997 Cal. Stat. ch. 722; see also *Report of the California Law Revision Commission on Chapter 722 of the Statutes of 1997 (Assembly Bill 939),* 27 Cal. L. Revision Comm'n Reports 595 (1997); *Mediation Confidentiality,* 26 Cal. L. Revision Comm'n Reports 407 (1996) (hereafter, "CLRC Mediation Recommendation #2").

resulting in the current statutory scheme.[143] The section below describes the structural effect and objectives of that bill. The next section describes the core substance of existing law. For convenient reference, the key provisions and corresponding Commission Comments are reproduced in the appendix.

Structural Effect and Objectives

As recommended by the Commission, the 1997 bill created a new chapter in the Evidence Code (Sections 1115-1128), entitled "Mediation." The bill also repealed the provision on admissibility, discoverability, and confidentiality of mediation communications[144] and the provision restricting a mediator from reporting to a court regarding a mediation.[145] Most of the substance of those two provisions was continued, with some revisions, in the new chapter.[146] Section 703.5 (governing a mediator's competency to testify) and Sections 1152 and 1154 (restricting the admissibility of evidence of settlement negotiations) were left unchanged; they remain as previously described.

A major objective of the 1997 reform was to resolve a conflict between two court of appeal decisions on the enforceability of an oral compromise that parties reach in mediation but never convert to a fully executed settlement agreement because the parties cannot agree on the terms.[147] Prompt resolution of that conflict was

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143. Only a few revisions have been made since 1997. Most of them were minor. See 2010 Cal. Stat. ch. 328, § 64; 2009 Cal. Stat. ch. 88, § 35; 2007 Cal. Stat. ch. 130, § 84. This year, Evidence Code Section 1120 was amended to make clear that mediation confidentiality does not extend to financial disclosure declarations exchanged in a divorce proceeding. See SB 217 (Wieckowski), 2017 Cal. Stat. ch. 60, § 1.

144. Former Evid. Code § 1152.5 (1996 Cal. Stat. ch. 174, § 1).

145. Former Evid. Code § 1152.6 (1995 Cal. Stat. ch. 576, § 8).

146. See Evid. Code §§ 1115(c), 1119, 1120, 1121, 1123 & 1127 & Comments.

147. One of those decisions held that such an oral compromise was inadmissible pursuant to former Section 1152.5 and therefore unenforceable. See Ryan v. Garcia, 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (1994). The

crucial, because a mediating disputant must be able to determine when an opponent is effectively bound.[148]

The 1997 bill also revised the law on the enforceability of a *written* agreement reached through mediation, in two key respects.[149] Those two reforms, plus resolution of the conflict on

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other decision held that mediation ended once the parties reached an oral compromise, so former Section 1152.5 did not apply to the compromise and it was enforceable. See Regents of the University of California v. Sumner, 42 Cal. App. 4th 1209, 50 Cal. Rptr. 2d 200 (1996).

148. CLRC Mediation Recommendation #2, *supra* note 142, at 427. The new chapter on mediation confidentiality addressed the conflict by (1) specifying a statutory procedure for orally memorializing an agreement, in the interest of efficiency (see Evid. Code § 1118 & Comment), (2) creating an exception to mediation confidentiality when parties follow that statutory procedure or certain other requirements are satisfied (see Evid. Code § 1124 & Comment), (3) providing specific guidance on when mediation ends for purposes of applying mediation confidentiality (see Evid. Code § 1125), and (4) making clear that "[a]nything said, any admission made, or any writing that is inadmissible, protected from disclosure, and confidential under this chapter before a mediation ends, shall remain inadmissible, protected from disclosure, and confidential to the same extent after the mediation ends" (Evid. Code § 1126).

The Commission's Comment to Section 1124 explains:

> Section 1124 sets forth specific circumstances under which mediation confidentiality is inapplicable to an oral agreement reached through mediation. Except in those circumstances, Sections 1119 (mediation confidentiality) and 1124 codify the rule of Ryan v. Garcia, 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (1994) (mediation confidentiality applies to oral statement of settlement terms), and reject the contrary approach of Regents of University of California v. Sumner, 42 Cal. App. 4th 1209, 50 Cal. Rptr. 2d 200 (1996) (mediation confidentiality does not protect oral statement of settlement terms).

149. Those two reforms were:

> (1) Under prior law, unless it was offered to prove fraud, duress, or illegality, a written agreement reached in mediation was admissible (and therefore enforceable) only if it expressly provided that it was admissible or subject to disclosure. See former Evid. Code § 1152.5(a)(2) (1996 Cal. Stat. ch. 174, § 1). The Commission considered that requirement overly rigorous; the law was thus revised to also make such an agreement admissible if it provides that it is "enforceable" or "binding" or words to that effect. See Evid. Code § 1123 & Comment; see also CLRC Mediation Recommendation #2, *supra* note 142, at 423.

enforceability of an oral compromise reached in mediation, were the "most crucial" aspect of the legislation.[150] The bill made various other revisions as well.[151]

Core Substance of Existing Law

The chapter on mediation confidentiality begins by defining "mediation" as "a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement."[152] The chapter also defines "mediator"[153] and "mediation consultation."[154]

The key provision in the chapter is Evidence Code Section 1119, which restricts the admissibility and discoverability of mediation communications, and also provides for confidentiality. It provides:

> 1119. Except as otherwise provided in this chapter:
> (a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a

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(2) Prior law was unclear regarding whose assent had to be obtained to disclose a written settlement agreement that *did not* contain the "magic language" described in the preceding paragraph. The 1997 bill made clear that it was only necessary to obtain assent from the parties, not from the mediator or other mediation participants. See Evid. Code § 1123 Comment; see also CLRC Mediation Recommendation #2, *supra* note 142, at 423.

150. CLRC Mediation Recommendation #2, *supra* note 142, at 424.

151. For a description of those revisions, see CLRC Staff Memorandum 2013-39, pp. 13-15.

152. Evid. Code § 1115(a). "The definition focuses on the nature of a proceeding, not its label." Evid. Code § 1115 Comment. Thus, a proceeding may be a "mediation" for purposes of the chapter on mediation confidentiality, even though it is denominated differently. *Id*.

153. A "mediator" is "a neutral person who conducts a mediation." Evid. Code § 1115(b). The term encompasses "any person designated by a mediator either to assist in the mediation or to communicate with the participants in preparation for a mediation." *Id*.

154. A "mediation consultation" is "a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator." Evid. Code § 1115(c).

> mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.
>
> (b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.
>
> (c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

Contrary to what some sources say,[155] the protection under this provision is not absolute. There are not many exceptions and limitations, however, and the ones that exist are relatively clear-cut and easy to apply.

Of particular importance, the protection of Section 1119 applies *only* in a *noncriminal* proceeding. It does *not* restrict the use of mediation communications in a *criminal* case.[156]

Other exceptions and limitations include:

- **Preexisting evidence.** Evidence that was admissible or subject to discovery before a mediation does not

155. See, e.g., Cole, *supra* note 5, at 1454 ("[F]or some states, creation of an absolute mediation privilege for mediation communications is a preferable policy choice. In 2002, for example, California enacted a very broad mediation privilege statute shortly before the UMA was finalized.").

156. See, e.g., *Cassel,* 51 Cal. 4th at 135 n.11.

become inadmissible or protected from disclosure upon being used in a mediation.[157]

- **Specified agreements.** The rule does not restrict the admissibility of an agreement to mediate a dispute, an agreement not to take a default, or an agreement for an extension of time in a pending civil action.[158]
- **Mediator background.** The rule does not prevent disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute.[159]
- **Financial disclosure declarations exchanged in a divorce proceeding**. Such declarations are required by the Family Code. They are *not* protected mediation communications even if they are exchanged during a mediation.[160]
- **Excluded proceedings.** The rule does not apply to a court settlement conference, a family conciliation proceeding, or a court-connected mediation of child custody and visitation issues.[161]
- **Constitutional rights.** The rule does not apply if it conflicts with a constitutional right, such as the right of due process,[162] or a juvenile's constitutional right of confrontation in a juvenile delinquency proceeding.[163]

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157. Evid. Code § 1120(a); see also Rojas v. Superior Court, 33 Cal. 4th 407, 423 n.8, 93 P.3d 260, 15 Cal. Rptr. 3d 643 (2004); Kullar v. Foot Locker Retail, Inc., 168 Cal. App. 4th 116, 132, 85 Cal. Rptr. 3d 20 (2008).

158. Evid. Code § 1120(b)(1)-(2).

159. Evid. Code § 1120(b)(3).

160. See Evid. Code § 1120(b)(4); Lappe v. Superior Court, 232 Cal. App. 4th 774, 181 Cal. Rptr. 3d 510 (2014).

161. Evid. Code § 1117(b).

162. *Cassel*, 51 Cal. 4th at 119, 127.

163. See Rinaker v. Superior Court, 62 Cal. App. 4th 155, 72 Cal. Rptr. 2d 464 (1998).

- **Absurd results.** The rule does not apply if it would "lead to absurd results that clearly undermine the statutory purpose."[164]
- **Express agreement to waive protection.** The rule does not prevent admissibility or disclosure of mediation materials if *all* of the participants in a mediation expressly agree in writing (or orally, pursuant to a specified procedure) to waive the protection.[165] In recommending this approach, the Commission explained that "[a]ll persons attending a mediation, parties as well as nonparties, should be able to speak frankly, without fear of having their words turned against them."[166] If a communication or writing was prepared by or on behalf of fewer than all of the mediation participants, only an express waiver by those participants is needed.[167]
- **Settlement agreement.** The rule does not prevent admissibility or disclosure of a written settlement agreement signed by the settling parties if certain requirements are met.[168] An oral settlement agreement may also be used, but only if it was prepared in accordance with a statutory procedure and meets certain requirements.[169]
- **Conduct not intended as an assertion.** The rule does not protect conduct at a mediation, only mediation communications.[170]

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164. *Cassel,* 51 Cal. 4th at 119.

165. Evid. Code § 1122(a)(1).

166. CLRC Mediation Recommendation #2, *supra* note 142, at 425.

167. Evid. Code § 1122(a)(2).

168. Evid. Code § 1123.

169. Evid. Code § 1124.

170. See, e.g., *Foxgate,* 25 Cal. 4th at 18 n.14; Radford v. Shehorn, 187 Cal. App. 4th 852, 857, 114 Cal. Rptr. 3d 499 (2010); Campagnone v. Enjoyable Pools & Spas Service & Repairs, Inc., 163 Cal. App. 4th 566, 571-72, 77 Cal.

To help persons determine whether their statements are protected by Section 1119, the chapter on mediation confidentiality includes a provision specifying when a mediation ends.[171] Among other circumstances, a mediation ends when the parties execute a written settlement fully resolving the mediated dispute, or complete a statutory procedure for orally agreeing to fully resolve the dispute.[172] Anything made inadmissible or otherwise protected by the chapter on mediation confidentiality *before* a mediation ends remains so protected *after* the mediation ends.[173]

Another important provision in the chapter on mediation confidentiality is Section 1121, which generally precludes a mediator or anyone else from reporting to a court regarding the substance of a mediation. That provision is similar to the earlier provision on the same topic, but more clear in a number of respects.[174]

Rptr. 3d 551 (2008); see also Ellerbee v. County of Los Angeles, 187 Cal. App. 4th 1206, 1216-17, 114 Cal. Rptr. 3d 756 (2010).

171. Evid. Code § 1125.

172. Evid. Code § 1125(a)(1)-(2).

173. Evid. Code § 1126.

174. Section 1121 provides:

> 1121. Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that is mandated by court rule or other law and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise in writing, or orally in accordance with Section 1118.

The focus of this provision is on preventing coercion. As the Commission's Comment explains, "a mediator should not be able to influence the result of a mediation or adjudication by reporting or threatening to report to the decisionmaker on the merits of the dispute or reasons why mediation failed to resolve it." Likewise, "a mediator should not have authority to resolve or decide the mediated dispute, and should not have any function for the adjudicating tribunal with regard to the dispute, except as a non-decisionmaking neutral." Section 1121 Comment.

If a mediator is subpoenaed to testify or produce a writing, and a court or other adjudicative body determines that the evidence is inadmissible under the chapter on mediation confidentiality, the mediator is entitled to attorney's fees.[175] Similarly, any reference to a mediation in a subsequent trial or other adjudication is an irregularity in the proceedings.[176]

Additional Sources of Protection for Mediation Communications

The mediation confidentiality statutes described above (Sections 1115-1128) are not the only potential source of evidentiary protection for mediation communications. Other provisions that may limit the admissibility or disclosure of such communications include California's constitutional right of privacy,[177] various specialized mediation confidentiality provisions,[178] Section 1160 (relating to benevolent conduct),[179] and the previously discussed provisions on a mediator's competency to testify (Section 703.5) and the admissibility of evidence of settlement negotiations (Sections 1152 and 1154).

In addition, mediation participants sometimes enter into contractual agreements restricting disclosure of mediation communications.[180] Issues might arise, however, regarding enforcement as to third parties and protection of public policies.

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175. Evid. Code. § 1127.

176. Evid. Code. § 1128.

177. Cal. Const. art. I, § 1; see also Garstang v. Superior Court, 39 Cal. App. 4th 526, 532, 46 Cal. Rptr. 2d 84 (1995).

178. See, e.g., Fam. Code §§ 1818 (family conciliation court), 3177 (child custody); Gov't Code §§ 12984-12985 (housing discrimination).

179. Section 1160 states in part: "The portion of statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of a person involved in an accident and made to that person or to the family of that person shall be inadmissible as evidence of an admission of liability in a civil action."

180. See, e.g., Facebook, Inc. v. Pacific Northwest Software, Inc., 640 F.3d 1034, 1041 (9th Cir. 2011) (District court "was right to exclude" proffered evidence of "what was said and what was not said during the mediation"

California's mediation statutes do not address the validity of a contractual requirement to keep settlement terms confidential. That issue (sometimes referred to as "settlement in sunshine") arises with regard to all settlements, not just mediated settlements. It is governed by other law.[181]

California Supreme Court Decisions on Mediation Confidentiality

Since the enactment of the chapter on mediation confidentiality, the California Supreme Court has issued five decisions interpreting provisions within the chapter. Those decisions are described in chronological order below. The first four cases are described only briefly;[182] the last decision (*Cassel*) is discussed in greater detail because it most directly concerns the topic of this study.

Foxgate

Foxgate Homeowners' Ass'n v. Bramalea California, Inc.[183] involved a mediation conducted pursuant to a case management order, which directed the parties to make their best efforts to cooperate during the mediation process. The plaintiffs' attorney came to the mediation with nine experts, but the defense showed up late and without any experts, despite a court notice to bring experts along. The mediation did not result in an agreement; the

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because confidentiality agreement precluded introduction of such evidence); ZVI Construction Co., LLC v. Levy, 90 Mass. App. Ct. 412, 60 N.E. 3d 368, 377 (2016) ("[T]he mediation agreement merely precluded the parties from disclosing mediation communications …. [T]he mediation agreement, and the confidentiality provision therein, are enforceable.").

181. See, e.g., Code Civ. Proc. § 2017.310 ("Notwithstanding any other provision of law, it is the policy of the State of California that confidential settlement agreements are disfavored in any civil action the factual foundation for which establishes a cause of action for a violation of the Elder Abuse and Dependent Adult Civil Protection Act (Chapter 11 (commencing with Section 15600) of Part 3 of Division 9 of the Welfare and Institutions Code).").

182. For more detailed discussions of those decisions, see CLRC Staff Memorandum 2013-39, pp. 18-25.

183. 26 Cal. 4th 1, 15, 25 P.3d 1117, 128 Cal. Rptr. 2d 642 (2001).

mediator ended it earlier than expected, concluding that mediation without defense experts would be fruitless.

Thereafter, the plaintiff sought sanctions from the defense for failing to cooperate at the mediation. In connection with the plaintiff's motion, the mediator filed a report that described the mediation session in detail, accused the defense of obstructive and bad faith tactics, and recommended awarding sanctions.[184]

The defense contended that the mediation confidentiality statutes barred consideration of the mediator's report. The trial court disagreed and awarded sanctions, but the court of appeal reversed and remanded, ruling that the some but not all of the mediator's report was admissible pursuant to an implied exception to the mediation confidentiality statutes.

On further appeal, the California Supreme Court determined that "there are no exceptions to the confidentiality of mediation communications or to the statutory limits on the content of mediator's reports."[185] The Court explained:

> Because the language of sections 1119 and 1121 is clear and unambiguous, judicial construction of the statutes is not permitted unless they cannot be applied according to their terms or doing so would lead to absurd results, thereby violating the presumed intent of the Legislature. Moreover, a judicially crafted exception to the confidentiality mandated by sections 1119 and 1121 is not necessary either to carry out the legislative intent or to avoid an absurd result.
>
> The legislative intent underlying the mediation confidentiality provisions of the Evidence Code is clear. The parties and all amici curiae recognize the purpose of confidentiality is to promote "a candid and informal exchange regarding events in the past .... This frank exchange is achieved only if the participants know that what is said in the mediation will not be used to their

184. *Id.* at 6.

185. *Id.* at 4.

> detriment through later court proceedings and other adjudicatory processes."[186]

The Court also distinguished two decisions in which other courts found exceptions to mediation confidentiality: *Rinaker v. Superior Court*[187] and *Olam v. Congress Mortgage Co.*[188] The Court explained that in *Rinaker,* the statutory right of mediation confidentiality was trumped by a juvenile delinquency defendant's constitutional right to confront a witness with inconsistent mediation statements, but *Foxgate* involved "no comparable supervening due-process-based right to use evidence of statements and events at the mediation session."[189]

The Court further explained that in *Olam,* both sides (but not the mediator) had waived mediation confidentiality and mediation evidence was crucial to achieve justice. In contrast, the *Foxgate* defendants had not waived confidentiality, so *Olam* was inapposite.[190]

The Court therefore concluded that the order imposing sanctions was based on wrongfully admitted mediation communications and had to be set aside.[191] The Court made clear, however, that "neither section 1119 nor section 1121 prohibits a party from revealing or reporting to the court about noncommunicative conduct, including violation of the orders of a mediator or the court during mediation."[192] Thus, the plaintiff could renew its sanctions motion on remand, so long as that motion was based on noncommunicative conduct rather than mediation communications.[193]

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186. *Id.* at 14 (citations omitted).

187. 62 Cal. App. 4th 155, 74 Cal. Rptr. 2d 464 (1998).

188. 68 F. Supp. 2d 1110 (N.D. Cal. 1999).

189. *Foxgate,* 26 Cal. 4th at 15-16.

190. *Id.* at 16-17.

191. *Id.* at 18.

192. *Id.* at 18 n.14.

193. *Id.* at 18.

Rojas

Three years after *Foxgate,* the California Supreme Court again considered the mediation confidentiality statutes, in *Rojas v. Superior Court*.[194] This time, the case concerned the discoverability of materials that had been prepared in connection with an earlier dispute, which had settled through mediation.

The trial court denied discovery of certain materials on grounds of mediation confidentiality. The court of appeal reached a different result, interpreting the mediation confidentiality statutes to be implicitly subject to the same three-prong analysis as the work product privilege: (1) material reflecting *only* an attorney's impressions, conclusions, opinions, or legal research or theories is absolutely protected, (2) material that does not reflect an attorney's impressions, conclusions, opinions, or legal research or theories is *not* protected, and (3) derivative material (material that contains an amalgamation of factual information and an attorney's impressions, conclusions, opinions, or legal research or theories) is discoverable only upon a showing of good cause, which involves balancing the need for the material against the purposes served by mediation confidentiality.

The California Supreme Court disagreed with that interpretation of the mediation confidentiality statutes, stating that it was contrary to both the statutory language and the legislative intent.[195] The Court's lengthy analysis quoted heavily from *Foxgate* and relied extensively on Commission materials.[196] Among other things, the Court explained:

> In *Foxgate,* we stated that "to carry out the purpose of encouraging mediation by ensuring confidentiality, [our] statutory scheme … unqualifiedly bars disclosure of" specified communications and writings associated with a mediation "absent an *express statutory* exception." We also found that the "judicially crafted exception" to section 1119

194. 33 Cal. 4th 407, 93 P.3d 260, 15 Cal. Rptr. 3d 643 (2004).

195. *Id*. at 411.

196. *Id*. at 415-24.

> there at issue was "not necessary either to carry out the legislative intent or to avoid an absurd result." We reach the same conclusion here; as [the trial judge] observed, "the mediation privilege is an important one, and if courts start dispensing with it by using the [test governing the work-product privilege], you may have people less willing to mediate."[197]

The Court thus again interpreted Section 1119 strictly, refusing to imply a "judicially crafted exception." In so doing, however, the Court recognized that Section 1120 creates an express (not implied) exception to mediation confidentiality for preexisting materials.[198] The Court also pointed out that physical samples do not constitute "writings" and thus do not fall within the protection of the mediation confidentiality statutes.[199]

Fair

The next California Supreme Court decision relating to mediation confidentiality was *Fair v. Bakhtiari*,[200] in which the Court considered how to construe the exception for a written settlement agreement that is signed by the settling parties and provides that it is "enforceable or binding or words to that effect."[201] The agreement in question did not include language along those lines, but did include an arbitration clause.

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197. *Id.* at 424 (citations omitted; emphasis in *Rojas*).

198. *Id.* at 417 ("under section 1120, a party cannot secure protection for a writing — including a photograph, a witness statement, or an analysis of a test sample — that was not 'prepared for the purpose of, in the course of, or pursuant to, a mediation' … simply by using or introducing it in a mediation or even including it as part of a writing — such as a brief or a declaration or a consultant's report — that was 'prepared for the purpose of, in the course of, or pursuant to, a mediation.'").

199. *Id.* at 416.

200. 40 Cal. 4th 189, 147 P.3d 653, 51 Cal. Rptr. 3d 871 (2006).

201. Evid. Code § 1123(b).

The Court determined that inclusion of an arbitration clause was not sufficient to satisfy the statutory requirement.[202] The Court thus interpreted the mediation confidentiality exception narrowly, not broadly.

In so doing, the Court noted that confidentiality "is essential to effective mediation"[203] and explained:

> A tentative working document may include an arbitration provision, without reflecting an actual agreement to be bound. If such a typical settlement provision were to trigger admissibility, parties might inadvertently give up the protection of mediation confidentiality during their negotiations over the terms of settlement. Disputes over those terms would then erupt in litigation, escaping the process of resolution through mediation. Durable settlements are more likely to result if the statute is applied to require language directly reflecting the parties' awareness that they are executing an "enforceable or binding" agreement.[204]

The Court further explained that under its interpretation of the exception, "the parties are free to draft and discuss enforcement terms such as arbitration clauses without worrying that those provisions will destroy the confidentiality that protects mediation discussions."[205] Thus, as in *Foxgate* and *Rojas,* the Court was sensitive to the legislative policy of protecting mediation confidentiality, and careful to interpret the statutory protection so as to be effective.

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202. *Fair,* 40 Cal. 4th at 197 ("[W]e hold that to satisfy the 'words to that effect' provision of section 1123(b), a writing must directly express the parties' agreement to be bound by the document they sign.").

203. *Id.*, *quoting Foxgate,* 26 Cal. 4th at 14.

204. *Fair,* 40 Cal. 4th at 197-98.

205. *Id.* at 199.

Simmons

In 2008, the California Supreme Court considered mediation confidentiality yet again, in *Simmons v. Ghaderi*.[206] The key question before the Court was whether a waiver of mediation confidentiality had to be express or could also be implied from a person's conduct.

The Court determined that the mediation confidentiality statutes unambiguously require any waiver of mediation confidentiality to be express, not implied.[207] The Court further noted that except where due process is implicated or there is an express waiver, those statutes must be "strictly enforced."[208]

The Court therefore refused to create a waiver-by-conduct exception to the mediation confidentiality statutes. It explained:

> [T]he legislative history of the mediation confidentiality statutes as a whole reflects a desire that section 1115 et seq. be strictly followed in the interest of efficiency. By laying down clear rules, the Legislature intended to reduce litigation over the admissibility and disclosure of evidence regarding settlements and communications that occur during mediation. Allowing courts to craft judicial exceptions to the statutory rules would run counter to that intent.
>
> Both the clear language of the mediation statutes and our prior rulings support the preclusion of an implied waiver exception. The Legislature chose to promote mediation by ensuring confidentiality rather than adopt a scheme to ensure good behavior in the mediation and litigation process. The mediation statutes provide clear and comprehensive rules reflecting that policy choice.[209]

The Court thus stuck to its firm approach prohibiting courts from judicially crafting exceptions to the mediation confidentiality rules.

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206. 44 Cal. 4th 570, 187 P.3d 934, 80 Cal. Rptr. 3d 83 (2008).

207. *Id*. at 586.

208. *Id*. at 582.

209. *Id*. at 588 (emphasis added; citation omitted).

Cassel

The most recent California Supreme Court decision on mediation confidentiality is *Cassel v. Superior Court,*[210] which prompted the Commission's current study. In that case, a man agreed in mediation to settle a lawsuit to which he was a party. He later sued his attorneys for malpractice, breach of fiduciary duty, fraud, and breach of contract. He claimed that at the mediation, his attorneys "by bad advice, deception, and coercion" persuaded him to settle for less than he had told them he would accept and less than the case was worth.[211]

Trial court proceedings. The defendant attorneys moved, under the mediation confidentiality statutes, to exclude all evidence of private attorney-client discussions, made immediately preceding or during the mediation, concerning mediation settlement strategies or the attorneys' efforts to persuade their client to reach a settlement in the mediation.[212] The trial court granted the motion and the plaintiff appealed.[213]

Court of Appeal decision. The court of appeal reversed, ruling that mediation confidentiality did not apply. It reasoned that the mediation confidentiality statutes are "not intended to prevent a client from proving, through private communications outside the presence of all other mediation participants, a case of legal malpractice against the client's own lawyers."[214] It further reasoned that an attorney and client are a single "participant" for purposes of mediation confidentiality, and thus the attorney cannot preclude the client from waiving the statutory protection.[215]

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210. 51 Cal. 4th 113, 244 P.3d 1080, 119 Cal. Rptr. 3d 437 (2011).

211. *Id.* at 118.

212. *Id.*

213. *Id.*

214. *Id.* at 122.

215. *Id.* Justice Perluss dissented, "argu[ing] that the majority had crafted a forbidden judicial exception to the clear requirements of mediation confidentiality." *Id.*

California Supreme Court decision. The defendant attorneys petitioned for review in the California Supreme Court, maintaining that their mediation-related discussions with their client were inadmissible in his malpractice action against them, "even if those discussions occurred in private, away from any other mediation participant."[216] The Court granted review and, consistent with its previous decisions, held that the mediation confidentiality statutes must be strictly construed and are not subject to a judicially crafted exception where a client sues for legal malpractice and seeks disclosure of private attorney-client discussions relating to a mediation.[217]

Preliminarily, the Court explained that it had to apply the plain terms of the mediation confidentiality statutes unless the result would violate due process or lead to absurd results that would clearly undermine the statutory purpose.[218] The plain terms of Section 1119(a)-(b) cover all oral or written communications made "for the purpose of," "in the course of," or "pursuant to" a mediation.[219] The Court thus concluded that such communications include those between a mediation disputant and the disputant's own attorney, even if the communications do not occur in the presence of the mediator or other disputants.[220]

The Court also explained that an attorney and client are not a single "participant" for purposes of the mediation confidentiality statutes, because those statutes mention "participants" several times, under circumstances making clear that the term encompasses more than just the mediation parties and disputants.[221] Consequently, the Court ruled that the mediation

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216. *Id*. at 123.

217. *Id*. at 123-33.

218. *Id*. at 119.

219. *Id*. at 128.

220. *Id*.

221. *Id*. at 130.

confidentiality protection could not be waived without the attorney's consent; the client's consent alone was not sufficient.[222]

The Court also rejected the idea that Section 958, which expressly creates an exception to the attorney-client privilege for legal malpractice suits, compels recognition of a similar exception to mediation confidentiality.[223] The Court explained:

> [T]he mediation confidentiality statutes do not create a "privilege" in favor of any particular person. Instead, they serve the public policy of encouraging the resolution of disputes by means short of litigation. The mediation confidentiality statutes govern only the narrow category of mediation-related communications, but they apply broadly within that category, and are designed to provide maximum protection for the privacy of communications in the mediation context. A principal purpose is to assure prospective participants that their interests will not be damaged, first, by attempting this alternative means of resolution, and then, once mediation is chosen, by making and communicating the candid disclosures and assessments that are most likely to produce a fair and reasonable mediation settlement. To assure this maximum privacy protection, the Legislature has specified that all mediation participants involved in a mediation-related communication must agree to its disclosure.
>
> Neither the language nor the purpose of the mediation confidentiality statutes supports a conclusion that they are subject to an exception, similar to that provided for the attorney-client privilege, for lawsuits between attorney and client. The instant Court of Appeal's contrary conclusion is nothing more than a judicially crafted exception to the unambiguous language of the mediation confidentiality statutes in order to accommodate a competing policy concern — here, protection of a client's right to sue his or her attorney. We and the Courts of Appeal have

222. *Id.* at 131.

223. *Id.* at 131-33.

> consistently disallowed such exceptions, even when the equities appeared to favor them.[224]

The Court further explained that applying the mediation confidentiality statutes to a legal malpractice case "does not implicate due process concerns so fundamental that they might warrant an exception on constitutional grounds."[225] In its view, "the mere loss of evidence pertinent to the prosecution of a lawsuit for civil damages does not implicate such a fundamental interest."[226]

The Court expressly refrained from passing judgment on the wisdom of the mediation confidentiality statutes.[227] It concluded, however, that applying the plain terms of those statutes to the case before it did not produce a result that was either absurd or contrary to the legislative intent.[228] The Court explained:

> Inclusion of private attorney-client discussions in the mediation confidentiality scheme addresses several issues about which the Legislature could rationally be concerned. At the outset, the Legislature might determine, such an inclusion gives maximum assurance that disclosure of an ancillary mediation-related communication will not, perhaps inadvertently, breach the confidentiality of the mediation proceedings themselves, to the damage of one of the mediation disputants.
>
> Moreover, as real parties observe, the Legislature might reasonably believe that protecting attorney-client conversations in this context facilitates the use of mediation as a means of dispute resolution by allowing frank discussions between a mediation disputant and the disputant's counsel about the strengths and weaknesses of the case, the progress of negotiations, and the terms of a

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224. *Id.* at 131 (citations & footnotes omitted).

225. *Id.* at 135.

226. *Id.*

227. *Id.* at 136.

228. *Id.*

> fair settlement, without concern that the things said by either the client or the lawyers will become the subjects of later litigation against either. The Legislature also could rationally decide that it would not be fair to allow a client to support a malpractice claim with excerpts from private discussions with counsel concerning the mediation, while barring the attorneys from placing such discussions in context by citing communications within the mediation proceedings themselves.[229]

The Court therefore reversed the decision of the court of appeal, but noted that "the Legislature is free to reconsider whether the mediation confidentiality statutes should preclude the use of mediation-related attorney-client discussions to support a client's civil claims of malpractice against his or her attorneys."[230]

Justice Chin's concurrence. Justice Chin concurred in the result, "but reluctantly."[231] He warned that the court's holding would

> effectively shield an attorney's actions during mediation, including advising the client, from a malpractice action even if those actions are incompetent or even deceptive. Attorneys participating in mediation will not be held accountable for any incompetent or fraudulent actions during that mediation unless the actions are so extreme as to engender a *criminal* prosecution against the attorney. This is a high price to pay to preserve total confidentiality in the mediation process.[232]

Justice Chin regarded it as a close call whether the result required by the literal language of the mediation confidentiality statutes was so absurd as to warrant a judicial deviation from the

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229. *Id*.

230. *Id*. at 137.

231. *Id*. at 138 (Chin, J., concurring).

232. *Id*. (citations and footnotes omitted; emphasis in original).

literal language.[233] For several reasons, he agreed with the majority that the Court had to give effect to the statutory language.[234] He was unsure, however, whether the Legislature had "fully considered whether attorneys should be shielded from accountability in this way."[235]

He thought there might be better ways to balance the competing interests than "simply providing that an attorney's statements during mediation may never be disclosed."[236] In particular, he suggested permitting use of mediation communications in a legal malpractice action to the extent they are relevant to that action, but preventing use of those communications for any other purpose.[237] He thus urged the Legislature to reconsider the statutory scheme.[238]

Other Decisions on the Intersection of Mediation Confidentiality and Alleged Attorney Misconduct Under California Law

In its resolution assigning this study to the Commission,[239] the Legislature specifically directed the Commission to consider *Cassel* and two other California cases: *Wimsatt v. Superior Court*[240] and *Porter v. Wyner*.[241] Both of those decisions involved the intersection of California's mediation confidentiality statutes and allegations of attorney misconduct.

This section of the Commission's report describes *Wimsatt* and *Porter*. The Commission then discusses some other decisions that

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233. *Id.* at 139.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *See id.*

239. 2012 Cal. Stat. res. ch. 108.

240. 152 Cal. App. 4th 137, 61 Cal. Rptr. 3d 200 (2007).

241. 107 Cal. Rptr. 3d 653 (2010) (formerly published at 183 Cal. App. 4th 949).

involved the intersection of California's mediation confidentiality statutes and allegations of attorney misconduct.[242]

Wimsatt

Wimsatt was a legal malpractice case in which the client alleged that his attorneys lowered the settlement demand in a personal injury case without his authorization, impairing his ability to obtain a satisfactory settlement of the personal injury case. The client claimed to have learned of this misconduct from a confidential mediation brief prepared by his opponents in the personal injury case.

Discovery dispute. To support his malpractice allegations, the client first deposed one of the attorney defendants, who denied having lowered the settlement demand in the personal injury case.[243] The client then sought discovery of the mediation briefs, some emails written shortly before the mediation in which the personal injury case settled, and any evidence showing there was a conversation in which his attorney lowered his settlement demand without authorization. The attorney defendants sought a protective order, contending that the information sought was protected from disclosure under the mediation confidentiality statutes.

The trial judge denied the application for a protective order. He reasoned that (1) the client was trying to show that the deposed attorney had lied under oath, and (2) the mediation confidentiality statutes did not apply because the Legislature did not intend to have them shield perjury or inconsistent statements.[244]

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242. For discussion of cases involving the intersection of mediation confidentiality and allegations of misconduct by a mediator, party, or other non-attorney participant, see CLRC Staff Memorandum 2015-4, pp. 19-28; see also CLRC Staff Memorandum 2015-36, pp. 1-2.

243. The client waived the attorney-client privilege. *Wimsatt,* 152 Cal. App. 4th at 144.

244. *Id*. at 148. In recognizing such an exception to the mediation confidentiality statutes, the trial judge relied on *Rinaker,* 62 Cal. App. 4th 155, which held that those statutes must yield when they conflict with a juvenile's

The defendant attorneys sought review in the court of appeals, which issued an opinion describing California's strict mediation confidentiality scheme and the California Supreme Court's decisions in *Foxgate* and *Rojas*.[245] The opinion also pointed out that mediation briefs "are part and parcel of the mediation negotiation process" and "epitomize the types of writings which the mediation confidentiality statutes have been designed to protect from disclosure."[246] The court further explained that the requested emails "were materially related to the mediation that was to be held the next day" and "would not have existed had the mediation briefs not been written."[247]

The court of appeals therefore held that the mediation briefs and eve-of-mediation emails were protected by the mediation confidentiality statutes.[248] It considered that result necessary because the California Supreme Court had repeatedly "refused to judicially create exceptions to the statutory scheme, even in situations where justice seems to call for a different result."[249]

The court of appeals further held, however, that the trial judge should *not* grant a protective order with regard to the conversation in which the deposed attorney purportedly lowered the client's settlement demand without authorization.[250] It explained that the attorney defendants were required to show that the conversation

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constitutional right of confrontation in a juvenile delinquency proceeding. On appeal, the *Wimsatt* court distinguished *Rinaker*, explaining that *Rinaker* involved vindication of constitutionally protected rights, whereas the case before it was "no different from the thousands of civil cases routinely resolved through mediation." *Wimsatt*, 152 Cal. App. 4th at 162.

245. *Wimsatt*, 152 Cal. App. 4th at 149-58.

246. *Id*. at 158.

247. *Id*. at 159.

248. *Id*. at 149, 158-59.

249. *Id*. at 152.

250. *Id*. at 165.

was protected by mediation confidentiality, but they had not demonstrated that the conversation was linked to mediation.[251]

Having reached those conclusions, the court of appeals made clear that it was uncomfortable with its ruling precluding discovery of the mediation briefs and eve-of-mediation emails. Among other things, the court said:

> The stringent result we reach here means that when clients … participate in mediation they are, in effect, relinquishing all claims for new and independent torts arising from mediation, including legal malpractice causes of action against their own counsel. Certainly clients, who have a fiduciary relationship with their lawyers, do not understand that this result is a by-product of an agreement to mediate. We believe that the purpose of mediation is not enhanced by such a result because wrongs will go unpunished and the administration of justice is not served.[252]

After referring to negative commentary and various cases involving California's mediation confidentiality statutes, the court urged the Legislature to reconsider the statutory scheme:

> Given the number of cases in which the fair and equitable administration of justice has been thwarted, perhaps it is time for the Legislature to reconsider California's broad and expansive mediation confidentiality statutes and to craft ones that would permit countervailing public policies be considered.[253]

The *Wimsatt* court also suggested that given "the harsh and inequitable results of the mediation confidentiality statutes … the parties and their attorneys should be warned of the unintended consequences of agreeing to mediate a dispute."[254]

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251. *Id.* at 160.

252. *Id.* at 163 (footnote omitted).

253. *Id.* at 163.

254. *Id.*

Later developments. After the court of appeals resolved the discovery dispute, the malpractice case returned to the trial court. The judge eventually granted a motion in limine precluding the client from introducing all evidence in his case-in-chief "because mediation confidentiality precluded the introduction of vital evidence."[255] The trial court thus entered judgment against the client, who appealed.

The court of appeal affirmed the judgment in an unpublished decision, explaining that when it ruled on the discovery motion "the record lacked sufficient information" from which it could conclude that the statements allegedly lowering the settlement demand were linked to the mediation."[256] In contrast, in the later appeal it was clear that the client would not be able to address issues regarding whether the settlement was appropriate because doing so "would require facts that are inextricably connected to the mediation and the settlement reached therein."[257]

In reaching that decision, the court of appeal made clear that it was *not* holding that "*all* plaintiffs are foreclosed from pursuing all legal malpractice-related lawsuits when the client's case is settled in mediation."[258] Instead, said the court, the key "is whether the accusations can be proven *without delving into what occurred in the mediation* and without using any communication made 'for the purpose of, in the course of, or pursuant to, a mediation or mediation consultation ….'"[259]

In circumstances like the ones before it, the court was "forced to conclude that an attorney is immunized from any negligent and intentional torts committed in mediation when said torts are the result of communications made for the purpose of, in the course of, or pursuant to a mediation, or a mediation consultation."

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255. Kausch v. Wimsatt, 2009 Cal. App. Unpub. LEXIS 8566, at **26.

256. *Id*. at *17.

257. *Id*. at *43-*44.

258. *Id*. at *42 n.12 (emphasis added).

259. *Id*., *quoting* Evid. Code § 1119 (emphasis added).

Porter

The history of the *Porter* litigation is long and complicated. To the best of the Commission's knowledge, the matter still is not fully resolved. For present purposes, it seems sufficient to concentrate on certain events.[260]

In particular, *Porter* is a legal malpractice case in which the clients alleged that their attorney (1) gave them incorrect tax advice in the underlying case, (2) failed to reimburse them for certain payments they made to him before the underlying case settled, and (3) failed to pay one of the clients for services she rendered as a paralegal in the underlying case. The clients sued their attorney for legal malpractice, breach of fiduciary duty, constructive fraud, negligent misrepresentation, breach of the fee agreement, rescission, unjust enrichment, and liability for unpaid wages.[261]

The trial court sustained a demurrer to the clients' malpractice claim because the clients admitted that they suffered no injury from their attorney's allegedly incorrect tax advice.[262] The other claims proceeded to a jury trial, at which both sides testified about what occurred at a mediation in the underlying case. The jury found for the clients on some claims and for the attorney on other claims.

Shortly after the jury verdict, the California Supreme Court decided *Simmons,* holding that any waiver of mediation confidentiality must be express, not implied, and must either be written or orally memorialized in accordance with a statutory procedure.[263] Based on *Simmons,* the attorney defendant in *Porter* moved for a new trial, arguing that mediation evidence was

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260. For a more detailed discussion of the *Porter* litigation, see CLRC Staff Memorandum 2015-4, pp. 6-12.

261. 107 Cal. Rptr. 3d at 658 (superseded opinion).

262. *Id.* at 658 n.7.

263. *Simmons* is further described in the discussion of "California Supreme Court Decisions on Mediation Confidentiality" *supra*.

improperly placed before the jury. The trial court agreed and vacated the judgment, but the clients appealed.

Majority opinion. In a split decision, the court of appeals reversed the order granting a new trial. The majority opinion distinguished between attorney-client discussions and other mediation communications:

> The confidentiality aspect which protects and shrouds the mediation process should not be extended to protect anything other than a frank, candid and open exchange regarding events in the past by and between disputants. It was not meant to subsume a secondary and ancillary set of communications by and between a client and his own counsel, irrespective of whether such communications took place in the presence of the mediator or not.[264]

The majority explained that extending mediation confidentiality to attorney-client conversations would be inconsistent with Evidence Code Section 958,[265] which says there is no attorney-client privilege "as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship." According to the majority, extending mediation confidentiality to the attorney-client relationship would render Section 958 a nullity, because then the "mediation process and its attendant confidentiality would trump the attorney-client privilege and preclude the waiver of it by the very holder of the privilege."[266] The majority did not think the Legislature intended for "a well-established and recognized privilege and waiver process" to be "thwarted by a nonprivileged statutory scheme designed to protect a wholly different set of disputants."[267]

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264. *Porter,* 107 Cal. Rptr. at 662 (superseded opinion).

265. *Id*. at 661-62.

266. *Id*. at 661.

267. *Id*. at 661-62.

In the majority's view,

> To expand the mediation privilege to also cover communications between a lawyer and his client would seriously impair and undermine not only the attorney-client relationship but would likewise create a chilling effect on the use of mediations. In fact, clients would be precluded from pursuing any remedy against their own counsel for professional deficiencies occurring during the mediation process as well as representations made to the client to induce settlement.[268]

The majority "decline[d] to extend the confidentiality component to a relationship neither envisioned nor contemplated by statute."[269]

Dissent. In dissent, Justice Flier noted that the only reason the attorney-client discussion in question occurred was "because a mediation was taking place and efforts were being made to settle the case in this mediation."[270] He therefore concluded that the discussion was "for the purpose of, in the course of, and pursuant to a mediation," as contemplated by the key provision on mediation confidentiality.[271]

Justice Flier also pointed out that the majority opinion "sweepingly exempts all client-lawyer communications from mediation confidentiality."[272] In his view, that approach was mistaken; instead, "such a drastic exception must be made by the Legislature under carefully crafted statutory standards."[273]

Review by the California Supreme Court. After the court of appeal issued its decision, the attorney defendant petitioned the

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268. *Id*. at 662.

269. *Id*. at 665.

270. *Id*. at 665 (Flier, J., dissenting).

271. *Id*. at 666-67.

272. *Id*. at 667.

273. *Id*.

California Supreme Court for review. The Court granted review, but deferred briefing pending its consideration and disposition of *Cassel*.[274]

Upon deciding *Cassel* in 2011, the Court transferred the *Porter* case back to the court of appeal. The Court instructed the court of appeal to vacate its earlier decision and reconsider the cause in light of *Cassel*.[275] To the best of the Commission's knowledge, the case has not yet been retried.

Other Lower Court Decisions

Cassel, Wimsatt, and *Porter* are not the only judicial decisions that involve the intersection of California's mediation confidentiality statutes and allegations of attorney misconduct. The Commission found two other published decisions[276] and six unpublished decisions[277] in which a court of appeal held that the mediation confidentiality statutes prevented a litigant from using mediation communications to support allegations that an attorney engaged in misconduct in the mediation process.[278] The

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274. See 2010 Cal. LEXIS 7269, 233 P.3d 1088, 111 Cal. Rptr. 3d 693 (2010).

275. See 2011 Cal. LEXIS 3636, 250 P.3d 180, 123 Cal. Rptr. 3d 577 (2011); see also 2011 Cal. LEXIS 10768 (2011).

276. See cases cited in notes 280 & 281 *infra*. In another published decision, a client alleged that his attorney wrongfully coerced him into entering into a mediated settlement agreement by threatening to withdraw on the eve of trial. The court of appeal ruled against the client on grounds unrelated to mediation confidentiality. See *Chan*, 188 Cal. App. 4th 1159; see also Chan v. Packard, 2015 Cal. App. Unpub. LEXIS 6899 (2015).

277. See cases cited in notes 282-87 *infra*. In another unpublished decision, a client alleged that her attorneys committed malpractice in the course of a mediation that settled both an underlying tort case and a related workers' compensation claim. The trial court sustained a demurrer with leave to amend; it entered judgment against the client when the client failed to amend. The court of appeal upheld that result, but did not resolve any mediation confidentiality issues because the client failed to supply an adequate record for review. Spanos v. Dreyer, 2016 Cal. App. Unpub. LEXIS 4752 (2016).

278. These totals do not include cases involving an alleged failure to comply with a court order to mediate. For discussion of cases in that category, see

Commission also found an unpublished decision in which a federal district court reached a similar conclusion in a case under California law.[279]

Those decisions involved the following types of allegations, the merits of which are unclear:

- A party's claim that a mediated settlement agreement was unenforceable because the party's attorney, his opponent's attorney, and the mediator coerced him into signing it through threats of criminal prosecution.[280]
- A client's claim that his attorney failed to adequately advise him of the risks of a mediated settlement agreement, drafted that agreement and the judgment such that corporate obligations became his personal obligations, and breached a conflict waiver by failing to negotiate a settlement with certain terms.[281]
- A legal malpractice case in which the clients alleged that their attorneys tricked them into settling the underlying case by inducing them to sign a supposed confidentiality agreement at a mediation, and later appending the signature sheet to a settlement agreement.[282]
- A legal malpractice case in which the client alleged that his attorneys failed to prepare for trial, agreed to

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CLRC Staff Memorandum 2015-4, pp. 28-31. See also *supra* note 22 (describing different types of noncompliance with a court order to mediate) and the description of *Foxgate* in the discussion of "California Supreme Court Decisions on Mediation Confidentiality" *supra*.

279. See Benesch v. Green, 2009 U.S. Dist. LEXIS 117641.

280. See *Provost*, 201 Cal. App. 4th 1289. For further discussion of this case, see CLRC Staff Memorandum 2015-4, p. 14.

281. See Amis v. Greenberg Traurig LLP, 235 Cal. App. 4th 331, 185 Cal. Rptr. 3d 322 (2015). For further discussion of this case, see CLRC Staff Memorandum 2015-4, pp. 15-16.

282. See Hadley v. The Cochran Firm, 2012 Cal. App. Unpub. LEXIS 5743 (2012).

a dispute resolution process (mediation-arbitration) that disfavored him, agreed to an unreasonable settlement, and negligently allowed defaults of other defendants to be taken, leaving him exposed as the only defendant.[283]

- A legal malpractice case in which the client alleged that his attorneys failed to inform him that (1) he would be personally liable under a mediated settlement agreement and (2) he should obtain separate counsel before signing the agreement.[284]
- A legal malpractice case in which the client alleged that his attorneys failed to include a general statement of release from his wife in a mediated settlement agreement and failed to obtain his new spouse's consent to the settlement.[285]
- A legal malpractice case in which the client alleged that his attorney made numerous misrepresentations to him, neglected to show him working drafts of a mediated settlement agreement in the underlying case, failed to explain certain things, neglected to take certain steps, and failed to advise the client to seek expert tax advice.[286]
- A legal malpractice case in which a creditor alleged that its attorneys negligently caused it to enter into a

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283. See Mellor v. Oaks, 2011 Cal. App. Unpub. LEXIS 8797 (2011). Apparently, the client sought to prove these allegations solely through mediation communications. The trial court granted a nonsuit and the court of appeal affirmed, explaining that mediation communications were inadmissible and thus there was a "paucity of evidence" that the client could present. *Id*. at *12.

284. See Gossett v. St. John, 2011 Cal. App. Unpub. LEXIS 3586 (2011).

285. See *In re* Malcolm, 2004 Cal. App. Unpub. LEXIS 10675 (2004). The court of appeals made clear that although the client could not use mediation communications to support his allegations, he was still "free to prosecute his malpractice action … using the property settlement and other nonconfidential evidence." *Id*. at *12.

286. See Biller v. Faber, 2016 Cal. App. Unpub. LEXIS 3017 (2016).

mediated settlement agreement for far less than the full amount of the debt.[287]

- A legal malpractice case in which the client alleged that during a mediation her attorney induced her to sign a settlement term sheet that failed to meet her goal of protecting her daughter's inheritance rights.[288]

The Commission also found two decisions (a published decision by a federal district court and an unpublished opinion by a superior court) in which evidence of mediation communications was used in resolving whether an attorney engaged in misconduct. In both cases, the court determined that the misconduct allegations were meritless.[289]

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287. See Shaozing City Maolong Wuzhong Down Products, Ltd. v. Landsberg & Associates, 2015 Cal. App. Unpub. LEXIS 4492 (2015).

288. See *Benesch,* 2009 U.S. Dist. LEXIS 117641. The plaintiff argued that California's mediation confidentiality statutes do not encompass attorney-client communications. The federal district court disagreed, concluding that "[c]ommunications between counsel and client that are materially related to the mediation, even if they are not made to another party or the mediator, are 'for the purpose of' or 'pursuant to' mediation" within the meaning of the California statutes. *Id*. at *22. The district court nonetheless denied the summary judgment motion without prejudice, because the plaintiff had not yet had an opportunity to explore "the question of what evidence would be left after application of the mediation confidentiality statutes …." *Id*. at *25.

Benesch preceded the California Supreme Court's decision in *Cassel*. The California Supreme Court described *Benesch* carefully in its *Cassel* opinion, *see* 51 Cal. 4th at 134-35, and expressly stated that it "agreed with" the district judge's analysis regarding mediation-related attorney-client communications, 51 Cal. 4th at 135.

289. See *Olam*, 68 F. Supp. 2d at 1151 (party sought to avoid obligations under mediated settlement agreement by alleging she was subjected to undue influence; court considered mediator's testimony and concluded there was "no evidence that [party] was subjected to anything remotely close to undue pressure"); Conwell v. Mallen, 2015 Cal. Super. LEXIS 11140 (2015) (client sought to avoid mediated settlement by blaming his attorneys; court considered evidence of mediation proceedings in resolving malpractice claim and ultimately granted judgment against client).

In contrast, in a state bar disciplinary proceeding a client alleged (among other things) that during a mediation her lawyer agreed to reduce his fee, yet he later reneged. Relying on *Cassel,* the Hearing Department ruled that "mediation confidentiality applied to preclude the discussion and the exact terms of the modification."[290] At the same time, however, it did consider evidence that there was a modification (the attorney admitted as much) and that the attorney subsequently took certain settlement funds for himself because he did not think the modification was valid.[291] That was sufficient for the Hearing Department to determine that the attorney had wrongfully failed to maintain disputed funds in trust, a ruling which was upheld on appeal.[292] The merits of the attorney's challenge to the validity of the modification are not clear to the Commission, but a legal malpractice case involving the same facts settled and the client "testified that she was 'made whole.'"[293]

In addition to the various published and unpublished cases described above, the Commission has received comments indicating that there are other disputes involving alleged attorney misconduct in the mediation process. It appears that due to *Cassel,* not all such disputes proceed to litigation.[294]

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290. *In re* Bolanos, Case No. 12-O-12167-PEM (Hearing Dep't of State Bar Ct., filed Sept. 16, 2013), n.7.

291. *Id.*

292. See *In re* Bolanos, Case No. 12-O-12167 (Review Dep't of State Bar Ct., filed May 18, 2015), pp. 4-6, 8 (*available at* http://www.statebarcourt.ca.gov/Portals/2/documents/opinions/Bolanos.pdf).

293. See *id.* at 7.

294. See, e.g., First Supplement to CLRC Staff Memorandum 15-46, Exhibit p. 52 (comments of Robert Sall) ("Many times since the *Cassel* decision in 2011, I have had to inform prospective clients that they would most likely be unable to prove [an] otherwise viable claim due to the impact of mediation confidentiality."); Memorandum 2015-36, Exhibit pp. 2-7 (comments of Gwire Law Firm) ("[W]e have had to decline too many compelling malpractice and fiduciary breach claims on the sole basis that the wrongdoing occurred during mediation. Indeed, turning away clients who have otherwise viable cases based on attorney negligence and false representations because the law has tied our

LAW OF OTHER JURISDICTIONS

The legislative resolution requesting this study directs the Commission to consider the law in other jurisdictions, including the Uniform Mediation Act ("UMA"). The Commission did extensive research in response to that request. Its findings on the topic are summarized below, in the following order:

(1) Uniform Mediation Act.
(2) Other states.
(3) Federal law.

Uniform Mediation Act

Drafting of the UMA began soon after California enacted its current statutory scheme governing protection of mediation communications. The project was prompted by the rising popularity of mediation across the country.[295] Experts in the area felt the time was ripe to assess which mediation approaches worked best, prepare legislation based on them, and attempt to attain a degree of nationwide uniformity.[296]

Drafting Process

The UMA was drafted over a period of four years, through collaboration between (1) a drafting committee of the National Conference of Commissioners on Uniform State Laws ("NCCUSL," now known as the "Uniform Law Commission" or "ULC") and (2) a drafting committee sponsored by the American Bar Association ("ABA"), working through its Section of Dispute Resolution.[297] Although both organizations had a long history of

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(and their) hands is one of the most tragic and morally wrong things we face in our practice."); see also First Supplement to Memorandum 2014-27, Exhibit pp. 1-2 (comments of Howard Fields).

295. See UMA, *supra* note 5, Prefatory Note at introduction.

296. See UMA, *supra* note 5, Prefatory Note at #4 (ripeness of uniform law).

297. See UMA, *supra* note 5, Prefatory Note at #5 (product of consensual process).

working to improve the law, this was the first time they participated jointly in drafting proposed legislation for state consideration.[298]

With the assistance of a grant from the William and Flora Hewlett Foundation, the drafting committees had academic support from many mediation scholars.[299] Numerous bar groups, mediators, and organizations of mediation professionals also participated in the drafting process. According to one of the reporters for the project, drafting the UMA "was an intense national dialogue on the mediation process — the nature of the process, its goals and values, its practices and experience, and its relationship to law — on a scale that the field of mediation had never before engaged so publicly." [300]

NCCUSL approved the UMA in the summer of 2001, and the ABA approved it six months later.[301] According to the ULC's website, the UMA has been endorsed by the American Arbitration Association, the Judicial Arbitration and Mediation Service, the CPR Institute for Dispute Resolution, and the National Arbitration Forum.[302]

Objectives

The Prefatory Note to the UMA explains the objectives of the legislation. A key objective was to promote uniformity in treatment

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298. Richard Reuben, *The Sound of Dust Settling: A Response to Criticisms of the UMA,* 2003 J. Disp. Resol. 99, 103 (2003). "The leadership of both organizations agreed to share resources, meet together, and work collaboratively but independently" in drafting the UMA. *Id.*

299. See UMA, *supra* note 5, Prefatory Note at #5 (product of consensual process).

300. Reuben, *supra* note 298, at 106.

301. In 2003, the UMA was amended to address international commercial mediation.

302. See http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Mediation%20Act.

of mediation issues across the country.[303] In addition, the drafters sought to:

- promote candor of parties through confidentiality of the mediation process, subject only to the need for disclosure to accommodate specific and compelling societal interests …;
- encourage the policy of fostering prompt, economical, and amicable resolution of disputes in accordance with principles of integrity of the mediation process, active party involvement, and informed self-determination by the parties …; and
- advance the policy that the decision-making authority in the mediation process rests with the parties.[304]

General Structure

A "central thrust" of the UMA is on protection of mediation communications.[305] According to the drafters, mediation involves a frank exchange of information and ideas that "can be achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes."[306] The drafters also specifically observed that "public confidence in and the voluntary use of mediation can be expected to expand if people have confidence that the mediator will not take sides or disclose their statements …."[307]

While emphasizing the importance of protecting mediation communications, the drafters did not consider it necessary to enact a statute making such communications "confidential" in the true

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303. UMA, *supra* note 5, Prefatory Note at introduction.

304. *Id*. For further discussion of those objectives, see *id*.

305. *Id*. The UMA also addresses a few other aspects of mediation. See UMA §§ 9 (mediator's disclosure of conflicts of interest; background), 10 (participation in mediation).

306. UMA, *supra* note 5, Prefatory Note at #1 (promoting candor).

307. *Id*.

sense of that word.[308] Rather, they concluded that a statute was needed only to restrict the admissibility or disclosure of evidence in judicial and other legal proceedings.[309]

The key provisions of the UMA protecting mediation communications are subdivisions (a) and (b) of Section 4, which provide:

> (a) Except as otherwise provided in Section 6, *a mediation communication is privileged* as provided in subsection (b) *and is not subject to discovery or admissible in evidence* in a proceeding unless waived or precluded as provided by Section 5.
>
> (b) In a proceeding, the following privileges apply:
>
> (1) A *mediation party* may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.
>
> (2) A *mediator* may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.
>
> (3) A *nonparty participant* may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.[310]

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308. *Id*. For the most part, the matter of confidentiality was left up to the parties to decide. See UMA § 8 (unless mediation is subject to open meetings act or open records act, "mediation communications are confidential to the extent agreed by the parties or provided by other law or rule" of enacting state).

309. UMA, *supra* note 5, Prefatory Note at #1 (promoting candor). According to the drafters, "the major contribution of the Act is to provide a privilege in legal proceedings, where it would otherwise either not be available or would not be available in a uniform way across the States." *Id*.

310. Emphasis added.

The UMA also includes a provision that prohibits a mediator from making, and prohibits a court, administrative agency, or arbitrator from considering, "a report, assessment, evaluation, recommendation, finding, or other communication regarding a mediation to a court, administrative agency, or other authority that may make a ruling on the dispute that is the subject of the mediation." UMA § 7(a), (c). Evidence Code Section 1121 served as a model in

These provisions establish "a privilege for mediation communications that, like other communications privileges, allows a person to refuse to disclose and to prevent other people from disclosing particular communications."[311]

That privilege applies in any "proceeding," which is defined broadly enough to include both civil and criminal matters.[312] In contrast, California's key statute protecting mediation communications applies only in noncriminal proceedings.

Under subdivision (b) of UMA Section 4, every mediation participant is a "holder" of the privilege — i.e., a "person who is eligible to raise and waive the privilege."[313] Unlike California law, however, all mediation participants are not treated equally.

Rather, subdivision (b) distinguishes between a "mediation party,"[314] a "mediator,"[315] and a "nonparty participant."[316] A mediation party receives more protection than a mediator, and a mediator receives more protection than a nonparty participant.[317]

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drafting this UMA provision, but differs from it in some respects (see UMA §§ 7(b)(2), (3), which lack California counterparts).

311. UMA § 4 Comment. In classifying its protection as a "privilege," the drafters of the UMA deliberately chose not to follow certain other approaches (e.g., creating a categorical, policy-based exclusion as in California). For explanation of that decision, see UMA § 4 Comment.

312. See UMA § 2(7) & Comment.

313. UMA § 4(b) & Comment.

314. A mediation party is "a person that participates in a mediation and whose agreement is necessary to resolve the dispute." UMA § 2(5).

315. A mediator is "an individual who conducts a mediation." UMA § 2(3).

316. A nonparty participant is "a person, other than a party or mediator, that participates in a mediation." UMA § 2(4).

317. The UMA drafters explained:

> As with other privileges, a mediation privilege operates to allow a person to refuse to disclose and to prevent another from disclosing particular communications.
>
> …. *[P]arties* have the greatest blocking power and may block provision of testimony about or other evidence of mediation communications *made by anyone* in the mediation, including persons other than the mediator and parties.…

In the drafters' view, giving mediation parties the greatest control over the use of mediation communications protects the expectations "of those persons whose candor is most important to the success of the mediation process."[318] The drafters also believed, however, that mediators should be holders with respect to their own mediation communications, "so that they may participate candidly, and with respect to their own testimony, so that they will not be viewed as biased in future mediations …."[319] Similarly, the drafters provided a limited privilege for a nonparty participant to

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> *Mediators* may block *their own provision of evidence,* including their own testimony and evidence provided by anyone else of the mediator's mediation communications, even if the parties consent.…
>
> Finally *a nonparty participant* may block evidence of *that individual's mediation communication* regardless of who provides the evidence and whether the parties or mediator consent.

UMA § 4(b) Comment (citation omitted) (emphasis added).

The UMA's complexity on this and other points has been the subject of debate. Some sources have contended that it is overly complex, difficult to explain, and may chill mediation communications. See, e.g., Brian Shannon, *Dancing With the One That "Brung Us" — Why the Texas ADR Community Has Declined to Embrace the UMA,* 2003 J. Disp. Resol. 197, 220 (2003) (hereafter, "Shannon (2003)") ("The UMA's backwards approach to confidentiality as well as its maze of privileges, waivers, and exceptions are not an adequate substitute for the current Texas approach"); see also *id*. at 197-200; N.Y. State Bar Ass'n Committee on ADR, *The Uniform Mediation Act and Mediation in New York* 10 (Nov. 1, 2002), *available at* https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26854; "Uniform Mediation Act video," *available at* http://open.mitchellhamline.edu/dri_mclvideo/40/. Other sources have defended the UMA as a precise balancing of competing interests. See, e.g., Reuben, *supra* note 298, at 109; Maureen Weston, *Confidentiality's Constitutionality: The Incursion on Judicial Powers to Regulate Party Conduct in Court-Connected Mediation,* 8 Harv. Negotiation L. Rev. 29, 52 (2003) ("The UMA's approach in establishing a mediation privilege while enumerating certain exceptions reflects a thoughtful a priori weighing of competing policies between confidentiality and the need for disclosure.").

318. *Id*.

319. *Id*.

"encourage the candid participation of experts and others who may have information that would facilitate resolution of the case."[320]

Waiver of the Protection Against Admissibility and Disclosure

The UMA privilege for mediation communications can be expressly waived. Unlike California, where an express waiver requires assent of *all* mediation participants, the requirements for an express waiver under the UMA depend on whose mediation communication is at stake and who is being asked to testify.[321]

The UMA privilege can also be waived in several other ways.[322] California has no comparable waiver provisions; any waiver of

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320. *Id.*

321. The UMA rules are:

- For testimony about mediation communications made by a party, all parties are the holders and therefore all parties must waive the privilege before a party or nonparty participant may testify or provide evidence; if that testimony is to be provided by a mediator, all parties and the mediator must waive the privilege.
- For testimony about mediation communications made by the mediator, both the parties and the mediator are holders of the privilege, and therefore both the parties and the mediator must waive the privilege before a party, mediator, or nonparty participant may testify or provide evidence of a mediator's mediation communications.
- For testimony about mediation communications that are made by a nonparty participant, both the parties and the nonparty participants are holders of the privilege and therefore both the parties and the nonparty participant must waive before a party or nonparty participant may testify; if that testimony is to be offered through the mediator, the mediator must also waive.

UMA § 5(a) & (b) Comment; see UMA § 4(b)(2) ("mediator may refuse to disclose a mediation communication"); UMA § 5(a) (express waiver requirements).

322. Waiver under the UMA occurs when:

California's mediation confidentiality protection must be express.[323]

UMA Exceptions Generally

The UMA drafters believed that the statutory protection for mediation communications should not be absolute. They explained:

> As with other privileges, the mediation privilege must have limits, and nearly all existing state mediation statutes provide them. Definitions and exceptions primarily are necessary to give appropriate weight to other valid justice system values .... They often apply to situations that arise only rarely, but might produce grave injustice in that unusual case if not excepted from the privilege.[324]

In the opinion of the drafters, "these exceptions need not significantly hamper candor."[325]

They decided to include ten different exceptions in the UMA.[326] Two of those exceptions are similar to ones that exist in California: an exception for preexisting evidence that is used in a mediation[327]

- A person discloses or makes a representation about a mediation communication and that action prejudices another person in a proceeding. UMA § 5(b).
- A person intentionally uses a mediation to plan, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity. UMA § 5(c).
- A mediator fails to comply with the UMA disclosure requirements or its impartiality requirement. UMA § 9(d) & Comment.

323. See *Simmons,* 44 Cal. 4th at 588.

324. UMA, *supra* note 5, Prefatory Note at #1 (promoting candor).

325. *Id*.

326. See UMA §§ 4(c), 6. The UMA is also subject to certain limits on its coverage and scope. See UMA §§ 2(2), 3(b)-(c); see also CLRC Staff Memorandum 2014-14, pp. 24-25 (discussing UMA §§ 2(2), 3(b)-(c)).

327. See UMA § 4(c) & Comment.

and an exception for a fully executed agreement reached in a mediation.[328] Another UMA exception applies only when mediation communications are proffered as evidence in a criminal case, which is beyond the scope of California's mediation confidentiality law.[329]

The remaining seven UMA exceptions have no clear counterpart under California law. Three of them seem particularly pertinent to this study, as explained next.[330]

UMA Exceptions for Professional Misconduct and Mediator Misconduct

UMA Section 6(a)(6) directly addresses the intersection of mediation confidentiality and professional misconduct. It creates the following exception to the UMA privilege:

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328. See UMA § 6(a)(1) & Comment.

329. See UMA § 6(b)(1) & Comment. The UMA provides two alternative versions of this exception. See *id*. & UMA § 6(b)(1) Comment.

330. The other exceptions with no California counterpart are:

(1) An exception for a mediation communication that is available to the public under an open records act, or is made during a mediation session that is open to the public, or required by law to be open to the public. See UMA § 6(a)(2) & Comment.

(2) An exception for "a threat or statement of a plan to inflict bodily injury or commit a crime of violence." UMA § 6(a)(3).

(3) An exception for a mediation statement that is "intentionally used to plan a crime, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity." UMA § 6(a)(4).

(4) An exception for a mediation communication that is "sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party …." UMA § 6(a)(7). The UMA provides two alternative versions of this exception. See *id*. & UMA § 6(a)(7) Comment.

> (a) There is no privilege under Section 4 for a mediation communication that is:
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> ….
>
> (6) except as otherwise provided in subsection (c), sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation….

Notably, this exception is not limited to evidence that *an attorney* engaged in legal malpractice or other professional misconduct. The exception also encompasses other types of professional misconduct, such as evidence that a mediation party, nonparty participant, or representative of a party engaged in medical malpractice or accounting malpractice.

By its terms, the professional misconduct exception includes both evidence tending to *prove* a claim of professional malpractice, and evidence tending to *disprove* such a claim. Importantly, however, a significant constraint exists with regard to establishing whether professional misconduct actually occurred: In such an inquiry, a mediator cannot be compelled to provide evidence of a mediation communication.[331]

Further, the professional misconduct exception is restricted to evidence of misconduct that allegedly occurred "during a mediation."[332] Thus, the exception would not apply to evidence of alleged misconduct in a non-mediation setting.

The drafters of the UMA gave the following reasons for their approach to professional misconduct:

> Sometimes the issue arises whether anyone may provide evidence of professional misconduct or malpractice occurring during the mediation. The failure to provide an

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331. See UMA § 6(a)(6), (c). Although the mediator cannot be compelled to testify under UMA Section 6(a)(6), the mediator may testify voluntarily. See UMA § 6(c) Comment. In contrast, California law provides that a mediator is generally incompetent to testify about a mediation. See Evid. Code § 703.5.

332. UMA § 6(a)(6).

> exception for such evidence would mean that lawyers and fiduciaries could act unethically or in violation of standards without concern that evidence of the misconduct would later be admissible in a proceeding brought for recourse. This exception makes it possible to use testimony of anyone except the mediator in proceedings at which such a claim is made or defended. Because of the potential adverse impact on a mediator's appearance of impartiality, the use of mediator testimony is more guarded, and therefore protected by Section 6(c). It is important to note that evidence fitting this exception would still be protected in other types of proceedings, such as those related to the dispute being mediated.[333]

They included a separate UMA exception for mediator misconduct, which is similar to the one for professional misconduct but without the restriction on mediator testimony.[334]

UMA Exception Relating to the Validity and Enforceability of a Mediated Settlement Agreement

Another noteworthy exception is UMA Section 6(b)(2), which applies when a mediation party challenges the validity of a mediated settlement agreement, as happened in some of the cases that prompted this study. According to the UMA drafters, this exception is "designed to preserve traditional contract defenses to the enforcement of the mediated settlement agreement that relate to the integrity of the mediation process, which otherwise would be unavailable if based on mediation communications."[335]

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333. UMA § 6(a)(6) Comment (citations omitted).

334. See UMA § 6(a)(5) & Comment.

335. UMA § 6(b)(2) Comment. The drafters further explained:

> A recent Texas case provides an example [of when this exception should apply]. An action was brought to enforce a mediated settlement. The defendant raised the defense of duress and sought to introduce evidence that he had asked the mediator to permit him to leave because of chest pains and a history of heart trouble, and that the mediator had refused to let him leave the mediation session. The exception might also allow party testimony in a personal injury case that the driver denied having

The exception does not apply every time there is a challenge to a mediated settlement agreement. Rather, it applies only if the proponent of the evidence convinces a judge, at an *in camera* proceeding, "that the evidence is unavailable, and the need for the evidence outweighs the policies underlying the privilege."[336]

If the proponent of the evidence provides the required proof of necessity, the evidence may be used in the proceeding to rescind or reform or otherwise avoid liability on a mediated settlement agreement, regardless of whether the evidence tends to support or refute the effort to avoid such liability. The mediator cannot be forced to testify in the proceeding, only the other mediation

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> insurance, causing the plaintiff to rely and settle on that basis, where such a misstatement would be a basis for reforming or avoiding liability under the settlement.

Id. (citation omitted).

California has no comparable exception to its key provision protecting mediation communications. However, a mediated settlement agreement may be introduced "to show fraud, duress, or illegality that is relevant to an issue in dispute." Evid. Code § 1123(d). The concept is that if a mediation party enters into a settlement agreement in reliance on a statement made during the mediation, that party can protect itself by incorporating the statement into the terms of the settlement agreement. That concept is relevant to the UMA example involving the uninsured driver.

In the duress scenario in which the mediator allegedly refused to let a party leave even though the party had chest pains, California's statute would preclude introduction of any statements made during the mediation, but would not bar evidence of the mediator's conduct or the party's physical condition. See cases cited in note 170 *supra*.

336. UMA Section 6 (b)(2) provides:

> (b) There is no privilege under Section 4 if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in:
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> ….
>
> (2) except as otherwise provided in subsection (c), a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.

participants. The UMA drafters imposed this limitation "to protect against frequent attempts to use the mediator as a tie-breaking witness, which would undermine the integrity of the mediation process and the impartiality of the individual mediator."[337]

Implementation of the UMA

The UMA has been enacted in the District of Columbia and eleven states: Hawaii, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, and Washington.[338] Efforts to enact the UMA in a number of other states have been unsuccessful;[339] UMA legislation is currently pending in New

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337. UMA § 6(c) Comment.

338. D.C. Code §§ 16-4201 to 16-4213; Haw. Rev. Stat. §§ 658H-1 to 658H-13; Idaho Code Ann. §§ 9-801 to 9-814; Idaho R. Evid. 507; 710 Ill. Comp. Stat. 35/1 to 35/99; Iowa Code §§ 679C.101 to 679C.115; Neb. Rev. Stat. §§ 25-2930 to 25-2542; N.J. Rev. Stat. §§ 2A:23C-1 to 2A:23C-13; N.J. R. Ct. 1:40-4; Ohio Rev. Code Ann. §§ 2710.01 to 2710.10; S.D. Codified Laws §§ 19-13A-1 to 19-13A-15; Utah Code Ann. §§ 78B-10-101 to 78B-10-114; Vt. Stat. Ann. tit. 12, §§ 5711 to 5723; Wash. Rev. Code §§ 7.07.010 to 7.07.904.

According to information from the U.S. Census Bureau, the combined population of the UMA jurisdictions in 2016 was about 54 million people, which was approximately 16.7% of the country's total population. In comparison, California was the most populous state, with about 39 million people or approximately 12.1% of the total population. See U.S. Census Bureau, Population Division, *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2016*.

339. See CLRC Staff Memorandum 2014-35, pp. 30-32 (Massachusetts), 36-39 (New York) & Exhibit pp. 10 (Connecticut), 17 (Maine), 26 (New Hampshire), 36 (South Carolina); see also CLRC Staff Memorandum 2014-44, p. 25 ("The UMA received some attention in Texas, but the legal and mediation community appears to prefer the existing Texas approach. To the [CLRC staff's] knowledge, the UMA has not been introduced in the Texas Legislature at any time."); *id*. at 18-25 (describing Texas reaction to UMA in detail); CLRC Staff Memorandum 2014-43, pp. 4-6 ("[T]he UMA encountered resistance in Pennsylvania .... Although that opposition was apparently withdrawn for purposes of the ABA vote, [CLRC staff] did not find any current or past legislation seeking to enact the UMA in Pennsylvania"); CLRC Staff

York and Massachusetts despite previous defeats in those jurisdictions.[340]

Nebraska was the first state to implement the UMA. Its version became operative in August 2003. By the end of 2006, the UMA was also enacted in the District of Columbia, Illinois, Iowa, New Jersey, Ohio, Utah, Vermont, and Washington. South Dakota's version of the UMA became operative in 2008, as did Idaho's version. Hawaii just enacted the UMA in 2013.

As best the Commission has been able to determine, none of the UMA jurisdictions afforded absolute or near-absolute protection to mediation communications before enacting the UMA. Instead, at the time of enacting the UMA, these jurisdictions appear to have afforded less protection for mediation communications than the UMA, or at least to have had a less well-developed body of law on the subject than the UMA.[341]

In general, the UMA enactments stick pretty close to the uniform text.[342] It is too early to tell how much variation there will be in interpreting the UMA protections from state to state.[343]

So far, every UMA jurisdiction has enacted the professional misconduct exception[344] without deviating from the uniform text.[345] The Commission found only one case squarely involving application of that exception: A recent Nebraska legal malpractice case in which a client alleged that at a mediation, her attorney negligently advised her to settle for less than her case was worth

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Memorandum 2014-35, p. 20 ("Minnesota's legal community participated in the drafting of the UMA.… But Minnesota has not enacted the uniform act.").

340. See HB 49 (Massachusetts); SB 1017 (Comrie) (New York).

341. That finding is consistent with a communication from the ULC on the same point. See First Supplement to CLRC Staff Memorandum 2014-14, Exhibit p. 1 (comments of Casey Gillece on behalf of ULC).

342. See CLRC Staff Memorandum 2014-24, pp. 4-5.

343. See *id*. at 6-7.

344. UMA § 6(a)(6), (c).

345. CLRC Staff Memorandum 2014-24, Exhibit pp. 7-8 & sources cited therein.

and coerced her by threatening to stop advancing litigation costs if she did not settle.[346] The trial court granted summary judgment to the attorney, but the appellate court reversed and remanded, concluding that neither side was entitled to summary judgment. The appellate court further concluded that the mediator's deposition testimony would be admissible on remand, pursuant to Nebraska's version of UMA Section 6(a)(6).[347]

Every UMA jurisdiction but one has enacted the mediator misconduct exception[348] without deviating from the uniform text; the revisions made by the remaining jurisdiction do not appear significant.[349] There does not yet appear to be any case law interpreting this exception.

Three UMA states deviated from the uniform text[350] in enacting the exception relating to the validity of a mediated settlement

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346. Shriner v. Friedman Law Offices, P.C., L.L.O, 23 Neb. App. 869, 877 N.W.2d 272 (Neb. Ct. App. 2016).

The Commission also found an unpublished decision by a federal district court in New Mexico, which referred to UMA Section 6(a)(6) in concluding that a similar New Mexico provision applies to alleged misconduct by an insurer, not just alleged misconduct by an attorney. See Willis v. Geico General Ins. Co., 2016 U.S. Dist. LEXIS 49038, at *23 (April 2016).

347. See *id*. at 290-91. A mediator cannot be compelled to testify under UMA Section 6(a)(6), but the mediator may testify voluntarily. See UMA §6(c) & Comment. Presumably, that is what happened in *Shriner*. For further discussion of *Shriner,* see CLRC Staff Memorandum 2016-30, pp. 12-14.

348. UMA § 6(a)(5).

349. See CLRC Staff Memorandum 2014-24, Exhibit pp. 7-8 & sources cited therein.

350. See *id*.

agreement.[351] A few written decisions[352] discuss that exception to some extent.[353]

Other States

Like the eleven UMA states, virtually all of the remaining states provide some significant, statewide protection for mediation communications generally.[354] Kentucky,[355] New York,[356] and Tennessee[357] appear to be the only exceptions.

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351. UMA § 6(b)(2).

352. See, e.g., Addessa v. Addessa, 392 N.J. Super. 58, 66, 919 A.2d 885 (N.J. Super. Ct. App. Div. 2007); City of Akron v. Carter, 190 Ohio App. 3d 420, 942 N.E.2d 409 (Ohio Ct. App. 2010).

353. For further information on the UMA and its implementation, see CLRC Staff Memoranda 2014-14 & 2014-24.

354. Ala. Civ. Ct. Mediation R. 11 & Ala. App. Ct. Mediation R.8 (Alabama); Alaska R. Civ. Proc. 100(g) & Alaska R. Evid. 408 (Alaska); Ariz. Rev. Stat. § 12-2238 (Arizona); Ark. Code Ann. § 16-7-206 (Arkansas); Colo. Rev. Stat. § 13-22-307 & Colo. Rev. Stat. § 301 *et seq*. (Colorado); Conn. Gen. Stat. § 52-235d (Connecticut); Del. Super. Ct. Civ. R. 16(b)(4)(d) (for compulsory mediation in Superior Court), Del. Ch. Ct. R. 174 (for mediation resulting from a referral by the Chancellor or a Vice Chancellor) & 6 Del. Code § 7716 (confidentiality under Voluntary ADR Act) (Delaware); Fla. Stat. §§ 44.401 to 44.406 (Florida); Ga. ADR R. VII & Ga. ADR Appendix C (Georgia); Ind. ADR R. 2.11 & Ind. Code Ann. § 4-21.5-3.5-27 (Indiana); Kan. Stat. Ann. § 60-452a (in Kan. Rules of Evidence), Kan. Stat. Ann. § 5-512 (in Kan. Dispute Resolution Act) & Kan. Sup. Ct. R. 903 (Ethical Standards for Mediators) (Kansas); La. Rev. Stat. § 9:4112 (Louisiana); Maine R. Civ. Proc. 16B(k) & Maine R. Evid. 408(b), 514 (Maine); Md. Code, Courts & Judicial Proceedings §§ 3-1801 to 3-1806 & Md. R. 17-105 (Maryland); Mass. Gen. Laws ch. 233, § 23C (Massachusetts); Mich. Ct. R. 2.412 (Michigan); Minn. Gen. R. Prac. 114.08 & Comment (applicable to ADR proceedings, which are required by Minn. Gen. R. Prac. 114.01 in almost all civil cases), Minn. Stat. § 572.36 & Minn. Stat. § 595.02, Subd. 1(m), Subd. 1a (Minnesota); R. VII & XV(E) of the Miss. Court Annexed Mediation Rules for Civil Litigation (Mississippi); Mo. Rev. Stat. § 435.014 & Mo. S.Ct. R. 17.06 (Missouri); Mont. Code Ann. § 26-1-813 (Montana); Nev. Rev. Stat. § 48.109 (Nevada); N.H. Super. Ct. R. 170(E) (New Hampshire); N.M. Stat. Ann. Sections 44-7B-4 & 44-7B-5 (New Mexico); R. III of the N.C. Standards of Professional Conduct for Mediators, R. 8.3 of the

Statutes and Rules

The statutes and rules protecting mediation communications vary widely from state to state.[358] Among other things, they differ

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Revised Rules of Professional Conduct of the N.C. State Bar, N.C. Settlement Conf. R. 4(F) & N.C. Gen. Stat. §§ 7A-38.1(*l*), 7A-38.4A(j) (North Carolina); N.D. Cent. Code § 31-04-11, N.D. R. Ct. 8.8 & N.D. Code of Mediation Ethics R. IV (North Dakota); Okla. Stat. tit. 12 § 1805 (applicable to proceedings under the Dispute Resolution Act); R. 10 & Appendices A & C of the Rules & Procedures for the Okla. Dispute Resolution Act & Okla. Stat. tit. 12, §§ 1824, 1836, 1837 (Oklahoma); Or. Rev. Stat. §§ 36.110, 36.220 to 36.238 (Oregon); Pa. Cons. Stat. § 5949 (Pennsylvania); R.I. Gen. Laws § 9-19-44 & R.I. Supreme Ct. Rule 35 (Rhode Island); R. 8 & Appendix B (Part V) of the S.C. Court-Annexed ADR Rules (South Carolina); Tenn. S.Ct. R. 31, §§ 7, 10(d), 11(b)(14)-(18), 12 & Appendix A, §§ 1(c)(4), 7 (Tennessee); Tex. Civ. Prac. & Rem. Code §§ 154.053, 154.073 (Texas); Va. Code Ann. §§ 8.01-576.10, 8.01-581.22 (Virginia); W.Va. Trial Ct. R. 25.12 (West Virginia); Wis. Stat. §§ 802.12(4), 904.085 (Wisconsin); Wyo. Stat. §§ 1-43-102, 1-43-103 (Wyoming).

355. Although Kentucky does not have a statute or statewide rule broadly addressing mediation communications, it does have a model rule on the topic (Ky. Model Ct. Mediation R. 12), which has served as a basis for numerous Kentucky local court rules. See, e.g., Ky. 11th Jud. Cir. L.R. 912.

356. New York just has (1) a few provisions that protect mediation communications in certain contexts, *see, e.g.,* N.Y. Judiciary Law § 849-b(6), and (2) a provision that protects settlement negotiations (similar to Evid. Code §§ 1152 & 1154 in California), *see* N.Y. C.P.L.R. 4547.

Apparently, many New York mediators use contractual agreements to protect the confidentiality of their mediations. See David J. Spellman, *Mediation Privilege in New York*, *available at* http://nysbar.com/blogs/ResolutionRoundtable/2013/04/mediation_privilege_in_new_yor.html (New York mediators "have all sought confidentiality in mediation by contract."). However, contractual confidentiality requirements generally are not binding on third parties.

357. Tennessee has a provision (Tenn. S.Ct. R. 31, § 7) that protects ADR proceedings "to the same extent as conduct or statements are inadmissible under Tennessee Rule of Evidence 408." Tennessee's Rule 408 is similar to California's provisions that protect settlement negotiations (Evid. Code §§ 1152, 1154).

358. See, e.g., CLRC Staff Memorandum 2014-44 (describing Texas law); CLRC Staff Memorandum 2014-43 (describing Pennsylvania law); CLRC Staff

in whether, and to what extent, they permit the use of mediation communications in resolving an allegation of attorney misconduct.

In seven states (plus the UMA states), a statute or rule protecting mediation communications has one or more exceptions that expressly addresses alleged *attorney* misconduct or alleged professional misconduct more generally (thus encompassing attorney misconduct).[359] Those states are Florida,[360] Maine,[361]

Memorandum 2015-35, pp. 4-25 (describing Florida law); *id*. at 25-32 (describing Massachusetts law); *id*. at 32-40 (describing New York law).

359. Another state, Minnesota, has an exception that *expressly* concerns alleged misconduct of an attorney acting as a mediator (as opposed to an attorney representing a client in a mediation). See Minn. Stat. § 595.02, Subd. 1a, which provides:

> *Alternative dispute resolution privilege* — No person presiding at any alternative dispute resolution proceeding established pursuant to law, court rule, or by an agreement to mediate, shall be competent to testify, in any subsequent civil proceeding or administrative hearing, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to any statement or conduct that could:
>
> ….
>
> (2) give rise to disqualification proceedings under the Rules of Professional Conduct for attorneys ….

360. See Fla. Stat. § 44.405(4)(a)(4) & (6), which provide:

> (4)(a) … there is no confidentiality or privilege … for any mediation communication:
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> ….
>
> 4. Offered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding;
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> ….
>
> 6. Offered to report, prove, or disprove professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct.

361. See Maine R. Evid. 514(c)(5), which provides:

> (c) **Exceptions.** There is no privilege under this rule:
>
> ….
>
> (5) *Party or counsel misconduct*. For communications sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty

Maryland,[362] Michigan,[363] New Mexico,[364] North Carolina,[365] and Virginia.[366]

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participant, or representative of a party based on conduct occurring during a mediation.

Another Maine provision protecting mediation communications — Maine R. Evid. 408(b) — does not have an exception that expressly addresses professional misconduct.

362. See Md. Code, Courts & Judicial Proceedings § 3-1804(b)(3), which provides:

> (b) Disclosures allowed. — In addition to any other disclosure required by law, a mediator, a party, or a person who was present or who otherwise participated in a mediation at the request of the mediator or a party may disclose mediation communications:
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> ….
>
> (3) To the extent necessary to assert or defend against allegations of professional misconduct or malpractice by a party or any person who was present or who otherwise participated in the mediation at the request of a party, except that a mediator may not be compelled to participate in a proceeding arising out of the disclosure ….

Another Maryland provision protecting mediation communications — Maryland Rule 17-105 — does not have an exception that expressly addresses professional misconduct.

363. See Mich. Ct. R. 2.412(D)(10) & (11), which provide:

> (D) **Exceptions to Confidentiality.** Mediation communications may be disclosed under the following circumstances:
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> ….
>
> (10) The disclosure is included in a report of professional misconduct filed against a mediation participant or is sought or offered to prove or disprove misconduct allegations in the attorney discipline process.
>
> (11) The mediation communication occurs in a case out of which a claim of malpractice arises and the disclosure is sought or offered to prove or disprove a claim of malpractice against a mediation participant.

364. See N.M. Stat. Ann. § 44-7B-5(a)(8), which provides:

> 44-7B-5. A. Mediation communications are not confidential pursuant to the Mediation Procedures Act if they:
>
> ….
>
> (8) are sought or offered to disprove a claim or complaint of professional misconduct or malpractice based on conduct during a mediation and filed against a mediation party or nonparty participant ….

365. See N.C. Gen. Stat. § 7A-38.1(*l*)(3), which provides:

In ten other states, there is no mediation confidentiality exception that expressly addresses *attorney* misconduct or professional misconduct generally, but there is one that expressly addresses *mediator* misconduct.[367] The remaining seventeen states

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> § 7A-38.1.... (*l*) Inadmissibility of negotiations — Evidence of statements made and conduct occurring in a mediated settlement conference or other settlement proceeding conducted under this section, whether attributable to a party, the mediator, other neutral, or a neutral observer present at the settlement proceeding, shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other civil actions on the same claim, except:
>
> ....
>
> (3) In disciplinary proceedings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals ....

N.C. Gen. Stat. § 7A-38.4A(j) (applicable to district court actions) is essentially identical to the provision shown above.

366. See Va. Code Ann. § 8.01-581.22(vii), which provides:

> 8.01-581.22. All memoranda, work products and other materials contained in the case files of a mediator ... are confidential. Any communication made in or in connection with the mediation, which relates to the controversy being mediated, ... is confidential....
>
> Confidential materials and communications are not subject to disclosure in discovery or in any judicial or administrative proceeding except ... (vii) where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party's legal representative based on conduct occurring during a mediation ....

Va. Code Ann. § 8.01-576.10(vii), applicable to court-referred dispute resolution proceedings, is similar in content.

367. See Ala. Civ. Ct. Mediation R.11(b)(3)(iii); Ariz. Rev. Stat. § 12-2238(B)(2); Colo. Rev. Stat. § 13-22-307(2)(D); Del. Super. Ct. Civ. R. 16(b)(4)(d)(ii) (but Del. Ch. Ct. R. 174 & 6 Del. Code § 7716 do not include an exception expressly that expressly addresses mediator misconduct); Ga. ADR R. VII(B); Kan. Stat. Ann. § 60-452a(b)(1); Kan. Stat. Ann. § 5-512(b)(1); Mont. Code Ann. § 26-1-813(5)(c); N.D. Cent. Code § 31-04-11(2); Okla. Stat. tit. 12 § 1805(F) (but Okla. Stat. tit. 12, § 1824 does not include an exception that expressly addresses mediator misconduct); Or. Rev. Stat. § 36.222(5).

Some of the states with a mediation confidentiality exception that expressly addresses *attorney* misconduct or *professional* misconduct also have an

(plus California) do not have a mediation confidentiality exception that expressly addresses professional misconduct of any type.[368]

In considering these figures, it is important to bear in mind that they only reflect which jurisdictions have *expressly* addressed professional misconduct in a statute or rule protecting mediation communications. If a jurisdiction has not expressly addressed the subject, a court might still *imply* an exception for evidence of alleged attorney misconduct or for evidence of professional misconduct more generally.

Further, if a jurisdiction lacks an exception expressly addressing professional misconduct, that does not necessarily mean that a mediation communication bearing on such misconduct will be inadmissible and protected from disclosure. The communication might still be subject to disclosure because it is beyond the scope of the provision protecting mediation communications, or because it falls within another type of exception.[369] Many of the mediation confidentiality statutes and rules are subject to a number of different exceptions.[370] Of particular note, some of them include an exception relating to the enforcement of a mediated settlement agreement, similar to UMA Section 6(b)(2).[371]

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exception that specifically addresses *mediator* misconduct. See, e.g., Maine R. Evid. 514(c)(4).

368. Those states are Alaska, Arkansas, Connecticut, Indiana, Louisiana, Massachusetts, Missouri, Mississippi, Nevada, New Hampshire, Pennsylvania, Rhode Island, South Carolina, Texas, West Virginia, Wisconsin, and Wyoming.

369. For example, an exception for evidence of fraud (see, e.g., Maine R. Evid. 408(b)), an exception for a disclosure required by statute (see, e.g., Ariz. Rev. Stat. § 12-2238(B)(3)), or a "manifest injustice" exception (see, e.g., Wisc. Stat. § 904.085(4)(e)).

370. See, e.g., Maine R. Evid. 514(c); N.M. Stat. Ann. § 44-7B-5; Wisc. Stat. § 904/085(4)(a).

371. See, e.g., Fla. Stat. § 44.405(4)(b) (giving no confidentiality to a mediation communication that is "[o]ffered for the limited purpose of establishing or refuting legally recognized grounds for voiding or reforming a settlement agreement reached during a mediation."); La. Rev. Stat. § 9.4112(B)(1)(c) (permitting disclosure of mediation communications with respect to a "judicial determination of the meaning or enforceability of an

Extent of Variation in Expressly Addressing Attorney Misconduct and Other Professional Misconduct

In expressly addressing the relationship between mediation confidentiality and professional misconduct, states do not just vary in whether they focus on attorney misconduct, mediator misconduct, or professional misconduct generally. Rather, the statutes and rules differ in various other respects as well. For example:

- *Disciplinary Proceeding vs. Malpractice Proceeding.* Some states have separate exceptions for a disciplinary proceeding (e.g., a State Bar proceeding seeking suspension of an attorney for extortionate statements in a mediation) and a malpractice proceeding (e.g., a suit by a client against his attorney, seeking to recover damages for providing incorrect tax advice in a mediation).[372] Other states lump the two types of proceedings together in a single exception,[373] or provide an exception for only one of them.[374]
- *Proof of Allegations vs. Defense Against Allegations.* Some of the exceptions are even-handed, permitting use of mediation communications to prove or disprove alleged professional misconduct.[375] Florida's

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agreement resulting from a mediation procedure if the court determines that testimony concerning what occurred in the mediation proceeding is necessary to prevent fraud or manifest injustice.").

372. See, e.g., Fla. Stat. § 44.405(4)(a)(4), (6); Mich. Ct. R. 2.412(D)(10), (11).

373. See, e.g., Maine R. Evid. 514(c)(4), (5); N.M. Stat. Ann. § 44-7B-5(A)(8).

374. See, e.g., N.C. Gen. Stat. § 7A-38.1(*l*)(2).

375. See, e.g., Kan. Stat. Ann. § 60-452a (Mediation confidentiality and privilege shall not apply to "[i]nformation that is reasonably necessary to allow investigation of or action for ethical violations against the neutral person conducting the proceeding or for the defense of the neutral person or staff of an approved program conducting the proceeding in an action against the neutral

exceptions expressly extend not only to proving and defending against allegations of professional misconduct, but also to reporting of such misconduct.[376]

In other states, the statutory exception appears exclusively or primarily directed at allowing a mediator to defend against allegations of professional misconduct.[377]

- *Professional Misconduct During Mediation vs. Other Professional Misconduct*. Some provisions create an exception to mediation confidentiality only for evidence of professional misconduct that allegedly occurred *during* mediation.[378] In other states, the

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person or staff of an approved program if the action is filed by a party to the proceeding."); Maine R. Evid. 514(c)(4), (5) (There is no mediation privilege for communications sought or offered to "prove or disprove" a claim of professional misconduct or malpractice).

376. Fla. Stat. § 44.405(4)(a)(4), (6).

377. See, e.g., Ga. ADR R. VII(B) ("Confidentiality does not extend to documents or communications relevant to legal claims or disciplinary complaints brought against a neutral or an ADR program and arising out of an ADR process. Documents or communications relevant to such claims or complaints may be revealed only to the extent necessary to protect the neutral or ADR program."); Okla. Stat. tit. 12, § 1805(F) ("If a party who has participated in mediation brings an action for damages against a mediator arising out of mediation, for purposes of that action the privilege provided for in subsection A of this section shall be deemed to be waived as to the party bringing the action.").

378. See, e.g., Maine R. Evid. 514(c)(5) (There is no mediation privilege for "communications sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party *based on conduct occurring during a* mediation.") (emphasis added); Va. Code Ann. § 8.01-581.22 (Mediation communications are confidential and protected from disclosure except "where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party's legal representative *based on conduct occurring during a mediation*.") (emphasis added).

exception is not expressly limited to misconduct *during* mediation.[379]

- *In Camera Proceedings*. Some states use *in camera* procedures in handling mediation communications bearing on professional misconduct. For example, the Comment to Alabama's mediation confidentiality provision explains: "Any review of mediation proceedings as allowed under Rule 11(b)(3) [relating to alleged mediator misconduct] should be conducted in an *in camera* hearing or by an *in camera* inspection."[380]
- *Limitations on the Extent of Disclosure*. Some states impose explicit limitations on the extent to which mediation communications can be used to prove or disprove professional malfeasance. For example, Florida's mediation confidentiality exception for professional malpractice applies "solely for the purpose of the professional malpractice proceeding."[381] Similarly, an Oregon provision says that "[i]n an action for damages or other relief between a party to a mediation and a mediator or mediation program, confidential mediation communications or confidential mediation agreements may be disclosed *to the extent necessary to prosecute or defend the matter*."[382]

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379. See, e.g., Mich. Ct. R. 2.412(D)(10) (Mediation communication may be disclosed when "[t]he disclosure is included in a report of professional misconduct filed against a mediation participant or is sought or offered to prove or disprove misconduct allegations in the attorney discipline process.").

380. Comment to Ala. Civ. Ct. Mediation R.11.

381. Fla. Stat. § 44.405(4)(a)(4); see also Fla. Stat. § 44.405(4)(a)(6) (imposing similar limitation with respect to investigation of professional misconduct).

382. Or. Rev. Stat. § 36.222(5). The same provision further states that "[a]t the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of the mediation communications or agreements."

The Commission kept these variables in mind as it crafted its proposed legislation in this study.

Case Law

The Commission is aware of several cases from non-UMA jurisdictions that involve the intersection of a mediation confidentiality rule or statute and allegations of attorney misconduct.[383] Some of these cases are framed as a claim against an attorney for legal malpractice or another type of misconduct. Examples from Arizona, Oregon, and Texas reflect differing approaches to this type of situation.

Grubaugh v. Blomo.[384] This is an Arizona case that is similar to *Cassel* in many respects. A client sued her attorney for giving "substandard legal advice" during a family court mediation. In defending against her claim, the attorney sought to introduce some mediation communications. The trial court concluded that Arizona's mediation privilege had been waived, but the client appealed from that ruling.

Relying on the language and legislative history of Arizona's mediation privilege statute, the appellate court determined that there was no waiver and the attorney could not introduce any mediation communications. It further determined, however, that the client's complaint could not include "any claim founded upon confidential communications during the mediation process."[385]

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383. The Commission also considered *ZVI Construction Co., LLC v. Levy,* 90 Mass. App. Ct. 412, 60 N.E. 3d 368 (2016), which involves the intersection of a *contractual* mediation confidentiality requirement and allegations of attorney misconduct. The plaintiff brought suit against the attorney who had represented its opponents in a mediation, claiming that he had "engaged in misrepresentation and other wrongdoing" in connection with the mediated settlement agreement. *Id*. at 413. The trial court dismissed the plaintiff's claims and the appellate court affirmed, explaining that the parties were sophisticated and their contractual mediation confidentiality requirement was not subject to a fraud exception. See *id*. at 420-22.

384. 238 Ariz. 264, 359 P.3d 1008 (Ariz. Ct. App. 2015).

385. *Id*. at 278.

The Arizona appellate court viewed that result as "sound policy."[386] It explained:

> By protecting all materials created, acts occurring, and communications made as a part of the mediation process, A.R.S. § 12-2238 establishes a robust policy of confidentiality of the mediation process that is consistent with Arizona's "strong public policy" of encouraging settlement rather than litigation. The statute encourages candor with the mediator throughout the mediation proceedings by alleviating parties' fears that what they disclose in mediation may be used against them in the future. The statute similarly encourages candor between attorney and client in the mediation process.
>
> Another reason confidentiality should be enforced here is that [the plaintiff] is not the only holder of the privilege. The privilege is also held by [her] former husband, the other party to the mediation. The former husband is not a party to this malpractice action and the parties before us do not claim he has waived the mediation process privilege. It is incumbent upon courts to consider and generally protect a privilege held by a non-party privilege-holder. The former husband has co-equal rights under the statute to the confidentiality of the mediation process. Although the superior court did rule that the privilege was not waived as to communications between the mediator and the former husband, waiving the privilege as to one party to the mediation may have the practical effect of waiving the privilege as to all. In order to protect the rights of the absent party, the privilege must be enforced.
>
> Accordingly, we hold that the mediation process privilege applies in this case and renders confidential all materials created, acts occurring, and communications made as a part of the mediation process, in accordance with A.R.S. § 12-2238(B).[387]

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386. *Id.* at 268.

387. *Id.* at 268-69 (emphasis in original; citations omitted).

Alfieri v. Solomon.[388] In this legal malpractice case, the Oregon Supreme Court took a different approach when interpreting Oregon's statute protecting mediation communications. The client in *Alfieri* alleged that his attorney mishandled a mediation and other aspects of his case, causing the client to settle for less than the case was worth. The client sought to use various mediation-related communications to support his claim.

The Oregon Supreme Court concluded that "[p]rivate communications between a mediating party and his or her attorney outside of mediation proceedings … are *not* 'mediation communications' as defined in the statute, even if integrally related to a mediation."[389] As in *Grubaugh,* however, the Court excluded certain other evidence because it fell within the scope of the mediation confidentiality statute.

In so doing, the Court recognized that its interpretation of Oregon law "may make it difficult, in some circumstances, for clients to pursue legal malpractice claims against their attorneys for work in connection with mediations."[390] Perhaps uncomfortable with that result, it described the UMA exception for professional

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388. 358 Ore. 383, 365 P.3d 99 (2015).

389. *Id*. at 404 (emphasis added).

390. *Id*. at 405 n.10.

An earlier, unpublished legal malpractice case interpreting Oregon law is consistent with *Alfieri*. In *Fehr v. Kennedy,* 2009 U.S. Dist. LEXIS 63748 (D. Oregon 2009), *aff'd*, 2010 U.S. App. LEXIS 16953 (9th Cir. 2010), a couple sued their attorney and his law firm, alleging that they failed to properly represent the couple at a mediation, causing the couple to reject a favorable settlement offer and later obtain a bad result at trial.

The federal district court granted summary judgment for the attorney and his law firm, because the case depended entirely on mediation communications, which were inadmissible under Oregon's mediation confidentiality statute. The district court did not have to resolve whether the statute protected the couple's private communications with their attorney, outside the presence of the mediator and not disclosed to the other mediation parties. See *id*. at *12-*13. The Ninth Circuit affirmed, explaining that "[w]ithout admitting confidential mediation communications, the record is devoid of any evidence of legal malpractice." *Fehr v. Kennedy,* 2010 U.S. App. LEXIS 16953, at *4 (9th Cir. 2010).

misconduct and said the Oregon Legislature "may wish to consider statutory changes based on the Uniform Mediation Act."[391]

Alford v. Bryant.[392] The court in this Texas legal malpractice case took still another approach. The fact scenario began when a dispute was settled through mediation, except for the allocation of attorney's fees and costs. A later ruling required each side to bear its own attorney's fees and costs.

One of the mediation parties then sued her attorney, contending that the attorney failed to disclose the risks and benefits of settlement, including the risk that the trial court would deny recovery of her attorney's fees. In defense, the attorney said that she had made such disclosures to her client, during a discussion that included the two of them and the mediator. The attorney tried to call the mediator to testify about that discussion, but the trial court said the testimony was barred by a Texas mediation confidentiality provision.[393]

The attorney appealed and the Texas Court of Appeals reversed and remanded. Its decision rested in part on what is known in Texas as the "offensive use doctrine."[394] Importantly, however, its decision also relied on *Avary v. Bank of America, N.A.,* a professional malpractice case against a bank fiduciary (not an attorney) in which the court construed another Texas mediation confidentiality provision[395] to permit the introduction of mediation evidence *for purposes of proving an "independent tort" committed during mediation that encompasses a duty to disclose, but only if*

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391. *Id*.

392. 137 S.W.3d 916 (Tex. Ct. App. 2004).

393. Tex. Civ. Prac. & Rem. Code § 154.053.

394. The Texas offensive use doctrine holds that a plaintiff may not "invoke the jurisdiction of the courts in search of affirmative relief, and yet, on the basis of privilege, deny a party the benefit of evidence that would materially weaken or defeat the claims against her." *Id*. at 921.

395. Tex. Civ. Prac. & Rem. Code § 154.073(e).

the trial judge conducts an in camera *hearing and determines that the "facts, circumstances, and context" warrant disclosure*.[396]

The *Alford* court made clear that the *Avary* doctrine applied to the case before it:

> As in *Avary*, the parties to the original litigation peacefully resolved their dispute. Again, as in *Avary,* one of the parties now seeks to prove a new and independent cause of action that is alleged to have occurred during the mediation process. That party does not propose to discover or use the evidence to obtain additional funds from the settling roofing contractor in the underlying litigation. The confidential information was offered in this separate and distinct case arising between one of the parties to the underlying litigation and her attorney.
>
> The new cause of action asserted by [the client] below involved [her attorney's] alleged legal malpractice during the mediation proceedings. Significant substantive and procedural rights of [the attorney] are implicated, including the opportunity to develop evidence of her defense to the claim of legal malpractice and to submit contested fact issues to the fact-finder. In pursuing her defense, [the attorney] will not disturb the settlement in the underlying litigation. From a policy standpoint, these considerations support disclosure of the confidential communications at issue in this case.[397]

Alford thus extended the *Avary* doctrine to mediator testimony in a legal malpractice case.[398]

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396. 72 S.W. 3d 770 (Tex. Ct. App. 2002).

397. *Alford,* 137 S.W.3d at 922 (citations omitted).

398. For a more detailed discussion of *Avary* and *Alford,* see CLRC Staff Memorandum 2014-44, pp. 7-15.

Nova Casualty Co. v. Santa Lucia, 2010 U.S. Dist. LEXIS 58693 (M.D. Fla. 2010), is another legal malpractice case that involved a mediation-related allegation of attorney misconduct. In particular, a client alleged that an attorney gave negligent advice about a High-Low agreement during a mediation. The

Cases that seek to undo mediated settlement agreements. In non-UMA states, allegations of mediation-related attorney misconduct have surfaced not only in some legal malpractice cases, but also in some cases that seek to enforce or undo a mediated settlement agreement. There are a few examples from Texas. From those cases[399] and some Texas cases involving other types of professionals,[400] it appears that the *Avary* exception described

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court's decision did not resolve that allegation on the merits or address mediation confidentiality. See *id*. at *1.

Rather, the court explained that the mediation took place before the defendant attorney joined one of the defendant law firms. The court denied that firm's motion for summary judgment, explaining that "[w]hether [the attorney's] alleged negligent acts continued after he joined [the firm] on September 1, 2006, remains an issue of fact to be decided by a jury." *Id*. at *7.

A further example interpreting law from a non-UMA state is *McKissock & Hoffman, P.C. v. Waldron,* 2011 U.S. Dist. LEXIS 86834 (2011), in which a client alleged that its law firm committed malpractice during a mediation by failing to advise the company to accept a particular settlement offer. Due to the posture of the case, the federal district court dismissed it without having to resolve whether permitting the mediator to testify would be a violation of Pennsylvania's mediation confidentiality statute. But the matter sparked discussion within Pennsylvania legal circles about "whether the Pennsylvania mediation privilege statute makes it virtually impossible to prove legal malpractice committed during the mediation." Abraham Gafni, *Does the Mediation Privilege Apply in Legal Malpractice Cases?,* The Legal Intelligencer (Oct. 25, 2011), p. 1.

399. See Rabe v. Dillard's, Inc., 214 S.W.3d 767 (Tex. Ct. App. 2007) (upholding summary judgment against woman who claimed she signed mediated settlement agreement under duress due to opposing counsel's threat to tell worker's compensation carrier she had prior injury; mediation communications were confidential, so "there was no competent summary judgment evidence of a threat"); Lype v. Watkins, 1998 Tex. App. LEXIS 6626 (Tex. Ct. App. 1998) (party sought to avoid enforcement of mediated settlement agreement due to alleged duress by opposing counsel, but court said settlement agreement cannot be avoided based on actions of attorney for settling party).

400. See Hydroscience Technologies, Inc. v. Hydroscience, Inc., 401 S.W.3d 783 (Tex. Ct. App. 2013) (declining to apply *Avary* doctrine to dispute over mediated settlement agreement); *In re* Empire Pipeline Co., 323 S.W.3d 308

above only applies in a suit for an "independent tort," not in a suit seeking to undo or enforce a mediated settlement agreement.[401]

There are also several examples construing Florida law, which includes a mediation confidentiality exception for evidence relating to the validity and enforcement of a mediated settlement agreement.[402] All of those claims against attorneys were unsuccessful; they involved the following situations:

- An attempt to set aside a mediated settlement agreement on grounds that the opposing attorney engaged in duress or coercion. In a published decision, a Florida appellate court determined that the record (which presumably included mediation communications) adequately supported the trial

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(Tex. Ct. App. 2010) (same); Allison v. Fire Ins. Exchange, 98 S.W.3d 227 (Tex. Ct. App. 2002), *pet. granted, judgment vacated w/out reference to the merits* (Tex. S.Ct. 2004) (same).

401. A counterexample is an unpublished 1996 opinion, in which a Texas Court of Appeal said that the trial court erred in excluding mediation communications proffered to show duress with respect to a mediated settlement agreement. See Randle v. Mid Gulf, 1996 Tex. App. LEXIS 3451 (Tex. Ct. App. 1996).

A Texas law professor says *Randle* was wrongly decided, because "[t]he Texas ADR Act's confidentiality provisions do not include an exception for providing evidence of traditional contract defenses." Brian Shannon, *Confidentiality of Texas Mediations: Ruminations on Some Thorny Problems,* 32 Tex. Tech. L. Rev. 77 (2000) (hereafter, "Shannon (2000)"); see also Edward Sherman, *Confidentiality in ADR Proceedings: Policy Issues Arising From the Texas Experience,* 38 S. Tex. L. Rev. 541, 557-58 (1997) (warning that *Randle* approach could "considerably reduce the confidentiality protection of the Texas ADR Act if there will always be a waiver of confidentiality whenever a contract defense is asserted.").

402. See Fla. Stat. § 44.405(4)(b) (There is no confidentiality or privilege for a mediation communication that is "[o]ffered for the limited purpose of establishing or refuting legally recognized grounds for ordering or reforming a settlement agreement reached during a mediation.").

court's finding that the opposing attorney was not involved in any duress or coercion.[403]

- An unpublished federal district court decision in which the plaintiff alleged that a mediated settlement agreement was obtained through duress. She allegedly felt threatened when the opposing attorney warned (during mediation) that her opponent might seek recovery of attorney's fees. After considering testimony about the mediation, the court found that the attorney's warning did "not rise to a level of coercion or support Plaintiff's claim that she was placed in a state of duress."[404]
- Another unpublished federal district court decision, in which a client sought to avoid a mediated settlement agreement due to alleged misconduct on the part of his own attorney. The court concluded that "Plaintiff's mere dissatisfaction with the advice of her attorney cannot support a finding that his agreement to settle and release his claims was not knowing or voluntary."[405]

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403. Vitakis-Valchine v. Valchine, 793 So.2d 1094, 1096 (Fla. Ct. App. 2001). The appellate court also held:

(1) The record adequately supported the trial court's finding that the opposing party was not involved in any duress or coercion. See *id*.

(2) Remand was necessary to determine whether the mediator engaged in misconduct. See *id*. at 1100.

404. Clark v. School Bd., 2010 U.S. Dist. LEXIS 120216, at *12 (M.D. Fla. 2010).

405. Shepard v. Florida Power Corp., 2010 U.S. Dist. LEXIS 58693, at *1 (M.D. Fla. 2010).

For further discussion of the law of non-UMA states, see CLRC Staff Memorandum 2014-35; First Supplement to CLRC Staff Memorandum 2014-35; CLRC Staff Memorandum 2014-43; CLRC Staff Memorandum 2014-44; CLRC Staff Memorandum 2014-59; CLRC Staff Memorandum 2015-54, pp. 5-7; CLRC Staff Memorandum 2016-30, pp. 12-15.

Federal Law

In federal court, mediation confidentiality issues arise in a variety of settings, such as:

- A case based on diversity jurisdiction, consisting solely of claims under state law.[406]
- A case that combines federal and state claims. Mediation evidence may be relevant to both types of claims,[407] or only to one type of claim.[408]
- A case involving a federal statute that includes a mediation confidentiality provision.[409]
- A case involving a federal court rule on mediation confidentiality.[410]

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406. See, e.g., *Benesch*, 2009 U.S. Dist. LEXIS 117641.

407. See, e.g., Folb v. Motion Picture Industry Pension & Health Plans, 16 F. Supp. 2d 1164 (C.D. Cal. 1998), *aff'd without opinion,* 216 F.3d 1082 (9th Cir. 2000).

408. See, e.g., Doe v. Archdiocese of Milwaukee, 2014 U.S. App. LEXIS 21114, at *5-*6 (No. 13-3783, Nov. 5, 2014).

409. See, e.g., J.D. v. Kanawha County Board of Education, 571 F.3d 381 (4th Cir. 2009) (construing mediation confidentiality provision in Individuals with Disabilities Education Act).

The Federal Administrative Dispute Resolution Act contains a mediation confidentiality provision that mediator Ron Kelly suggested as a possible model for this study. See 5 U.S.C. § 574; Third Supplement to CLRC Staff Memorandum 2014-60, Exhibit p. 3 (comments of Ron Kelly).

410. See, e.g., Davis v. Nat'l Council of Negro Women, 821 F. Supp. 2d 262 (D.D.C. 2011) (construing mediation confidentiality provision in local rule).

The Alternative Dispute Resolution Act of 1998 requires each federal district court to provide civil litigants with at least one ADR process and directs each court to adopt a local rule providing for the confidentiality of its ADR process(es) and prohibiting disclosure of confidential ADR communications. See 16 U.S. C. § 652(a), (d).

In response to this requirement, the federal district courts have adopted local rules for their ADR programs, which vary in how they protect confidentiality. See, e.g., N.D. Cal. ADR Local R. 6-12; N.D.N.Y. Local R. 83.11-5(d). Federal appeals courts also have local rules regarding the

- A case purely under federal law, but not governed by a mediation confidentiality rule or statute.[411]
- A case involving a contractual agreement in which the parties agreed to keep mediation communications confidential.[412]

Many federal courts have expressed support for the concept of protecting mediation communications.[413] In some of those cases,

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confidentiality of their ADR programs, which vary as well. See, e.g., 3d Cir. Local R. 33.5(c); 11th Cir. Local R. 33-1(c)(3).

411. See, e.g., *Sheldone,* 104 F. Supp. 2d at 511.

412. See, e.g., *Facebook,* 640 F.3d at 1041 (confidentiality agreement precluded introduction of mediation communications); *ZVI*, 60 N.E. 3d at 377 (confidentiality requirement in mediation agreement was enforceable).

413. See, e.g., *J.D.,* 571 F.3d at 386 (mediation confidentiality requirement is "critical to ensuring that parties trust the integrity of the mediation process and remain willing to engage in it."); Beazer East, Inc. v. Mead Corp., 412 F.3d 429, 435 (3d Cir. 2005) (mediation confidentiality requirement allows attorneys to discuss matters in uninhibited manner that often leads to settlement; creating exception would make them cautious, tight-lipped, and non-committal, and would "compromise the effectiveness of the Appellate Mediation Program."); Fields-D'Arpino v. Restaurant Associates, Inc., 39 F. Supp. 2d 412, 417 (S.D.N.Y. 1999) ("Successful mediation … depends upon the perception and existence of mutual fairness throughout the mediation process. In this regard, courts have implicitly recognized that maintaining expectations of confidentiality is critical."); Willis v. McGraw, 177 F.R.D. 632, 632 (S.D. W.Va. 1998) (local rule regarding mediation confidentiality "was drafted to ensure confidentiality, to reassure the parties and counsel they would suffer no prejudice, perceived or actual, as a result of the full, frank, conciliatory, and sometimes heated, exchanges that occur inevitably during the mediation process."); *In re* Joint Eastern and Southern Districts Asbestos Litigation, 737 F. Supp. 735, 739 (E.D.N.Y. & S.D.N.Y 1990) ("The parties engaged in a mediated settlement process recognize that they must, if the process is to work, fully disclose to the mediator their needs and tactics — not only those that have been publicly revealed, but also their private views and internal arrangements."); Pipefitters Local Union No. 208 v. Mechanical Contractors Ass'n, 507 F. Supp. 935, 935 (D. Colo. 1980) ("Effective mediation hinges upon whether labor and management negotiators feel free to advance tentative proposals and pursue possible solutions that later may prove unsatisfactory to one side or the other.

courts have stressed the importance of protecting a mediator from having to testify or produce mediation-related documents.[414] In a few of the cases, a federal court has gone so far as to impose sanctions for violation of a mediation confidentiality requirement.[415] At other times, a federal court has determined that a competing policy interest overrides the interest in mediation confidentiality.[416]

Such uninhibited interaction may be impaired absent the assurance that mediation proceedings will remain confidential.").

414. See, e.g., *Anonymous,* 283 F.3d at 639 ("[G]ranting of consent for the mediator to participate in any manner in a subsequent proceeding would encourage perceptions of bias in future mediation sessions involving comparable parties and issues ...."); *Macaluso,* 618 F.2d at 55 (explaining that if conciliators could testify about their activities or be compelled to produce notes or reports of their activities, not even strictest adherence to purely factual matters would prevent evidence from favoring or seeming to favor one side).

415. See, e.g., Williams v. Johanns, 529 F. Supp. 2d 22, 23 (D.D.C. 2008) (holding counsel in civil contempt for violating court's order regarding mediation confidentiality, because it is "essential that counsel maintain the confidentiality of mediation sessions and comply with orders of the Court to ensure that such proceedings operate fairly, efficiently, and effectively."); Frank v. L.L. Bean, Inc., 377 F. Supp. 2d 229 (D. Maine 2005) (applying 5-factor test and imposing $1,000 sanction on plaintiff for disclosing settlement offer made in mediation); Bernard v. Randolph, 901 F. Supp. 778 (S.D.N.Y. 1995) (imposing $2,500 sanction on plaintiff's lead counsel for willfully and deliberately disclosing details of mediation); but see *Anonymous,* 283 F.3d at 635-36 (applying 5-factor test and determining that sanctions for violation of local rule on mediation confidentiality were not warranted).

416. See, e.g., *In re* Grand Jury Proceedings, 148 F.3d 487, 492 (5th Cir. 1998) (mediation confidentiality must yield to public interest in administration of criminal justice); In the Matter of the Fort Totten Metrorail Cases, 960 F. Supp. 2d 2, 15-16 (D.D.C. 2013) (mediation confidentiality must yield to common law right of public access to judicial records); In re March, 1994 — Special Grand Jury, 897 F. Supp. 1170, 1173 (S.D. Ind. 1995) (interest in fact-finding served by grand jury subpoena outweighs interest in mediation confidentiality under circumstances of case).

In resolving mediation confidentiality issues, a federal court must first determine what law applies. The choice-of-law rules are described below.

Choice-of-Law Rules

To decide whose law applies in a federal case, it is critical to identify the particular issue being resolved.[417] Here, the Commission is examining mediation confidentiality issues, which fall within the same rubric as evidentiary privilege issues.[418]

The Federal Rules of Evidence do not include a set of evidentiary privileges, like the attorney-client privilege and the doctor-patient privilege. Congress could not agree on such rules,[419] so it enacted a single choice-of-law provision instead: Federal Rule of Evidence 501.[420]

Under that rule,

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, *the privilege of a witness*, person, government, State, or political subdivision thereof *shall be governed by the principles of the common law* as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or

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417. See *Olam,* 68 F. Supp. 2d at 1119.

418. See *id*. at 1120 n.15 (differentiating between mediation confidentiality rule and evidentiary privileges in federal choice-of-law analysis would be little more than semantic sleight of hand). For analysis of the term "mediation privilege" and the consequences of classifying a provision as a "privilege," see discussion of "Mediation Privilege" *supra*.

419. "Since it was clear that no agreement was likely to be possible as to the content of specific privilege rules, and since the inability to agree threatened to forestall or prevent passage of an entire rules package, the determination was made that the specific privilege rules proposed by the Court should be eliminated …." Sen. Rep. No. 93-1277, 93rd Cong. 2d Sess. (Oct. 18, 1974).

420. See *id*.

> defense *as to which State law supplies the rule of decision,* the privilege of a witness, person, government, State, or political subdivision thereof *shall be determined in accordance with State law*.[421]

In other words, (1) federal common law applies to a privilege issue in a case that consists solely of federal claims, while (2) state law applies to a privilege issue in a diversity case that only involves questions of state law.[422]

Thus, for example, federal common law governed the admissibility of mediation evidence in a federal case solely alleging violations of the federal Fair Labor Standards Act.[423] In contrast, state law governed the admissibility of mediation evidence in a legal malpractice case removed to federal court based on diversity of citizenship.[424]

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421. Fed. R. Evid. 501 (emphasis added).

422. See, e.g., Gilbreath v. Guadalupe Hosp. Foundation, Inc., 5 F.3d 785, 791 (5th Cir. 1993) (applying federal privilege law in federal question case); International Ins. Co. v. RSR Corp., 426 F.3d 281, 299 n.26 (5th Cir. 2005) (applying state privilege law in diversity case); see also In re Sealed Case, 381 F.3d 1205, 1212 (D.C. Cir. 2004) ("It is thus clear that when a plaintiff asserts federal claims, federal privilege law governs, but when he asserts state claims, state privilege law applies."); Platypus Wear, Inc. v. K.D. Co., Inc., 905 F. Supp. 808, 811 (S.D. Cal. 1995) ("It is clear that State law governs a claim of privilege in a pure diversity case, and that in pure federal question cases the federal common law of privilege governs."); Guzman v. Memorial Hermann Hosp. System, 2009 U.S. Dist. LEXIS 13336 (S.D. Texas 2009) ("It is well established that federal privilege law governs in a federal question case involving only federal law and that state privilege law applies in a diversity case involving only state law."); but see Babasa v. LensCrafters, Inc., 498 F.3d 972, 974-75 (9th Cir. 2007) (federal law, including federal privilege law, governs determination of whether case exceeds amount-in-controversy necessary for diversity action to proceed in federal court).

423. See *Sheldone*, 104 F. Supp. 2d 511.

424. See *Benesch*, 2009 U.S. Dist. LEXIS 117641; see also *Olam*, 68 F. Supp. 2d at 1124 ("[I]f the basis for subject matter jurisdiction was diversity of citizenship, F.R.E. 501 would require application of state privilege law in all phases of the proceedings in federal court ….").

How Rule 501 applies in a case involving both federal and state law is more complex. Where the same evidence relates to both federal and state law claims, "federal privilege law governs."[425] As courts have explained, this approach is warranted because applying different privilege rules to different claims in the same lawsuit could undermine federal evidentiary policies and be unworkable.[426]

Where, however, the evidence at issue relates only to a state law claim, and has no relevance to any federal claim, most courts have concluded that Rule 501's proviso requires application of state privilege law.[427] As one court put it, "[w]here the application of state privilege law to evidence in support of a claim arising under state law creates no conflict, such as where the evidence sought can be relevant only to state law claims, the state law privilege should be applied consistent with the express language of Rule 501."[428]

Existence and Contours of a Federal Mediation Privilege or Similar Protection Under Federal Common Law

Because federal common law sometimes applies to mediation confidentiality issues that arise in federal court, a number of cases address whether federal common law includes a mediation privilege. There is considerable, but far from definitive, support for the existence of such a privilege.

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425. Sony Computer Entertainment America, LLC v. HannStarr Display Corp., 835 F.3d 1155, 1158-59 (9th Cir. 2016); Wilcox v. Arpaio, 753 F.3d 872 (9th Cir. 2014); see also *Guzman,* 2009 U.S. Dist. LEXIS at *12 (collecting authorities establishing that "[i]n cases in which there are federal and state claims, the evidence at issue is relevant to both, and the privilege rules conflict, courts have generally applied federal privilege law ….").

426. See, e.g., *In re Sealed Case*, 381 F.3d at 1213; Pearson v. Miller, 211 F.3d 57, 66 (3d Cir. 2000).

427. See, e.g., Doe v. Archdiocese of Milwaukee, 2014 U.S. App. LEXIS 21114 (No. 13-3783, Nov. 5, 2014); Garza v. Scott & White Memorial Hosp., 234 F.R.D. 617, 624-25 (W.D. Tex. 2005); *Platypus Wear*, 905 F. Supp. at 811-12; *Guzman,* 2009 U.S. Dist. LEXIS at *17-*24 (collecting & analyzing cases).

428. *Platypus Wear*, 905 F. Supp. at 812.

In particular, several lower courts have found that a mediation privilege exists.[429] In so doing, those courts have applied a four-factor test that the United States Supreme Court established in a case involving the psychotherapist-patient privilege.[430] They

429. See *Sheldone*, 104 F. Supp. 2d at 517 ("[T]he federal mediation privilege will be adopted and applied in this case …."); *Folb,* 16 F. Supp. 2d at 1179-80 ("[I]t is appropriate, in light of reason and experience, to adopt a federal mediation privilege applicable to all communications made in conjunction with a formal mediation."); Hays v. Equitex, Inc., 277 B.R. 415, 430 (N.D. Ga. Bankr. 2002) ("While it is impossible to know for certain whether the existence of a mediation privilege actually encourages settlements, the Court is persuaded that it does."); see also Chester County Hosp. v. Independence Blue Cross, 2003 U.S. Dist. LEXIS 25214 (E.D. Pa. 2003); Microsoft Corp. v. Suncrest Enterprise, 2006 U.S. Dist. LEXIS 21269 (N.D. Cal. 2006).

Some federal courts have expressed apparent support for the existence of a federal mediation privilege, without holding as much. See Sampson v. School Dist., 262 F.R.D. 469, 477 n. 6 (E.D. Pa. 2008) ("We decide this case on grounds other than the federal mediation privilege. Nevertheless, we find persuasive the reasoning set forth by the court in [*Sheldone*] and by other courts that have adopted the federal mediation privilege."); U.S. Fidelity & Guaranty Co. v. Dick Corp., 215 F.R.D. 503, 506 (W.D. Pa. 2003) ("Because there are no Pennsylvania cases directly on point we look to federal case law construing the federal mediation privilege for guidance."); see also N.J. Dep't of Environmental Protection v. American Thermoplastics Corp., 2017 U.S. Dist. LEXIS 16743, *48-*50 (asserting that "[m]any federal courts have recognized a 'federal mediation privilege' of some nature," but concluding that "[t]his court need not determine the appropriateness of applying the federal privilege"); United States v. Union Pacific Railroad Co., 2007 U.S. Dist. LEXIS 40178, *14-*20 (E.D. Cal. 2007) (seemingly accepting existence of federal mediation privilege but concluding that requested documents were not privileged).

430. In *Jaffee v. Redmond,* 518 U.S. 1 (1996), the United States Supreme Court directed courts to weigh the following factors in determining whether an asserted federal privilege exists:

(1) Whether the asserted privilege is rooted in an imperative need for confidence and trust.

(2) Whether the privilege would serve public ends.

(3) Whether the evidentiary detriment caused by exercise of the privilege is modest.

(4) Whether denial of the federal privilege would frustrate a parallel privilege adopted by the states.

ultimately conclude that a privilege is necessary to encourage mediation, which is a public good that transcends the general principle of using all relevant evidence to determine the truth.[431]

Although these courts acknowledge the existence of a mediation privilege, they do not fully flesh out its contours.[432] None of the decisions resolve whether that privilege is subject to any kind of exception relating to alleged attorney misconduct (in the mediation context or otherwise).

A few district courts, applying the same four-factor test, have issued unpublished decisions refusing to recognize a mediation privilege in the particular circumstances before them.[433] In taking that position, one court correctly pointed out that "no Circuit Court has ever adopted or applied such a privilege …."[434]

The Sixth Circuit has, however, recognized the existence of a settlement privilege under federal common law — i.e., a privilege that extends to settlement negotiations generally, not just to mediation communications.[435] Two other circuits have rejected that

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Id. at 9-13.

431. See, e.g., *Folb,* 16 F. Supp. 2d at 1181.

432. See, e.g., *Sheldone,* 104 F. Supp. 2d at 517-18 (declining to determine full contours of mediation privilege); *Folb*, 16 F. Supp. 2d at 1180 (same).

433. See Willis v. Geico General Ins. Co., 2016 U.S. Dist. LEXIS 49038, at *25; Munoz v. J.C. Penney Corp., 2009 U.S. Dist. LEXIS 36362, at *7 (C.D. Cal. 2009); Molina v. Lexmark International, Inc., 2008 U.S. Dist. LEXIS 83014 (C.D. Cal. 2008); see also *In re* Lake Lotawana Community Improvement Dist., 563 B.R. 909, 923-24 (2016).

434. *Molina,* 2008 U.S. Dist. LEXIS 83014, at *41-*44. The Fourth Circuit and the Ninth Circuit have declined to decide whether a mediation privilege exists. See *Babasa,* 498 F.3d at 975 & n. 1; *Anonymous,* 283 F.3d at 639 n. 16. Some federal district courts have done the same. See EEOC v. Hibbing Taconite Co., 266 F.R.D. 260, 271-72 (D. Minn. 2009); Smith v. Smith, 154 F.R.D. 661, 675 (N.D. Tex. 1994).

435. Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976, 981 (6th Cir. 2003).

concept[436] and two circuits have expressly left the question open.[437] The Sixth Circuit does not appear to have resolved whether the settlement privilege is subject to an exception for alleged attorney misconduct.

Regardless of whether federal common law includes a settlement privilege, settlement negotiations (including mediation communications) receive some protection under Federal Rule of Evidence 408.[438] In enacting that rule, however, Congress only restricted the admissibility of settlement negotiations for certain purposes, and it did not expressly provide any protection from discovery.[439]

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436. See *In re* MSTG, Inc., 675 F.3d 1337 (Fed. Cir. 2012); *In re* General Motors Corp. Engine Interchange Litigation, 594 F. 2d 1106, 1124 n.20 (7th Cir. 1979).

437. See Gov't of Ghana v. ProEnergy Services, LLC, 677 F.3d 340, 344 n.3 (8th Cir. 2012); *In re* Subpoena Duces Tecum, 439 F.3d 740, 754 (D.C. Cir. 2005). "District courts are divided on whether a settlement negotiation privilege exists." *MSTG,* 675 F.3d at 1342 n.2.

438. Rule 408 provides:

> (a) **Prohibited Uses.** Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
>
> (1) furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and
>
> (2) conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.
>
> (b) **Exceptions.** The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

439. See, e.g., *Admissibility, Discoverability, and Confidentiality of Settlement Negotiations, supra* note 52 & sources cited therein.

Using Mediation Evidence to Prove or Disprove Allegations of Attorney Misconduct

Although the cases on the existence of a federal mediation privilege do not address the intersection of mediation confidentiality and attorney misconduct, a few other federal cases do. Some of these have already been mentioned elsewhere in this report.[440] A few other examples are described below.

In the Matter of Young.[441] This was a disciplinary proceeding stemming from a mediation conducted by a mediator in the Settlement Conference Office of the Seventh Circuit. The mediator had directed appellants' lawyers to bring their clients to meet with him, but the lawyers refused to do so. The underlying case later settled, but the Seventh Circuit was troubled by the lawyers' conduct and issued an order to show cause regarding that matter.

The Seventh Circuit ultimately concluded that "[t]he lawyers' refusal to produce their clients in response to the mediator's order was unjustifiable and indeed contumacious."[442] In reaching that conclusion, the Seventh Circuit considered mediation communications. It briefly explained that "[a]lthough settlement negotiations are of course confidential for most purposes, *their contents may be revealed insofar as necessary for the decision of an issue of alleged misconduct in them*."[443]

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440. See, e.g., *supra* note 288 & accompanying text (referring to *Benesch*); *supra* note 390 (discussing *Fehr*).

441. 253 F.3d 926 (7th Cir. 2001).

442. *Id*. at 928.

443. *Id*. at 927 (emphasis added). In support of this statement, the Seventh Circuit cited only a decision in which the Tenth Circuit said, without support or elaboration, that an attorney had not violated the local rule making Tenth Circuit mediations confidential when he disclosed settlement negotiations in response to an order to show cause why he should not be sanctioned. See Pueblo of San Ildefonso v. Ridlon, 90 F.3d 423, 424 n.1 (10th Cir. 1996). In making that statement, however, the Tenth Circuit had cautioned that it was making "no determination as to the exact scope of confidentiality nor [was it] establish[ing] a basis for counsel to disclose such matters in the future." *Id*.

In re Teligent.[444] This Second Circuit case did not involve allegations that an attorney committed misconduct during a mediation. Rather, it involved an attempt by a law firm accused of legal malpractice to obtain discovery of information from a mediation it did not attend, which it claimed was critical to issues in the legal malpractice case.

Unlike the Seventh Circuit, the Second Circuit did not automatically admit the proffered mediation evidence because it was being used to establish misconduct. Instead, the court established the following test for disclosure of confidential mediation communications:

> A party seeking disclosure of confidential mediation communications must demonstrate (1) a special need for the confidential material; (2) resulting unfairness from a lack of discovery, and (3) that the need for the evidence outweighs the interest in maintaining confidentiality. All three factors are necessary to warrant disclosure of otherwise non-discoverable documents.[445]

Applying the 3-part test to the case before it, the Second Circuit found that the law firm had failed to satisfy any of the three

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For another federal case in which a court admitted mediation communications in resolving an allegation of attorney misconduct, see *FDIC,* 76 F. Supp. 2d 736. After considering the evidence, the court rejected the defendants' claim that the opposing counsel and the mediator coerced settlement by threatening criminal prosecution. See *id*. at 738.

444. 640 F.3d 53 (2d Cir. 2011).

445. *Id*. at 58 (citations omitted). The court drew that standard from the Uniform Mediation Act, the Administrative Dispute Resolution Act of 1996, and the Administrative Dispute Resolution Act of 1998. According to the court, each of those sources "recognizes the importance of maintaining the confidentiality of mediation communications and provides for disclosure in only limited circumstances." *Id*.

Notably, the 3-part *Teligent* test does not appear to be limited to evidence of attorney misconduct, evidence of professional malfeasance, or even evidence of wrongdoing. Rather, it conceivably could apply to any type of request for disclosure of mediation communications.

requirements. Accordingly, the law firm was not entitled to disclosure of the mediation evidence it sought. The Second Circuit specifically warned that "[w]ere courts to cavalierly set aside confidentiality restrictions on disclosure of communications made in the context of mediation, parties might be less frank and forthcoming during the mediation process or might even limit their use of mediation altogether."[446]

Olam.[447] U.S. Magistrate Judge Wayne Brazil, a national and international innovator and leader in the field of alternative dispute resolution, used still another approach in the *Olam* decision mentioned several times earlier in this report. In *Olam,* an individual sought to avoid enforcement of a mediated settlement agreement on the ground that it was obtained against her will. The parties waived their right to mediation confidentiality and the key question was whether the mediator could be compelled to testify about the mediation.

Relying on *Rinaker,*[448] a case that involved a clash between mediation confidentiality and a constitutional right, Judge Brazil decided to apply a two-stage balancing test. He explained the *Rinaker* procedure as follows:

> In essence, the *Rinaker* court instructs California trial judges to conduct a two-stage balancing analysis. The goal of the first stage balancing is to determine whether to compel the mediator to appear at an *in camera* proceeding to determine precisely what her testimony would be. In this first stage, the judge considers all the circumstances and weighs all the competing rights and interests, including the values that would be threatened not by public disclosure of mediation communications, but by ordering the mediator to appear at an *in camera* proceeding to disclose only to the court and counsel, out of public view, what she would say the parties said during the mediation. At this juncture the

446. *Id*. at 59-60.

447. 68 F. Supp. 2d 1110.

448. 62 Cal. App. 4th 155.

> goal is to determine whether the harm that would be done to the values that underlie the mediation privileges simply by ordering the mediator to participate in the *in camera* proceedings can be justified — by the prospect that her testimony might well make a singular and substantial contribution to protecting or advancing competing interests of comparable or greater magnitude.
>
> The trial judge reaches the second stage of balancing analysis only if the product of the first stage is a decision to order the mediator to detail, *in camera*, what her testimony would be. A court that orders the *in camera* disclosure gains precise and reliable knowledge of what the mediator's testimony would be — and only with that knowledge is the court positioned to launch its second balancing analysis. In this second stage the court is to weigh and comparatively assess (1) the importance of the values and interests that would be harmed if the mediator was compelled to testify (perhaps subject to a sealing or protective order, if appropriate), (2) the magnitude of the harm that compelling the testimony would cause to those values and interests, (3) the importance of the rights or interests that would be jeopardized if the mediator's testimony was not accessible in the specific proceedings in question, and (4) how much the testimony would contribute toward protecting those rights or advancing those interests — an inquiry that includes, among other things, an assessment of whether there are alternative sources of evidence of comparable probative value.[449]

Judge Brazil did not follow those exact same procedures in *Olam,* but instead used ones that he considered similar in effect and no more harmful to the interests underlying California's mediation confidentiality statute. In particular, he "decided not to hold a separate *in camera* proceeding in advance of the evidentiary hearing to determine what the mediator's testimony would be."[450]

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449. *Olam,* 68 F. Supp. 2d at 1131-32.

450. *Id.* at 1126.

Rather, he began by hearing testimony from other key witnesses, which convinced him that the mediator's testimony was necessary under the first stage of the balancing analysis. He then took the mediator's testimony in closed proceedings, under seal. Having heard all the evidence, he decided to publicly disclose the mediator's testimony, because it was essential to doing justice in the case before him. He concluded that there was "absolutely no basis" for finding that plaintiff's attorney coerced her assent to the mediated settlement.[451]

In re Anonymous.[452] This Fourth Circuit case did not involve allegations of attorney misconduct, but it is noteworthy because it provides another model for addressing the intersection between mediation confidentiality and competing interests. In it, the court considered whether to grant a waiver from the confidentiality requirement applicable to mediations conducted by Office of the Circuit Mediator for that court.

With regard to mediation evidence generally, the Fourth Circuit decided that the appropriate test for waiver was to disallow disclosure "unless the party seeking such disclosure can demonstrate that 'manifest injustice' will result from non-disclosure."[453] With regard to disclosures by the mediator, however, the court established a more stringent test:

> [T]he threshold for granting of consent to disclosures by the mediator is substantially higher than that for disclosures by other participants. Thus, we will consent for the Circuit Mediator to disclose confidential information only where such disclosure *is mandated by manifest injustice, is indispensable to resolution of an important subsequent*

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451. *Id*. at 1150. The California Supreme Court has narrowly limited the application of the approach that Judge Brazil used in *Olam*. See CLRC Staff Memorandum 2014-45, pp. 12-13 & cases cited therein.

452. 283 F.3d 627.

453. *Id*. at 637.

> *dispute, and is not going to damage our mediation program.*[454]

Implications of Federal Law on Mediation Confidentiality

From the foregoing discussion, it is clear that many factors, beyond the content of California law, may affect whether communications or other evidence from a California mediation are admissible, subject to discovery, or can otherwise be disclosed or used in the future. Among those factors are the following:

- Whether a person seeks disclosure in California or in some other state, and which state's law applies to the request, if any.
- Whether a person seeks disclosure in federal court as opposed to state court.
- If the evidence is sought in federal court, whether the evidence is sought in connection with a federal claim as opposed to a state claim.
- If the evidence is sought in federal court in connection with a federal claim, whether the case involves a federal statute that governs admissibility and disclosure of mediation evidence.
- If the evidence is sought in federal court in connection with a state claim, whether that claim is coupled with a federal claim, and, if so, whether the evidence is relevant to the federal claim or only to the state claim.
- Whether the mediation was court-connected and is subject to a local rule governing mediation confidentiality, and, if so, how that rule is interpreted.
- Whether the mediation participants entered into a contractual confidentiality agreement and, if so, the terms of that agreement, whether the party seeking disclosure is a party to that agreement, and whether

454. *Id.* at 640 (emphasis added).

the court considers the agreement enforceable under the circumstances of the case.

- If the evidence is sought in federal court, which federal court is considering the request. Different doctrines apply in different federal circuits (such as whether to recognize a federal mediation privilege or a federal settlement privilege, and what test to apply when someone seeks disclosure of mediation communications).

Given all these potential variables, no matter what California says on the subject, it will be difficult for participants in a California mediation to predict with full confidence whether their mediation-related communications could later be used to support or refute allegations of legal malpractice or other misconduct.[455]

EMPIRICAL INFORMATION

Among other things, the legislative resolution on this study instructs the Commission to consider "any data regarding the impact of differing confidentiality rules on the use of mediation."[456] This part of the Commission's report begins by addressing that matter. The Commission then discusses other empirical information that is relevant to this study.

Throughout the study, the Commission sought relevant empirical information and encouraged interested persons to bring pertinent

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455. It is also worth noting that California law protects mediation communications only in a non-criminal case. See Evid. Code § 1119. The admissibility and discoverability of a mediation communication may thus depend on whether the evidence is offered in a criminal case, another circumstance that would be difficult for mediation participants to predict.

For further discussion of federal law relevant to this study, see CLRC Staff Memoranda 2014-45 and 2014-58.

456. 2012 Cal. Stat. res. ch. 108.

data to its attention.[457] The discussion below is based on the information it was able to gather.

Empirical Information on Mediation Confidentiality

Gathering, evaluating, and effectively using empirical evidence is challenging, particularly in non-scientific fields. As explained below, conducting a rigorously-controlled experiment on the effect of a mediation confidentiality rule appears close to impossible.

There are, however, a few studies in this area, most notably some work by Profs. James Coben and Peter Thompson.[458] After explaining the difficulties in experimentation, the Commission briefly describes that body of work.

Impediments to Rigorous Scientific Testing

In designing an experiment to compare two different mediation confidentiality rules, it is crucial to recognize that it is impossible to mediate the same dispute with the same participants under the same conditions twice, once using one rule and once using another rule. As soon as a dispute is mediated the first time, the conditions necessarily change. Even if the dispute remains unresolved, its character and the relationships among the parties will have been influenced by the first mediation: Positions may have hardened, animosities may have grown, participants may have greater understanding of each others' positions, participants may be more aware of strengths and weaknesses in their own cases, and the like. The mediation could not simply be redone from scratch, even if the dispute were simulated rather than real.[459]

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457. See, e.g., CLRC Minutes (July 2016), p. 4; CLRC Minutes (Aug. 2013), p. 3; CLRC Staff Memorandum 2013-47, pp. 13-15 & Exhibit pp. 7-8 (Project #2); CLRC Staff Memorandum 2013-39, pp. 34-35.

458. At the time of those studies, both Prof. Coben and Prof. Thompson were on the faculty of Hamline University School of Law. Prof. Coben is now a professor at Mitchell Hamline School of Law; Prof. Thompson is an emeritus professor at the same institution.

459. If a simulated dispute were mediated a second time with the same participants, the participants would not be able to set aside what they had

Because it is impossible to redo the same mediation using a different confidentiality rule, assessing the impact of differing confidentiality rules would necessarily have to involve comparing the outcomes of mediations that differ not only with regard to which rule is used, but also in other respects (such as the personalities and experience of the participants, and the nature and intensity of the dispute). That constraint would make it difficult to determine whether a difference in outcome is attributable to the use of a different confidentiality rule, or to some other difference between the mediations.[460]

By using a large sample of mediations that involve closely similar disputes, similar types of participants, and closely similar conditions, and randomly selecting which confidentiality rule to apply to each of the mediations, one could minimize the problem just identified.[461] It would be challenging, however, to obtain such a sample.

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learned in the first mediation. In addition, the process of repeating the mediation, but providing different information regarding confidentiality, might draw the participants' attention to the level of confidentiality and the possibility that researchers are evaluating its effect. That might then influence their behavior and distort the results of the mediation.

460. For example, if the settlement rate of Florida mediations were 60% (a purely hypothetical figure) and the settlement rate of California mediations were 50% (also a purely hypothetical figure), the difference in settlement rates might be due to differing mediation confidentiality rules, or it might be due to any number of other factors: Differences in the types of disputes mediated in the two states, differences in the quality of the mediators, differences in cultural attitudes about reaching a compromise, differences in the demography of the disputants, differences in litigation costs, differences in usage of mandatory mediation, and so forth. There would be too many variables to determine which one (or more) of them accounts for the difference in results.

461. Under that approach, there would be two groups of mediations: (1) mediations conducted pursuant to Confidentiality Rule A and (2) mediations conducted pursuant to Confidentiality Rule B. Through the process of random selection, other differences between the groups would tend to cancel each other out and make it possible to determine with some degree of confidence that a difference between the results of the two groups was attributable to the use of differing confidentiality rules.

The simplest way may be to have a court in a particular jurisdiction establish a mandatory mediation program for a carefully defined set of cases.[462] The researchers would randomly assign a mediator from a court-selected mediator pool, and randomly determine which of two mediation confidentiality rules to apply to each case. Other mediation conditions would have to be kept as constant as possible.[463]

Such an approach might be effective in determining the impact of a mediation confidentiality rule, at least within a particular jurisdiction for a particular type of case. The results would be a start in gathering empirical data, but they would not tell anything about private mediations (pre-litigation or otherwise) or voluntary court-connected mediations. Nor could the results be generalized to mandatory court-connected mediations in other jurisdictions or to other types of cases without replicating the experiment elsewhere and with other types of cases (preferably numerous repetitions). That would, of course, be costly and extremely time-consuming. Moreover, the expenditures would multiply dramatically if researchers sought to compare several different confidentiality rules, not just two such rules.[464]

For example, if the same pool of mediators (with varying levels of experience, skill, and expertise) was used for all of the mediations, and every mediator conducted multiple mediations, one would expect that each mediator would mediate some disputes that would be randomly selected for the first group of mediations and a roughly equal number of disputes that would be selected for the second group, and thus the mediator's attributes (whatever they might be) would affect both groups roughly equally and thus would not account for a difference in the outcomes of the two groups.

462. For example, a court could establish a mandatory mediation program comprised of all car accident cases filed in a particular jurisdiction within a certain time frame that consist solely of property damage claims for $10,000-$15,000 in which both sides are represented by counsel.

463. For example, to eliminate variability due to mediation timing, the program could require that all of the mediations be conducted 90-120 days after the filing of the complaint.

464. As the Commission has seen during the course of this study, there are many different possible approaches to mediation confidentiality: jurisdictions

Perhaps most importantly, the type of experiment described above would involve applying different mediation confidentiality rules to similarly-situated litigants. That raises important fairness considerations and the specter of potentially inconsistent results in future cases involving attempts to introduce or obtain discovery of mediation evidence. Such concerns might even rise to the level of a due process challenge.

There would also be related practical complications. Suppose the experiment involved comparison of a jurisdiction's own mediation confidentiality rule with another jurisdiction's mediation confidentiality rule. Regardless of how the experiment turns out and whether the jurisdiction revises its approach to mediation confidentiality as a result, the experiment would essentially involve making promises to mediation participants about how their mediation communications will be treated by courts within that jurisdiction in the future.

That is always the case with regard to a promise of confidentiality; it necessarily is a promise regarding future treatment of the communications. But the scenario contemplated here is a promise that future courts will, with regard to communications made in at least half of the mediations involved in the experiment, apply a mediation confidentiality rule *other than* the one that is normally used in their jurisdiction. It may not be realistic and proper to expect that this type of promise will be kept, perhaps many years later. If not, it might be unfair to make the promise in the first place.

The types of concerns just described — concerns about fairness, inconsistent results, due process, and binding future courts to use a mediation confidentiality rule other than the one normally applied in their jurisdiction — would not arise if the experiment involved mediations of simulated, rather than real, disputes. In that case,

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vary in the scope and extent of protection for mediation communications, the existence and contours of exceptions to the general rules, who has authority to prevent disclosure and under what circumstances, waiver doctrines, treatment of the mediator, and various other aspects. Ideally, it would be possible to test the effects of all of the different approaches, but that would be prohibitive.

however, a different problem could occur. While the same artificially-constructed dispute could be used in all of the simulations, the mediation participants may not be motivated to keep matters confidential in the same way or to the same degree as with a real, naturally occurring dispute.[465] That may make it hard to learn anything useful about mediation confidentiality through simulations.

These are just some of the challenges that researchers would have to overcome to obtain useful empirical data regarding the impact of differing confidentiality rules on the use of mediation. It is thus not surprising that, to the best of the Commission's knowledge, no jurisdiction has tried an experiment like the one described above.

Consequently, there is not much empirical information available and its import is debatable. The work of Profs. Coben and Thompson is perhaps most significant.

Coben and Thompson Studies

As mediation increased in popularity, a number of scholars called for research on mediation confidentiality. This included some scholars who supported the concept,[466] and a few self-

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465. It is one thing, for example, to disclose impending financial ruin and infidelity to your spouse if the situation is hypothetical, and quite another to make such a disclosure if the situation is real. Likewise, attitudes regarding disclosure may vary depending on the nature of the matter disclosed (e.g., incest or rape, as opposed to cheating in a card game during a research study).

466. For example, Prof. Frank Sander (Harvard Law School), a leader of the ADR movement, said:

> Perhaps the most sacred canon in mediation is the importance of mediation confidentiality.… There have been spirited scholarly debates about the importance *vel non* of confidentiality to the process, but little by way of basic data.
>
> [T]his may be a question very difficult to explore.… While real-life experiments might be difficult to achieve, perhaps we could learn something from laboratory experiments.

Frank Sander, *Some Concluding Thoughts,* 17 Ohio St. J. on Disp. Resol. 705, 706 (2002); see also Phyllis Bernard, *Reply: Only Nixon Could Go To China:*

described "heretics" who questioned the need for providing special protection to mediation communications.[467]

In 2006, Profs. Coben and Thompson noted the lack of empirical data on mediation generally, described some of the limitations in obtaining such data, and pointed out that "one extremely large database" had been largely overlooked thus far: "the reported decisions of state and federal judges forced to confront legal disputes about mediation."[468] They reported the results of a study in which they examined that database.

Through Westlaw searches of all federal and state opinions issued between 1999 and 2003, they found 1,223 cases that implicated mediation issues.[469] They reviewed those cases and compiled various types of information about them.[470]

Third Thoughts on the Uniform Mediation Act, 85 Marq. L. Rev. 113, 116 (2001) (scholars have not yet compiled sufficient empirical evidence from longitudinal studies to measure need for mediation confidentiality, mediation confidentiality should remain norm absent solid evidence on question, and empirical data might never "truly answer this confidentiality question since the relevant factors may not be susceptible to quantification.").

467. See, e.g., Charles Ehrhardt, *Confidentiality, Privilege, and Rule 408: The Protection of Mediation Proceedings in Federal Court,* 60 La. L. Rev. 91, 126 (1999) ("Those favoring a [mediation] privilege would be well-served to develop relevant data."); Scott Hughes, *A Closer Look — The Case for Mediation Confidentiality Has Not Been Made,* 5 Disp. Resol. Mag. 14, 16 (1998) (hereafter, "Hughes (1998)") (no empirical data connects success of mediation to availability of mediation privilege; that privilege should not be created until such connection is made); see also Eric Green, *A Heretical View of the Mediation Privilege,* 2 Ohio St. J. on Disp. Resol. 1, 32 (1986) (no data shows confidentiality is essential to mediation process; dubious that researchers could collect such data).

468. James Coben & Peter Thompson, *Disputing Irony: A Systematic Look at Mediation About Litigation,* 11 Harv. Negotiation L. Rev. 43, 45-46 (2006) (hereafter, "Coben & Thompson (2006)").

469. *Id.* at 49-50.

470. For example, they noted the jurisdiction in which case arose, the nature of the claims asserted, the type of issues addressed in the opinion, and the result of the case. See *id.* at 50.

In undertaking that analysis, Profs. Coben and Thompson admitted that "a written trial or appellate court decision is by no means a perfect window into the world of mediation."[471] As they pointed out, "[o]nly the rare mediated dispute shows up in a reported opinion."[472]

Most mediated disputes result in a durable settlement, either during the mediation or later in the litigation process. In a small, atypical fraction of the cases, the dispute proceeds to trial, is resolved by a pretrial motion, or litigation recommences when a settlement falls apart. Only a few of those cases result in a written, publicly accessible opinion that is included in the Westlaw database; many court decisions are not memorialized in such an opinion. The sample of cases that Profs. Coben and Thompson examined was thus skewed, not necessarily representative of mediated disputes generally, or even of mediation-related litigation.[473]

Nonetheless, Profs. Coben and Thompson believed they could learn valuable information from what they described as "failed" mediations (ones that resulted in "the adversarial opinion that the ADR process was designed to avoid").[474] One unexpected finding, for instance, was "the sheer volume of litigation about mediation."[475]

With regard to mediation confidentiality, Profs. Coben and Thompson summarized their findings as follows:

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471. *Id.* at 46.

472. *Id.* at 46-47.

473. As Profs. Coben and Thompson acknowledge, "most litigated issues about mediation are handled at the trial level, usually without any reported opinion." *Id.* at 54. Most of the opinions in their database came from appellate courts (874), but they did find 350 trial court opinions, most of which (209) came from federal courts. *Id.*

474. *Id.* at 47.

475. *Id.*; see also *id.* at 143. In a five-year time-span when general civil caseloads were relatively steady or declining nationwide, there were over a thousand cases involving mediation issues, and mediation litigation increased 95% (from 172 decisions in 1999 to 335 in 2003). *Id.* at 47-48.

The database contains 152 opinions where courts considered a mediation confidentiality issue, including fifteen state supreme court decisions and eight federal circuit court opinions. The number of cases raising confidentiality issues more than doubled between 1999 and 2003, from seventeen to forty-three. In a number of opinions, confidentiality issues were commonly interlinked with other mediation dispute issues: enforcement (46); ethics/malpractice (21); sanctions (21); fees (18); mediation-arbitration (9); and duty to mediate (8).

The majority of the confidentiality opinions (130) considered whether to permit testimony or discovery from mediation participants. Courts upheld statutory or rule limitations on availability of such evidence in fifty-seven opinions (44%), upheld limitations in part in eight cases (6%), and declined to protect confidentiality in sixty opinions (46%). In five cases (4%), the issue was left undecided. The balance of the confidentiality decisions (22) address a range of questions other than admissibility or discovery, most commonly judicial disqualification or consequences for breach of confidentiality agreements.

While these confidentiality disputes certainly merit discussion, *the more significant finding is the large volume of opinions in which courts considered detailed evidence of what transpired in mediations without a confidentiality issue being raised* — either by the parties, or sua sponte by the court. Indeed, uncontested mediation disclosures occurred in thirty percent of all decisions in the database, cutting across jurisdiction, level of court, underlying subject matter, and litigated mediation issues. Included are forty-five opinions in which mediators offered testimony, sixty-five opinions where others offered evidence about mediators' statements or actions, and 266 opinions where parties or lawyers offered evidence of their own mediation communications and conduct — all without objection or comment. *In sum, the walls of the mediation room are remarkably transparent*.[476]

476. *Id*. at 57-59.

As the above quote makes clear, "a major surprise" from the study was how often courts considered evidence of what transpired in a mediation, particularly how often courts considered such evidence without any objection.[477] Both mediators and other mediation participants offered uncontested mediation evidence on a wide range of topics.[478]

In the cases involving disputes over confidentiality, courts upheld confidentiality restrictions about half of the time, and over 20% of such decisions were issued by California courts.[479] According to Profs. Coben and Thompson, the "level of vigilance for maintaining the confidentiality of mediation discussions varie[d] depending on the context of the litigation."[480]

Profs. Coben and Thompson further found that when courts expressly refused to protect mediation confidentiality, few of them engaged in "a reasoned weighing of the pros and cons of compromising the mediation process."[481] Instead of balancing the policy considerations at stake, the courts typically justified their decisions on other grounds, such as waiver or the harmless error doctrine.[482]

Profs. Coben and Thompson continued their research after completing the above-described article. A 2007 follow-up article reported the results of similar research they conducted during 2004-2005, and more limited research they conducted during

477. *Id.* at 48.

478. *Id.* at 59-61, 62-63.

479. *Id.* at 64.

480. *Id.* at 68.

481. *Id.* at 66.

482. *Id.* at 66-67.

2006.[483] In large part, the trends identified in their original article continued during the follow-up period.[484]

Other Studies

In addition to the work of Profs. Coben and Thompson, the Commission found a few other studies that provide some empirical information on mediation confidentiality. These include:

- *Foster and Prentice Study*. In a study published in 2009, Prof. T. Noble Foster and Selden Prentice[485] systematically reviewed recently published Washington cases and found only three in which a court admitted mediation communications.[486] The Washington researchers also surveyed 30 local mediators, judges, and attorneys, who had handled a combined total of over 23,000 mediations (court-connected and otherwise).[487] Out of all those mediations, the survey respondents were only aware of 65 breaches of confidentiality (much less than 1%).[488] The Washington results thus differ sharply from what Profs. Coben and Thompson found in their

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483. James Coben & Peter Thompson, *Mediation Litigation Trends: 1999-2007,* 1 World Arbitration & Mediation Review 395 (2007) (hereafter, "Coben & Thompson (2007)").

484. *Id*. at 397. For additional information collected by these professors, see James Coben & Peter Thompson, *Mediation Case Law Project 1999-2007 State Supreme Courts (Sorted by Subject Matter of Case)*, Mediation Case Law Summaries, Paper 4 (Aug. 11, 2008), *available at* http://digitalcommons.hamline.edu/dri_mclsummaries/4/; see also notes 503 & 504 *infra* & accompanying text.

485. Both researchers were from Albers School of Business and Economics at Seattle University.

486. T. Noble Foster & Selden Prentice, *The Promise of Confidentiality in Mediation: Practitioners' Perceptions,* 2009 J. Disp. Resol. 163, 166 (2009).

487. *Id*. at 169-70.

488. *Id*. at 170.

nationwide research, which focused on mediations discussed in court decisions.[489]

- *Ohio Study*. In 2008, the Chief Judge of the U.S. District Court for the Southern District of Ohio sent a questionnaire to 290 lawyers that asked questions about their experiences with five different types of settlement procedures: (1) a settlement conference conducted by the judge or magistrate assigned to the case, (2) a settlement conference conducted by a judge or magistrate not assigned to the case, (3) a mediation conducted by a court staff mediator, (4) a court-connected mediation conducted by a volunteer mediator, and (5) a mediation conducted by a private, paid mediator.[490] A total of 136 lawyers (47%) responded to the questionnaire.[491]

  Among other things, the results showed that the lawyers "thought that parties could be much less candid with judges assigned to the case than with each of the other types of neutrals."[492] The lawyers also "thought that judges assigned to the case were much less 'able to fully explore settlement without prejudice to ongoing litigation if the case is not settled' than other types of neutrals."[493]

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489. *Id*. at 171.

490. The results of the questionnaire were presented in an article by Roselle Wissler (a research director of a dispute resolution program at the law school of Arizona State University). Roselle Wissler, *Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences,* 26 Ohio St. J. on Disp. Resol. 271, 275-76 (2011) (hereafter, "Wissler (2011)").

491. *Id*. at 275. Most of those lawyers had a substantial amount of legal experience. *Id*. at 275-76.

492. *Id*. at 284.

493. *Id*. at 285-86. According to the author, "[t]he main factor that appeared to affect whether *lawyers thought* they could candidly and fully discuss settlement with the neutral without negative consequences or prejudice to ongoing litigation was whether the neutral facilitating settlement discussions would make subsequent substantive decisions in the case and preside at the trial." *Id*. at 286

The Ohio study also found that of the five procedural options, the lawyers thought parties could be most candid with private mediators. Court-connected mediators (court staff mediators and volunteer mediators for court programs) ranked higher than judges not assigned to the case.[494] The results were similar with regard to the ability to explore settlement fully without prejudice.[495]

- *Disparity Between Volume of UMA Litigation and Volume of California Litigation*. In 2011, JAMS published a short article regarding the tenth anniversary of the UMA.[496] The article reported that Prof. Nancy Rogers (one of the reporters for the UMA) viewed "'the limited amount of case law surrounding'" the UMA as a "'sign that the UMA was

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(emphasis added). She pointed out that there were no "independent observations to show … whether parties *were in fact* more candid in some models than others." *Id*. at 283 (emphasis added). It seems likely, however, that if a lawyer thinks candor in a particular context could be unusually detrimental to a client, the lawyer will be less candid in that context than otherwise, and will instruct the client to do the same.

494. See *id*. at 285.

495. See *id*. at 286. The author offered several possible explanations for these results:

> Finding that settlement conferences with judges not assigned to the case were rated lower on these two dimensions than all models of mediation suggests that a settlement facilitator with any potential decisionmaking role in the case raised concerns that information discussed during the settlement conference could affect subsequent rulings. Or perhaps lawyers thought that judges would be more likely than mediators to talk to the trial judge about the case, either because the judges would be more likely to communicate with the trial judge about other pretrial proceedings in the case or because the mediators had explicit confidentiality provisions and reporting limitations.

Id. (footnotes omitted).

496. See Justin Kelly, *The Uniform Mediation Act Turns 10 This Year,* JAMS Dispute Resolution Alert (Summer 2011).

well crafted.'"[497] She explained that "'[b]y the end of 2009 there were only 30 reported cases and there were very few where a court was confused about the privilege and its application.'"[498] She regarded it as "'a good sign that the courts [were] consistently getting it right.'"[499]

The same article says that Prof. Coben "echoed her point, noting that 'in California there is a lot of litigation over the confidentiality statute.'"[500] He contrasted that situation to the UMA, saying that "'[p]eople just aren't litigating UMA issues.'"[501] He said that although "he was 'not a proponent of the UMA when it came out,'" the more he studied litigation, the more he became "'convinced that the approach the drafters took was the correct one.'"[502] He expanded on that point in a more recent article he wrote himself,[503] which contrasts the amount of mediation confidentiality litigation under the UMA with the amount of such litigation under California law from 2013 to 2015.[504]

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497. *Id.* at 3 (quoting Prof. Rogers).

498. *Id.* (quoting Prof. Rogers).

499. *Id.* (quoting Prof. Rogers).

493. *Id.* (quoting Prof. Coben).

501. *Id.* (quoting Prof. Coben).

502. *Id.* (quoting Prof. Coben).

503. See James R. Coben, *My Change of Mind on the Uniform Mediation Act,* Dispute Resol. Mag. 6 (Winter 2017) (hereafter, "Coben (2017)").

504. The article reports:

> I analyzed federal and state mediation cases published on Westlaw and found that fewer than 50 cases decided as of 2012 discussed any aspect of the Uniform Mediation Act.…
>
> A similar pattern has emerged in the last three years, 2013 through 2015, with state or federal courts interpreting the UMA to resolve a dispute about confidentiality in mediation only 16 times nationwide (just 8% of all state and federal cases addressing mediation confidentiality disputes in that three-year period). By comparison, in that same three-

While the amount of mediation confidentiality litigation is clearly a factor to consider in evaluating a confidentiality rule, another factor would be the extent to which a rule does, or does not, chill candid mediation discussions that lead to effective settlements. Unfortunately, that effect would be extremely difficult to measure and quantify. To the best of the Commission's knowledge, no such empirical data is available.[505]

A number of people have commented, however, that there is no evidence that enactment of the UMA has triggered a decline in the use or effectiveness of mediation in a UMA jurisdiction.[506] There does not seem to be any systematically compiled contrary evidence either.

The lack of empirical data or anecdotal reports regarding negative effects of the UMA is encouraging, though apparently none of the UMA jurisdictions had a stricter mediation confidentiality rule in place prior to enacting the UMA.[507] Whether the same result would occur in a jurisdiction like California is thus unclear.[508]

> year time frame, California state and federal courts issued more than four dozen mediation confidentiality opinions (25% of all state and federal cases addressing mediation confidentiality disputes in that three-year period).

See *id*. at 7.

505. The Ohio study perhaps comes closest to addressing this point.

506. See, e.g., Coben (2017), *supra* note 503, at 8 ("[T]o my knowledge not a single empirical study suggests that the UMA has triggered a decline in the use of mediation. If there are anecdotal reports, I have not heard them."); see also First Supplement to CLRC Staff Memorandum 2016-36, Exhibit pp. 5-6 (comments of Jeff Kichaven).

507. See First Supplement to CLRC Staff Memorandum 2014-14 (comments of Casey Gillece on behalf of Uniform Law Commission).

508. It seems reasonable to predict that mediation would not entirely disappear upon enactment of a weaker mediation confidentiality rule in California. Whether there would be a less dramatic effect is less certain. Even a relatively small reduction in the percentage of cases settled through mediation could have a significant impact on court dockets and access to justice.

Empirical Information on the Effects of Mediation

Empirical data on the impact of differing mediation confidentiality rules is not the only type of empirical data that might be useful in this study. For instance, rules protecting mediation communications are grounded in part on the concept that mediations (or at least some types of mediations) have positive effects, such as cost savings and increased party satisfaction. Researchers have expended much effort trying to determine whether such effects actually occur.

In this section of its report, the Commission first describes some of the difficulties inherent in mediation research generally. The Commission then discusses the results of empirical research on the benefits of mediation.

Difficulties Inherent in Mediation Research Generally

Like research on the impact of mediation confidentiality rules, other empirical research on mediation issues involves significant challenges. The effectiveness of mediation could be measured in a variety of different ways;[509] there is no standardized, broadly accepted, and readily administered measuring technique.[510]

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509. For instance, the effectiveness of a mediation could be measured by (1) whether it results in a settlement, (2) whether it results in an early settlement, which is likely to conserve judicial and litigant resources, (3) whether it results in a durable settlement, which will not unravel or result in further disputes, (4) whether it results in a settlement that enhances party satisfaction, (5) some combination of the preceding means of measurement, or (6) some other method. For a list of possible factors to consider in determining whether court-connected mediation is "successful," see Bobbi McAdoo & Nancy Welsh, *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation,* 5 Nev. L.J. 399, 404-05 (2004). Regardless of which criterion is used, it is of no use in a vacuum; it must instead be compared to what would occur without the use of mediation.

510. See Gregory Jones, *Fighting Capitulation: A Research Agenda for the Future of Dispute Resolution,* 108 Penn. St. L. Rev. 277, 302 (2003) ("I have found little in the way of measurement of dispute resolution processes, with the notable exception of the ex post participant satisfaction surveys that have

Collecting data on mediation programs and analyzing such data is also expensive, slow, time-consuming, and hard to finance when state budgets are tight and data collection would divert funds and resources away from direct provision of services to the public.[511] In addition, "sound empirical data is necessarily hard to obtain

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become so common.… Efforts at standardization and consistency in the collection and reporting of longitudinal data are desperately needed.").

In 2003, an ABA task force developed a list of data fields the courts could use to determine what ADR data to capture. "The hope [was] that with more similar data collection across court systems, there [would] be more ability to discern the impact of ADR on the justice system as a whole." Bobbi McAdoo, *All Rise, the Court is in Session: What Judges Say About Court-Connected Mediation*, 22 Ohio St. J. on Disp. Resol. 377, 428 n. 270 (2007) (hereafter, "McAdoo (2007)"); see also Donna Shestowsky, *Disputants' Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little,* 23 Ohio St. J. on Disp. Resol. 549, 592 n. 158 (2008). It is not clear to the Commission whether the ABA effort has had much impact; as best we can tell from extensive reading in the area, the measurement problem persists.

In California, the Judicial Council similarly prepared a model survey for trial courts to use in collecting ADR data. The Commission does not have information on how extensively the trial courts have used the model survey.

511. See, e.g., McAdoo (2007), *supra* note 510, at 430 ("In this era of severe budget constraint encompassing the fiscal environment in state and federal government, great creativity will be needed to generate effective systems to monitor and evaluate ADR programs."); Ignazio Ruvolo, *Appellate Mediation — "Settling" the Last Frontier of ADR,* 42 San Diego L. Rev. 177, 188 n.23 (Feb.-March 2005) ("[S]ome programs have been required to limit the resources devoted to the collection of data, thereby making the process of drawing conclusions about the reasons for programmatic success somewhat more conjectural than might be desirable."); see generally Peter Robinson, *An Empirical Study of Settlement Conference Nuts and Bolts: Settlement Judges Facilitating Communication, Compromise, and Fear,* 17 Harv. Negotiation L. Rev. 97, 102-03 (2012) (California judicial officers were surveyed on settlement practices in 2000-2004, but results were published in 2012).

Long-term follow-up (such as checking whether a settlement proves durable) is particularly prohibitive. See, e.g., Lynn Kerbeshian, *ADR: To Be Or …?*, 70 N. Dak. L. Rev. 381, 400 (1994) ("long-term follow-up is nonexistent").

given the confidential nature of most mediation."[512] In fact, it is even hard to learn how many mediations occur.[513]

Moreover, "[s]ome of the standard requirements of experimental design, including random case selection, adequate model specification, and the control of other non-specified variables, have offered significant challenges in the context of actual (non-simulated) dispute resolution."[514] "Random assignment is the best way to create groups that are reasonably equivalent on all known variables (e.g., age of disputant, nature of relationship between the disputants, case type) as well as unknown or unmeasured variables (e.g., psychological functioning of disputants)."[515] Despite its "greatness of value," ADR research using random assignment of actual cases has been rare.[516]

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512. Jeffrey Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology,* 2000 J. Disp. Resol. 247, 250 (2000); see also Jones, *supra* note 510, at 283 ("Given the importance of process integrity and confidentiality, how can we measure the performance of alternative dispute resolution programs, particularly those that are connected to our formal systems of justice?").

513. Coben & Thompson (2006), *supra* note 468, at 45-46 ("Since many mediations are private matters, it is difficult to determine the number of mediations conducted in any jurisdiction."); see also Jones, *supra* note 510, at 302 ("We do not even have a good idea about how many mediations are conducted each year."); Art Thompson, *The Use of Alternative Dispute Resolution in Civil Litigation in Kansas,* 12 Kan. J. L. & Pub. Policy 351, 354 (2003) ("much of the ADR that takes place is never reported").

514. Jones, *supra* note 510, at 290 n. 61; see also Kerbeshian, *supra* note 511, at 399 ("The success of mediation is difficult to assess given the limitations in methodology and research design common in much of the published literature.").

515. Shestowsky, *supra* note 510, at 608 (footnote omitted).

516. *Id.* at 609 (footnote omitted); see also Kerbeshian, *supra* note 511, at 399 ("Random assignment and use of matched samples is frequently impossible or not attempted."); Wayne Brazil, *Should Court-Sponsored ADR Survive?,* 21 Ohio St. J. on Disp. Resol. 241, 250 (2006) (hereafter, "Brazil (2006)") (pointing out that comparative analyses of control groups are "a very rare commodity in the world of judicial administration.").

Not only is data collection relating to mediation challenging, but also much care is necessary in interpreting the data that do exist.[517] Particularly common are problems comparing results that may have been affected by multiple variables. As Magistrate Judge Brazil explained:

> Local legal cultures vary, as do docket profiles, court resources, docket pressures, and the demography of the client and lawyer communities. The extent of the development of the private ADR provider market can also vary dramatically between jurisdictions — as can the level of experience and comfort with various ADR tools in the local bar and among local repeat-player clients.[518]

Key characteristics of court programs may also vary, such as "whether participation in ADR is mandated by the court or is voluntary; whether the parties are permitted to select their own neutral; whether the parties are required to pay for the neutral's services and, if so, whether at market rates or at below-market rates; and the kinds of cases that are served by the ADR program and the circumstances of the parties."[519] Consequently, Judge

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In part, the lack of such experimentation may be due to reluctance to treat an actual case in a manner that appears sub-optimal, simply for purposes of experimental research. For example, in discussing the pros and cons of random assignment to appellate mediation, Justice Ruvolo (California First District Court of Appeal) explained that "forcing the parties and counsel to spend time, and therefore money, mediating a hopeless case will undoubtedly engender resentment towards the court and its program." Ruvolo, *supra* note 511, at 217.

517. See, e.g., Matthias Prause, *The Oxymoron of Measuring the Immeasurable: Potential and Challenges of Determining Mediation Developments in the U.S.,* 13 Harv. Negotiation L. Rev. 131, 134 (Winter 2008) ("[T]he availability of data might be as heterogeneous as the development of mediation throughout the country; information might be difficult to obtain due to decentralized organization and lack of coordination, and even if successfully obtained, there might be too many variables to accurately compare and contrast it.").

518. Brazil (2006), *supra* note 516, at 243 n.2.

519. *Id.*

Brazil warned that it is "*impossible to generalize reliably* because there is such a huge range of programs, with major differences in setting, purpose, design, quality, and quality control, as well as other variables."[520]

With that warning in mind, and appreciation for the difficulties in gathering empirical data on the costs and benefits of mediation, the Commission turns now to describing the available data.

Results From Across the Country

By the mid-1990's, a majority of state courts and almost all federal district courts had adopted mediation programs for large categories of civil cases.[521] Some of these programs were "based on efficiency goals of being less costly — both to the court system and to the individual parties — and a quicker way to a final resolution …."[522] Other programs focused on party satisfaction, looking to mediation "as a means to enhance self-determination and mutual problem solving by the parties in a dispute to a much greater degree than litigation."[523] Proponents also justified mediation programs on other grounds, such as the notion that a

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520. *Id.* at 249; see also Roselle Wissler, *Representation in Mediation: What We Know From Empirical Research,* 37 Fordham Urb. L.J. 419, 468 (2010) ("Mediation programs for different types of cases and in different jurisdictions differ in many ways, including the characteristics of the parties, the characteristics of the mediators, the model or style of mediation, whether mediation is voluntary or mandatory, the typical length and number of mediation sessions, and the legal context and local legal culture within which they operate.") (hereafter, "Wissler (2010)"); Kerbeshian, *supra* note 511, at 400 ("results obtained in one jurisdiction may not generalize to another location or type of program").

521. Sharon Press, *Court-Connected Mediation and Minorities: A Report Card,* 39 Cap. U. L. Rev. 819, 823 (2011) (footnote omitted).

522. *Id.*

523. *Id.*

mediated settlement was more likely to be durable than a settlement reached through other means.[524]

There are apparently "hundreds of studies" pertaining to these justifications.[525] The Commission does not have sufficient resources to review and analyze each of those studies. Instead, the Commission assessed the general nature of the findings, as summarized in the scholarly literature.

In sum, looking at the empirical data from across the country on the costs and benefits of mediation, the situation appears to be:

- It is unclear whether mediation results in significant cost savings, helps reduce court dockets, or shortens case disposition times. Scholars generally indicate that the data is mixed and inconclusive.[526]
- Empirical studies (mostly post-mediation surveys) fairly consistently show that disputants like using the mediation process.[527] Whether mediation is *the most*

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524. See, e.g., James Alfini & Catherine McCabe, *Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law,* 54 Ark. L. Rev. 171, 195 (2001); Chris Guthrie & James Levin, *A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute,* 13 Ohio St. J. on Disp. Resol. 885, 887 n.7 (1998); Kerbeshian, *supra* note 511, at 395.

525. Shestowsky, *supra* note 510, at 603.

526. For example, Prof. Deborah Hensler (Stanford Law School) said in 2003 that the available data on court mediation programs "indicates that they … produce little in the way of time or cost savings." Deborah Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System,* 108 Penn. State L. Rev. 165, 187-188 (2003) (hereafter, "Hensler (2003)"). In contrast, Magistrate Judge Brazil said a few years later that "*there is substantial evidentiary support — even if no unassailable empirical proof* — for the view that strong court ADR programs can reduce cost and delay for significant percentages of litigants." Brazil (2006), *supra* note 516 at 249 (emphasis added; citing sources, while acknowledging that results are mixed).

For additional sources and further discussion of this point, see CLRC Staff Memorandum 2015-5, pp. 25-28 & sources cited therein.

527. See, e.g., McAdoo (2007), *supra* note 510, at 378 (referring to "a body of literature suggesting that parties are 'satisfied' with the mediation process.");

effective means, as opposed to *an effective* means, of promoting disputant satisfaction is not definitively resolved, but mediation is clearly very popular.[528]

- It is unclear whether mediation results in more durable or otherwise better settlements than unassisted negotiations, or has other beneficial effects besides what is noted above.[529]

Art Thompson, *supra* note 513, at 355 (referring to Kansas data and "a number of national studies that show high levels of satisfaction among users of various forms [of ADR] and in particular mediation."); Sander, *supra* note 466, at 706-07 ("[i]f there is any consistent finding in mediation research, it is that the participants like the process and tend to view it as fair, regardless of whether a settlement was reached."); Guthrie & Levin, *supra* note 524, at 887 ("Parties consistently report high levels of satisfaction with mediation."); see also Daniel & Lisa Klerman, *Inside the Caucus: An Empirical Analysis of Mediation from Within,* 12 J. Empirical Legal Stud. 686 (2015) (providing rare data on voluntary, private mediations; authors conclude that "the very high settlement rate [of mediator in study] and the fact that parties are willing to pay thousands of dollars to mediate suggest that mediation is helpful.").

528. See, e.g., Brazil (2014), *supra* note 107, at 64 (describing multi-option ADR program in federal district court and reporting that parties very much prefer settlement-oriented alternatives like mediation and "the closer a particular process parallels the trial process the less attracted to it they are likely to be."); Shestowsky, *supra* note 510, at 552 ("On balance, the initial research, conducted primarily in the 1970s, suggests that disputants favor adjudicative procedures (e.g., arbitration) to nonadjudicative procedures (e.g., mediation). The more recent literature tends to suggest the opposite."); Deborah Hensler, *Suppose It's Not True: Challenging Mediation Ideology,* 2002 J. Disp. Resol. 81, 83-84 (2002) (hereafter, "Hensler (2002)") ("[K]nowing that litigants are 'satisfied' with mediation tells us little about preferences for mediation — litigants might be even more satisfied with a different procedure if it were offered to them.").

529. *Compare* sources cited in *supra* note 524 (maintaining that mediated settlements are more durable than other settlements) *with* McAdoo (2007), *supra* note 510, at 382 ("although judges perceive better and more durable settlements, we know so little about settlements, with or without ADR, that the validity of this result is questionable."); see also Kerbeshian, *supra* note 511, at 400 ("There is little data on long-term compliance or noncompliance and the factors influencing both."). For additional sources and further discussion of this point, see CLRC Staff Memorandum 2015-5, pp. 28-29 & sources cited therein.

Although scholars express differing views on what the existing empirical results show, they do agree that more empirical research is needed.[530]

California Results

Given the gaps and limitations in the nationwide data, especially the difficulties inherent in comparing data from different jurisdictions, it seems appropriate to pay particularly close attention to data from studies of mediations in California jurisdictions. Such data may be the best indicator of whether the use of mediation is having beneficial effects in the state today, and is therefore worth promoting in the future.

In that regard, the Commission is fortunate to have access to the data from five early mediation pilot programs established pursuant to a 1999 legislative mandate.[531] The Judicial Council's study of those programs was carefully designed to yield reliable empirical data. Although the precise program structure varied from jurisdiction to jurisdiction, and not every feature was present in each jurisdiction, the study involved the use of large samples (almost 8,000 mediations altogether), random selection, control groups, and direct querying of both parties and attorneys (as well as some inquiries of judges). The researchers analyzed the results cautiously, using regression analyses and other techniques to control variables as much as possible.[532]

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530. See, e.g., Press, *supra* note 521, at 846, 850-51; Jones, *supra* note 510, at 282; see also Hensler (2003), *supra* note 526, at 183 n. 76 ("[T]here are no comprehensive statistics on cases that use alternative dispute resolution mechanisms in the private sector."). For additional sources and further discussion of this point, see CLRC Staff Memorandum 2015-5, pp. 30-32 & sources cited therein.

531. See Judicial Council, *Evaluation of the Early Mediation Pilot Programs* (Feb. 27, 2004) (hereafter, "Judicial Council report"). The full report can be downloaded at http://www.courts.ca.gov/documents/empprept.pdf.

532. It is also noteworthy that the study collected data from five programs with certain required characteristics, and, with few exceptions, the results were similar for each of the five programs. The consistency of the results adds to their

The results showed that the early mediation pilot programs were successful based on all of the criteria specified by the Legislature in the pilot program statute. "These benefits included reductions in trial rates, case disposition time, and the courts' workload, increases in litigant satisfaction with the court's services, and decreases in litigant costs in cases that resolved at mediation in some or all of the participating courts."[533]

The results thus tend to support one of the premises underlying mediation confidentiality: The notion that mediation is a beneficial process, which should be encouraged and therefore governed by rules that promote its effectiveness.[534] Importantly, however, the pilot program data pertains only to court-connected, early mediations conducted within a certain time period, and is subject to other caveats and limitations.[535]

Other California research reflects similarly positive results:

- *Earlier Judicial Council study*. In an earlier study, the Judicial Council examined how ADR affected civil cases in Los Angeles, San Diego, and El Dorado Superior Courts, as well as several municipal courts.[536] The study reported "a high level of satisfaction from the parties and attorneys involved" and "found significant savings to the court system in reducing motions, hearings, conferences, and trials."[537] In addition, the study showed that "the

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credibility, even though the test conditions were not identical in each jurisdiction.

533. Judicial Council Report, *supra* note 531, at xix.

534. Scholars have recognized that the Judicial Council study tends to support this premise. See, e.g., Shestowsky, *supra* note 510, at 560 n.37; McAdoo (2007), *supra* note 510, at 424 n.256.

535. See CLRC Staff Memorandum 2015-6, pp. 13-14. For further discussion of the early mediation pilot programs, see *id*. at 2-14 & Exhibit pp. 1-26.

536. See Art Thompson, *supra* note 513, at 363 (referring to data reported in Judicial Council publication entitled *Civil Action Mediation Act: Results of the Pilot Project* (Nov. 1996)).

537. *Id*.

program was associated with a reduction in the trial judgment rate, no change in median time to disposition, and possibly a reduction in relitigation compared to trial judgments."[538]

- *Appellate mediation program*. The results of a mediation program in Division Two of the Fourth District Court of Appeal (commenced in 1991) were also promising, leading to a two-year experimental mediation program in the First District Court of Appeal (commencing in mid-1999).[539] The latter program used both random selection and criterion-based selection techniques; participation was mandatory and the mediations occurred early in the appellate process.[540] For the 217 cases mediated during the pilot period, the settlement rate was 43.3% and the time from notice of appeal to resolution "was reduced from approximately fourteen months to about four months …."[541] The experimental mediation program also "achieved substantial savings for the parties as well as for the court, primarily by assisting the parties to settle before briefing."[542] In addition, "evaluations by participants of the mediation process,

538. *Id*. at 363-64.

539. See Ruvolo, *supra* note 511, at 180-89.

540. See *id*. at 184-87.

541. See *id*. at 191.

542. *Id*. at 192. More specifically,

> In settled mediated cases, counsel estimated the cumulative savings of attorney's fees and costs to exceed $7.1 million. Per case savings in attorney fees averaged from $45,367 for appellants to $21,269 for respondents. Cost savings per case approached $10,000. The investment made by even those cases that did not resolve appears to have been worth the expenditure. On average, attorney fees in nonsettled cases were $2989 for appellants and $2402 for respondents, covering the time devoted to the mediation process. Yet, even after the costs of unsuccessful mediations were offset, the estimated net savings to parties participating in the mediation program exceeded $6.2 million.

Id. at 192-93.

the mediators, and program administration were generally quite positive."[543]

Because the experimental program was a success, the program was made permanent. Data from the permanent program, summarized in a 2005 publication by Justice Ignazio Ruvolo, are similarly favorable.[544]

- *San Mateo County program*. In San Mateo County Superior Court, virtually 100% of the ADR used in the court's civil/probate/complex litigation program from July 2007 to July 2008 was mediation, although the court offered other options.[545] The "overwhelming majority" of attorneys surveyed said that ADR reduced court time.[546] In addition, "85% of respondents believed that costs were reduced as a result of ADR, whereas 15% thought that ADR increased costs."[547] The court also found that "[m]ost respondents, regardless of their role, felt very satisfied with the process …."[548] The positive results for the

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543. *Id*. at 193. "The great majority of parties and counsel indicated they would use the process and the mediators again." *Id*.

544. See *id*. at 194-201. Combined data from 1999-2003 showed a settlement rate of 55% in a total of approximately 500 mediations. *Id*. at 201. Based on evaluations completed by attorneys and parties, Justice Ruvolo estimated that "mediation program operations have saved the parties an estimated net savings of $13,636,500."

545. See Superior Court of California, County of San Mateo, *Multi-Option ADR Project Evaluation Report July 2007-July 2008* (hereafter, "San Mateo Multi-Option ADR Report"), p. 11. This report can be downloaded at http://sanmateocourt.org/documents/adr/2007_2008_evaluation_report.pdf.

546. *Id*. at 16.

547. *Id*. at 17.

548. *Id*. at 21. More specifically, the cumulative satisfaction rating for parties and attorneys was more than 4.0 on a scale of 1 to 5, with 5 being most satisfied and 4 being least satisfied. *Id*. "The highest overall satisfaction across roles was

> period from 2007-2008 were consistent with earlier data from the same court; more recent data does not appear to be available.[549]

From the data discussed above, it appears that court-connected mediation programs of the types mentioned are having beneficial effects in the California jurisdictions studied.

Unfortunately, the Commission is aware of only one study pertaining to private mediations in California. That study yielded encouraging results, but it involved only one particular mediator.[550] Additional information on private mediations may not exist due to privacy concerns and cost constraints.

Given that information gap and the need for caution in generalizing from the results of studies conducted under specific circumstances, it would be overly strong to say there is empirical proof that mediation of all types has beneficial effects in all California jurisdictions. Such strong proof rarely exists for policy decisions that the Legislature must make.

What can perhaps be said is that the results of studies conducted in various California jurisdictions at various times tend to support, rather than refute, the general notion that mediation has significant positive effects. That in turn suggests that the rules governing mediation, including any confidentiality requirements, should be

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in response to the question about whether the neutral provided a safe and secure setting for the ADR session." *Id*.

As in the early mediation pilot program, "attorneys expressed more satisfaction with the process overall than did their clients." *Id*. This "could be due to the fact that attorneys may have more realistic expectations about the ADR process as well as a better sense of the ultimate value of the case." *Id*. The same result occurred in a study of domestic relations mediation in Maine in 1996-97 and a study of general civil mediation in Ohio in 1998-2000. See Wissler (2010), *supra* note 520, at 437 ("parties rated the mediation process as less fair than their lawyers did ….").

549. See San Mateo Multi-Option ADR Report, *supra* note 545, at 16; see also Shestowsky, *supra* note 510, at 565-66.

550. See *Klerman, supra* note 527.

crafted to promote its effectiveness, absent other overriding policy considerations.

Empirical Information on Mediation Misconduct

As directed by the Legislature, the Commission's current study is focusing on the relationship between mediation confidentiality and attorney malpractice and other misconduct.[551] Consequently, any empirical data regarding alleged misconduct occurring in mediations, particularly professional misconduct, would be of interest. It would also be useful to have empirical data regarding instances in which evidence of professional misconduct in another setting allegedly surfaced in a mediation.[552]

Results From Across the Country

From the nationwide case law discussed earlier in this report, it is clear that there are occasional allegations of attorney misconduct in a mediation context.[553] It is less clear how often those allegations are true; the written decisions do not usually reveal as much.

A few sources shed further light on attorney misconduct in a mediation context:

(1) A survey of Minnesota judges.

(2) The previously-mentioned studies conducted by Profs. Coben and Thompson.

(3) Research on a multi-option ADR program in the federal district court for the Northern District of California.

Each source is discussed in order below.

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551. 2012 Cal. Stat. res. ch. 108; see discussion of "Scope of Study" *supra*.

552. For example, a mediation communication revealing that an attorney gave erroneous advice at an earlier stage of the case.

553. See discussions of "Implementation of the UMA," "Case Law" (under "Other States"), and "Using Mediation Evidence to Prove or Disprove Allegations of Attorney Misconduct" (under "Federal Law") *supra*.

Survey of Minnesota Judges. In 2003, a survey was administered to all 287 state district court judges in Minnesota.[554] Of those judges, 203 responded (71%), of which 172 (60%) regularly handled the types of Minnesota cases subject to ADR processes.[555]

Among other things, the survey asked whether the judges had heard complaints about the use of ADR under the applicable Minnesota rule. In response, 55 judges said "yes," and 48 of those judges gave qualitative comments.[556]

Of the 14 "representative complaints" that Prof. Bobbi McAdoo quoted in her article reporting the survey results, only three could conceivably have involved mediation misconduct.[557] While those results do not provide a firm sense of the volume of mediation misconduct, the small number of judges who reported having heard complaints that *might* have involved such misconduct at least suggests that mediation misconduct is not a major problem in court-connected mediations in Minnesota.

Coben and Thompson Studies. In their first study, which involved a database of 1,223 federal and state Westlaw opinions

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554. McAdoo (2007), *supra* note 510, at 386.

555. *Id*.

556. *Id*. "[I]ssues of costs and time, together and separately, were noted by forty-six judges; six judges referred to problems with arbitration; and nineteen judges raised an issue that arguably could be considered a justice concern …." *Id*.

557. Those complaints were:

- "Mediated agreement doesn't provide sense of fair process or fair result — but rather, just a cheaper result they will live with."
- "Mediator's notes or others' writings don't accurately reflect agreement, unequal bargaining positions resulting in unfair agreements, bias of mediator."
- "Raises cost of process — insurance industry fails to negotiate in good faith."

Id. at 418-19.

issued between 1999 and 2003, Profs. Coben and Thompson found:

- The most frequently litigated mediation issue was an attempt to enforce a mediated agreement. Enforcement issues were raised in 568 cases (46% of the opinions in the 5-year database).[558]
- A total of 99 opinions in the 5-year database involved issues relating to ethics or malpractice in mediation. Those opinions fell into five categories: (1) 34 opinions on mediator misconduct,[559] (2) 30 opinions on lawyer malpractice, (3) 19 opinions on lawyer discipline, (4) five opinions on lawyer conflict of interest, and (5) 11 opinions on judicial ethics.[560]
- In 21 of the enforcement cases, a party argued that counsel had acted without authority in agreeing to the

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558. Coben & Thompson (2006), *supra* note 468, at 73. Of the enforcement cases, 55 involved claims that a mediated agreement was obtained by fraud or misrepresentation. "The fraud or misrepresentation defense was successful in whole or in part in only nine cases." *Id.* at 80.

Duress was raised as an enforcement defense in 36 opinions in the 5-year database. *Id.* at 81-82. "A mediation party was successful in claiming duress in only one of the thirty-six opinions." *Id.* at 82.

Thirteen of the opinions in the 5-year database involved a defense of undue influence. None of those defenses was successful. *Id.* at 83-84.

There were 34 opinions that appeared to involve a claim of mutual mistake. In four of those, the court refused to enforce the mediated agreement; in two of them the case was remanded. *Id.* at 85. There were also 19 claims of unilateral mistake, none of which was successful. *Id.*

559. The database contained four opinions naming mediators as defendants, none of which was successful. *Id.* at 98. Similarly, mediator misconduct was asserted as an enforcement defense "only seventeen times in five years." *Id.* at 48. That statistic led Profs. Coben and Thompson to conclude that "[e]ither the concern about coercive mediators is unwarranted or the litigation process does not provide an appropriate forum to address this issue." *Id.*

For further information on mediator misconduct, see CLRC Staff Memorandum 2015-5, pp. 41-45 & sources cited therein.

560. *Id.* at 89-90.

mediated settlement.[561] "This defense was rarely successful."[562]

- In addition to claims of lack of authority, specific acts of misconduct were raised as a defense in 20 of the cases involving an attempt to enforce a mediated agreement.[563] Those claims "involved some variation on an argument that counsel placed undue pressure on their clients to settle."[564] Profs. Coben and Thompson did not specify how often those claims succeeded.
- Similarly, Profs. Coben and Thompson did not specify how many of the 30 cases involving legal malpractice claims were successful. They did give details regarding several of those cases, including three in which the malpractice plaintiff succeeded to some extent with regard to the issues at stake in the opinion.[565] Such results were apparently the exception rather than the rule, because Profs. Coben and Thompson noted that claims for erroneous legal advice in mediation "usually fail for inability to establish causation and damages."[566]
- The disciplinary proceedings against lawyers involved "a wide range of alleged improper conduct."[567] Profs. Coben and Thompson provided examples of the alleged improper conduct, but did not specify how often the allegations succeeded.[568]

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561. *Id.* at 90.

562. *Id.*

563. *Id.* at 91.

564. *Id.*

565. See *id.* at 92-93.

566. *Id.* at 93.

567. *Id.*

568. See *id.*

With regard to mediation misconduct, the results of the second study that Profs. Coben and Thompson conducted were similar to the results of the first study.[569] In particular, they concluded that the later data was consistent with their previous findings that "if there is widespread overreaching and unfairness in the thousands of mediations throughout the country, *it is not showing up in great numbers in the reported cases*."[570] The two studies also show, however, that allegations of mediation misconduct occasionally occur and a few of them succeed.

Northern District of California Research. The federal district court for the Northern District of California has offered a multi-option ADR program for many years.[571] In theory, "when litigants choose either mediation or settlement conferences over ENE or arbitration they are choosing the processes whose form and substance are least regulated by Court rule and in which, as a matter of formal, rule-based constraints, the parties could be most exposed to 'abuse' by the neutral or by other parties."[572] Nonetheless, "for years parties consistently have been choosing the least structured and the least rule-controlled of the Court's ADR process options."[573]

As Magistrate Judge Brazil puts it:

> There simply is no evidence that the substantially lower level of regulation-based control of mediation and

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569. See Coben & Thompson (2007), *supra* note 483, at 404-06, 413; see also CLRC Staff Memorandum 2015-5, p. 41. In at least some jurisdictions, a confidentiality restriction or mediator immunity provision might have impeded or deterred one or more parties in pursuing a mediation misconduct claim.

570. *Id*. at 405 (emphasis added). The studies by Profs. Coben and Thompson involved a skewed sample of mediations: Ones that resulted in opinions in the Westlaw database. See discussion of "Coben and Thompson Studies" under "Empirical Information on Mediation Confidentiality" *supra*.

571. See Brazil (2014), *supra* note 107.

572. *Id*. at 53.

573. *Id*.

> judicially hosted settlement conferences engenders greater fear that parties will try to take advantage, for improper purposes, of the freedom and flexibility that these procedures entail. Nor is there evidence that, in fact, there is a higher incidence of misbehavior by participants or neutrals in these more fluid processes. The incidence of complaints about abuse of any of the Court's ADR processes is extremely small – and the complaints that do surface most often are based on alleged post-process breaches (by parties, not neutrals) of confidentiality rules, not on misbehavior during the events.[574]

Judge Brazil notes, however, that this result might not occur in every ADR program; it could stem from special factors applicable to the program in the Northern District of California.[575]

California Results

In an effort to learn more about the magnitude and nature of mediation misconduct in California (particularly attorney malpractice and other attorney misconduct), the Commission sought information from the State Bar. Unfortunately, it appears that the State Bar has not collected any data on the point.[576]

The Commission also sought such data from the Judicial Council. Although the Judicial Council could not provide any data on *attorney* misconduct in the mediation context, it did provide some information suggesting that *mediator* misconduct in California's court-connected mediation programs is infrequent.[577]

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574. *Id*.

575. See *id*. at 54.

576. See CLRC Staff Memorandum 2015-5, P. 37 & Exhibit p. 1 (comments of Saul Bercovitch on behalf of State Bar of California); see also CLRC Staff Memorandum 2016-37; CLRC Staff Memorandum 2016-30, pp. 10-11 & Exhibit pp. 22-23; CLRC Minutes (July 2016), p. 4.

577. See Cal. R. Ct. 3.865 Comment ("Complaints about mediators are relatively rare."); Memorandum from Civil & Small Claims Advisory Committee to Members of the Judicial Council re *Alternative Dispute Resolution: Procedures for Addressing Complaints About Mediators in Court-*

As previously discussed, California's court-connected mediation programs are quite popular and studies consistently show high levels of satisfaction with those programs.[578] From those facts, it seems reasonable to infer that there is not much misconduct during such mediations, whether by attorneys, mediators, or anyone else.[579]

Some anecdotal information tends to reinforce the conclusion that mediation misconduct is relatively uncommon. The Commission has received many comments to that effect,[580] several of which include numerical references.[581]

Connected Mediation Programs for Civil Cases (Oct. 6, 2008), at 15 ("complaints about mediators are rare and are almost always informally resolved"), 18 ("Complaints about mediators are relatively rare."); Memorandum from Civil & Small Claims Advisory Committee to Members of the Judicial Council (Sept. 27, 2005) re *Alternative Dispute Resolution: Preserving Mediation Confidentiality in Rule 1622 Proceedings*, at 13 (volume of complaints against mediators is "perhaps 50 per year statewide" out of more than 30,000 court-program mediations per year statewide), 16 n.20 ("overall number of complaints against mediators historically received by the courts is small"). The Commission does not have access to the data supporting these statements.

578. See discussion of "California Results" under "Empirical Information on the Effects of Mediation" *supra*.

579. See generally Brazil (2014), *supra* note 107, at 53-54 (inferring low incidence of misconduct from popularity of federal district court's mediation program and lack of complaints about it).

580. See, e.g., CLRC Staff Memorandum 2015-54, Exhibit pp. 2 (comments of Donald Proby & Coreal Riday-White on behalf of Ass'n for Dispute Resolution of Northern California), 25 (comments of Deborah Ewing), 39 (comments of Lynnette Berg Robe); First Supplement to CLRC Staff Memorandum 2015-46, Exhibit p. 15 (comments of Win Heiskala); Third Supplement to CLRC Staff Memorandum 2015-46, Exhibit p. 8 (comments of Loretta Van Der Pol & J. Felix De La Torre on behalf of Public Employment Relations Board); CLRC Staff Memorandum 2015-45, Exhibit p. 29 (comments of Jill Switzer).

581. See, e.g., First Supplement to Memorandum 2015-46, Exhibit pp. 37 (In my family law mediations, "I have witnessed very rare instances of what might be deemed malpractice. Maybe once or twice in the past six years a lawyer has espoused a position not supported by law.") (comments of Hon. Gretchen Taylor

It would be improper to infer, however, that misconduct is nonexistent in court-connected mediation programs, much less in California mediations generally. There are certainly some allegations of misconduct, as reflected in the case law and comments previously discussed.[582] At least a few of those allegations appear to have merit,[583] while the validity of many allegations will never be clear.[584]

(ret.)); CLRC Staff Memorandum 2015-45, Exhibit p. 20 (Revising mediation confidentiality "should require solid evidence establishing a need …. Personally, I've never seen such a need in the 900+ mediations I have conducted in 11 years of mediation practice.") (comments of David Karp); CLRC Staff Memorandum 2013-39, Exhibit pp. 22-23 ("I have specialized in handling professional liability cases throughout my 27-year career as a trial attorney, including hundreds of legal malpractice cases. I have acted as mediator in over 400 disputes …. In all the legal malpractice cases I have handled in the last 27 years, either for a party or as a mediator, I can think of only two situations where mediation confidentiality might have impaired a party's ability to prosecute or defend a potential legal malpractice claim. Ironically, the only situation I have ever encountered where the situation was serious was a case where *the attorney* might have been precluded from defending himself against a bogus legal malpractice claim — not the other way around ….") (comments of John S. Blackman) (emphasis in original), 27 ("[S]ome 90% of my mediations produce settlements. Other than the few publicized situations in the court cases, I have never encountered conduct that might lead to a malpractice case.") (comments of Richard J. Collier).

See also CLRC Staff Memorandum 2015-46, Exhibit pp. 88 (comments of Daniel Kelly), 176 (comments of mediator Stephen Sulmeyer); First Supplement to Memorandum 2015-46, Exhibit p. 7 (comments of Hon. Susan Finlay (ret.)); Second Supplement to CLRC Staff Memorandum 2015-46, Exhibit p. 9 (comments of Robert J. Macfarlane).

582. See discussions of "*Cassel*" and "Other Decisions on the Intersection of Mediation Confidentiality and Alleged Attorney Misconduct Under California Law" *supra* & sources cited therein.

583. See, e.g., *In re* Bolanos, Case No. 12-O-12167 (Review Dep't of State Bar Ct., filed May 18, 2015), pp. 4-8 (*available at* http://www.statebarcourt.ca.gov/Portals/2/documents/opinions/Bolanos.pdf); *In re Bolanos,* Case No. 12-O-12167-PEM (Hearing Dep't of State Bar Ct. filed Sept. 16, 2013), n.7. See also CLRC Staff Memorandum 2016-59, Exhibit p. 52 ("I spoke recently with Mr. Cassel's attorney, Mr. Makarem.… He pointed out

Empirical Information on Mediation Usage

At times during this study, Commissioners or others have asked how the volume of mediations in California compares to the volume in other states, or other questions about how California's mediation culture differs from that in other states. To some extent, such information might be helpful in attempting to assess the likely impact of adopting a mediation confidentiality approach used in another jurisdiction. As previously discussed, however, such data is hard to obtain.[585]

It is clear that mediation is well-established in California. There are many mediators, lots of mediation programs, and numerous mediations.[586] Nonetheless, precise statistical information appears to be scarce.

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that even in Mr. Cassel's case, and even without the ability to introduce mediation communications following that Supreme Court decision, when his case went to trial the jury nevertheless returned a verdict in Mr. Cassel's favor with regard to liability which included all issues related to mediation.") (comments of Ron Kelly).

584. See discussion of "Other Decisions on the Intersection of Mediation Confidentiality and Alleged Attorney Misconduct Under California Law" *supra* & sources cited therein.

585. See discussion of "Difficulties Inherent in Mediation Research Generally" *supra*.

586. See, e.g., http://apps2.alameda.courts.ca.gov/adr/Default.aspx (ADR options in Alameda County Superior Court include court mediation and private mediation; court's ADR information packet includes contact information for three low-cost mediation services in Alameda County); http://www.amadorcourt.org/gi-adr.aspx (Amador County Superior Court encourages ADR in civil cases and offers court mediation as ADR option); http://www.cc-courts.org/civil/alternative-dispute-resolution.aspx (Amador County Superior Court says mediation is "the leading" alternative to trial); http://www.fresno.courts.ca.gov/alternative_dispute_resolution (Fresno County Superior Court implemented Case Management Conference order in 2006 that requires parties in general civil cases to participate in ADR prior to trial; court says "mediation process is commonly used for most civil case types and can provide the greatest level of flexibility for parties."); http://www.humboldt.courts.ca.gov/gi/adr.htm (Humboldt County Superior Court offers Voluntary Civil Mediation Program and "[m]ost civil lawsuits are

resolved without a trial";); https://www.kern.courts.ca.gov/divisions/civil/alternative_dispute_resolution (Through Dispute Resolution Programs Act, Kern County Superior Court provides mediation services in certain cases); http://www.mariposacourt.org/mediationpolicy.htm (Mariposa County Superior Court has policy "to provide no-cost mediation services to litigants or potential litigants in areas of small claims, unlawful detainer, and civil harassment); http://www.mercedcourt.org/alternative_dispute_resolution.shtml (Merced County Superior Court says most civil cases are resolved without a trial; it offers Early Mediation Program for unlimited civil cases); Sheila Fell, *Spotlight on ADR — Part 1: Options With Merit,* 51 Orange County Lawyer 10 (Dec. 2009) (Orange County Superior Court mediation program "has had enormous popularity" and "success rate has been highly rewarding to the litigants, the attorneys, and the mediators"); www.riverside.courts.ca.gov/adr/civmed_partiescounsel.shtml ("Riverside County Superior Court offers mediation services to help parties resolve their general disputes as early in the process as appropriate."); https://www.saccourt.ca.gov/civil/alternative-dispute-resolution.aspx (Sacramento County Superior Court "strongly encourages" parties in civil cases to pursue ADR; it offers mediation as one of two ADR options); https://www.sb-court.org/Portals/0/Documents/PDF/Misc/AlternativeDisputeResolution.pdf (In San Bernardino Superior Court, ADR "provides an opportunity for parties to receive assistance reaching a resolution in their small claims, landlord tenant, civil family law, probate case with a trained mediator" from Inland Fair Housing and Mediation Board); http://www. sdcourt.ca.gov/portal/page?_pageid=55,1555034&_dad=portal&_schema=PORTAL (San Diego County Superior Court offers mediation as ADR option; court also points out that "[p]arties may voluntarily stipulate to private mediation" and parties may "utilize mediation services offered by programs that are partially funded by the county's Dispute Resolution Programs Act."); http://sfsuperiorcourt.org/divisions/civil/dispute-resolution (San Francisco County Superior Court has policy that every noncriminal, nonjuvenile case participate in ADR; court offers variety of ADR options, including judicial mediation and Bar Association of San Francisco mediation program, which has success rate of 64% and satisfaction rate of 99%); https://www.sjcourts.org/self-help/alternative-dispute-resolution/ (San Joaquin County Superior Court says "most civil lawsuits are resolved without a trial;" it offers mediation as one of two ADR options); https://www.slo.courts.ca.gov/dv/civil-adr.htm (San Luis Obispo County Superior Court offers mediation as one of two ADR options); San Mateo County Superior Court, *Multi-Option ADR Project Evaluation Report: July 2007-July 2008,* pp. 7 (Of cases referred to ADR in 2007-2008, 73% participated in ADR), 10 (71 % of cases settled in ADR and another 3% partially settled), 11 (about 100% court's ADR users chose mediation), 21 (most

It may be worth noting, however, that a decade ago Prof. Frank Sander[587] and Matthias Prause[588] proposed the concept of a "Mediation Receptivity Index" ("MRI"), a "metric to measure the extent of mediation development" in a jurisdiction.[589] They hoped that this concept would help "determine the strengths and weaknesses of the various mediation communities," so as to

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participants were very satisfied with court's ADR program); Sheila Purcell, *Growing Mediation in Our Courts: Why and How One Court Made the Journey,* Cal. Cts. Review 13 (Spring 2007) ("Through its mediation programs, our court, like many others across California and throughout the country, has been able to better serve litigants by meeting their need for a different dispute resolution option."); http://www.scscourt.org/documents/mediation.pdf (Santa Clara County Superior Court online slideshow says "95% of cases settle before trial," "mediation promotes *quicker, cost-effective* settlements," and California courts "are successfully using Mediation"); http://www.solano.courts.ca.gov/AlternativeDisputeResolutionADR.html (Solano County Superior Court encourages parties to use ADR and offers mediation as ADR option); http://sonoma.courts.ca.gov/self-help/adr (Sonoma County Superior Court says mediation "is one of the most frequently used methods of ADR because it is informal, quick, convenient and confidential"); https://www.stanct.org/voluntary-mediation (Stanislaus County Superior Court says "[m]any courts successfully use mediation as a form of alternative dispute resolution;" it offers "ground-breaking" voluntary mediation program); http://www.trinity.courts.ca.gov/civil (Trinity County Superior Court website includes link to video inviting litigants to "please consider mediation instead of going to court" and describing advantages of mediation); See also Fam. Code § 3170 ("If it appears on the face of a petition, application, or other pleading to obtain or modify a temporary or permanent custody or visitation order that custody, visitation, or both are contested, the court shall set the contested issues for mediation."); Cal. R. Ct. 3.221(c) (In every general civil case, plaintiff must serve copy of ADR information package on each defendant).

587. Prof. Sander (Harvard Law School emeritus) was a well-respected leader of the ADR movement.

588. Matthias Prause is a legal scholar who was mentored by Prof. Sander.

589. See Frank Sander & Matthias Prause, *Developing the MRI (Mediation Receptivity Index),* 22 Ohio St. J. on Disp. Resol. 599 (2007).

"improve the understanding of mediation" and "be a powerful tool for its practical promotion and advocacy."[590]

Prof. Sander and Mr. Prause suggested a list of factors to use in calculating a jurisdiction's MRI, which Mr. Prause refined in a later article.[591] Using his refined list, Mr. Prause attempted a "first rough cut" at determining the MRI for each state and the District of Columbia.[592] He then put the jurisdictions into five groups based on their MRI scores.[593] California was in the top group, indicating that (1) it is one of the most active states in terms of the absolute level of mediation, and (2) the level of mediation is high even relative to the state's large population.[594]

As best the Commission can tell, there has not been any follow-up work on the MRI concept. It is unclear how much weight to ascribe to Mr. Prause's "first rough cut."

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590. *Id*. at 600-01.

591. As refined, Mr. Prause's list included:

I. Objective MRI

A. *Quantitative indicators*

1. Number of community mediation centers
2. Number of companies offering mediation services
3. Number of members of ADR organizations
4. Academic Citation index

B. *Infrastructure indicators*

1. UMA implemented
2. State ADR Office

II. Subjective MRI

1. Survey of ADR experts

Prause, *supra* note 517, at 141-42.

592. *Id*. at 134. For each jurisdiction, Mr. Prause calculated not only an "absolute MRI" (the absolute level of mediation activity in the jurisdiction), but also a "relative MRI" (the relative level of mediation activity in relation to the population). *Id*. at 145-47, 149-50, 162.

593. See *id*. at 150-56.

594. *Id*. at 150.

Conclusions Regarding Empirical Information

According to the Judicial Council, California's court system is the largest in the world, with approximately 2,000 judicial officers, 19,000 court employees, and 6.8 million cases processed in fiscal year 2014-2015.[595] Ideally, any policy choice about mediation "should be informed by empirical data bearing on procedural justice and other aspects of civil case dispute resolution," and "the central comparison [should] be between unaided bilateral settlement in the context of litigation and such negotiation assisted by mediation."[596] It would also be valuable to have data that was replicated in a number of different studies "from both the laboratory and field paradigms," so as to "obtain more clarity on the reliability and generalizability of findings."[597]

Unfortunately, empirical data on mediation is difficult and costly to gather, and there is much danger of comparing apples and oranges. One cannot just examine what one jurisdiction is doing and assume that the same approach will have the precisely same effect in another jurisdiction with a different mediation structure.[598]

In the Commission's view, the empirical data discussed in this memorandum, while imperfect, tends to suggest:

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595. *2016 Court Statistics Report, supra* note 1, at Preface & xvii.

596. Craig McEwen & Roselle Wissler, *Finding Out If It Is True: Comparing Mediation and Negotiation Through Research,* 2002 J. Disp. Resol 131, 131 (2002).

597. Shestowsky, *supra* note 510, at 624.

598. This does not mean it is pointless to look at what is happening in other jurisdictions. From looking at Florida's mediation practice, for instance, it is probably safe to conclude that creating a malpractice exception to California's mediation confidentiality statute would not eliminate mediation in California. But it would be risky to assume that the effect of such an exception would be the exactly same here as in Florida (even if we knew what effect the exception had in Florida). There is no way to predict precisely what would happen to California's mediation culture and its court system.

(1) Mediation, or at least court-connected mediation similar to the types used in the California programs previously described, serves valuable purposes in California.

(2) Mediation misconduct is relatively infrequent, but allegations of such misconduct do occur occasionally and at least a few of those allegations appear to have some merit.

As for the impact of differing confidentiality rules (i.e., whether one such rule is better than another in promoting frank discussion and effective mediation), there do not seem to have been any rigorously controlled experiments in this area. The Commission is dubious about the feasibility of such experimentation.[599]

Consequently, assessing the potential impact of a particular mediation confidentiality rule appears to be a decision that the Legislature and the Governor have to make without the benefit of solid empirical evidence. Many other policy decisions fall into the same category.[600]

In such a situation, it seems reasonable to rely on the *commonsense* notions that people will speak more freely if they are confident their words will not be used to their detriment, and

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599. See discussion of "Impediments to Rigorous Scientific Testing" *supra*.

Profs. Coben and Thompson have shown the existence of a significant number of written opinions in which mediation participants disclosed mediation communications without objection. See notes 476-84 *supra* & accompanying text. It might be a mistake, however, to put much weight on that statistic in assessing the importance of mediation confidentiality to the many thousands of mediation participants in the universe of mediations conducted in this country. Presumably, if confidentiality were important to one or more participants in a mediation, those participants would be reluctant to let the dispute become the subject of an opinion in the Westlaw database that Profs. Coben and Thompson searched. In such circumstances, it seems likely that they would try hard to settle the dispute without reaching that point.

600. For instance, it cannot be empirically proven that freedom of speech promotes sounder governmental decisions or is the best test of truth, but our federal and state constitutions nonetheless firmly protect the right to speak freely.

negotiations are more likely to succeed if the participants are able to speak freely.[601] Courts and legislatures across the country have made such commonsense, experience-based assumptions for years in establishing provisions that protect mediation confidentiality.[602]

Although commonsense suggests that policymakers should recognize the *existence* of an interest in protecting mediation communications, that does not end the analysis. Policymakers must further decide how much weight to place on that interest and how to balance it against competing interests.

Given the limited availability of reliable empirical data, those determinations properly depend largely on the personal values of each policymaker. The Commission's recommendation, presented in Parts II and III of this report, reflects the collective assessment

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601. Minnesota bar groups advocated this type of approach in commenting on a draft of the UMA:

> While we appreciate that there is no research demonstrating that participants in mediation would be less forthright or would refuse to participate without the assurance of confidentiality, *common sense and experience with settlement negotiations* dictates that participants in mediation feel free to be forthright, to "try on" ideas that they may later reject and to share information they might not otherwise share *without risk that their communications could be used against them*.

Letter from Jennelle Soderquist (Chair, Conflict Management & Dispute Resolution Section of Minnesota State Bar Ass'n) & Rebecca Picard (Chair, Ethics Committee of Conflict Management & Dispute Resolution Section of Minnesota State Bar Ass'n) to NCCUSL & ABA Drafting Committees on Uniform Mediation Act (Oct. 7, 1999) (emphasis added), *available from* Minnesota State Bar Ass'n.

602. See discussion of "Law of Other Jurisdictions" *supra*; see also CLRC Staff Memorandum 2015-5, p. 3 (Mediation confidentiality "is the main thrust of the Uniform Mediation Act ('UMA'); it is established by court rule or statute in virtually every state; it is a mandatory element of the local rules governing court-connected mediations in the federal arena; it has broad (but not unanimous) support in the academic community; and it is considered essential for effective mediation by numerous mediators, attorneys, and judges throughout the country.") (footnotes omitted).

of its members regarding the best means of balancing the competing interests at stake in this study.[603]

SCHOLARLY VIEWS

In this study, the Legislature specifically directed the Commission to consider "scholarly commentary."[604] Consistent with that directive, numerous references to scholarly commentary appear throughout this report. This section of the report focuses specifically on scholarly commentary.

The volume of scholarly commentary potentially relevant to this study is vast. It would be prohibitively time-consuming to review and summarize all of it. The discussion below briefly describes the material that seems most likely to be of interest.[605] It is organized as follows:

(1) Scholarly views on protection of mediation communications in general.

(2) Scholarly views on use of mediation communications to prove or disprove a misconduct claim.

(3) Scholarly views on use of mediation communications to challenge a mediated settlement agreement.

(4) Scholarly views on *in camera* proceedings relating to mediation evidence.

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603. For further discussion of empirical information relevant to this study, see CLRC Staff Memoranda 2015-5 and 2015-6.

The Commission considered the possibilities of (1) conducting some empirical research before commencing this study (or enlisting a knowledgeable person to do so) and/or (2) calling for some empirical research in its proposed legislation. The Commission decided not to pursue either of those options; it was not convinced that such efforts would be advisable given the costs and difficulties of designing and conducting a good empirical study. See CLRC Minutes (Aug. 2013), p. 3; CLRC Minutes (July 2016), p. 4; CLRC Minutes (Dec. 2016), p. 7.

604. 2012 Cal. Stat. res. ch. 108.

605. For further information on scholarly commentary relevant to this study, see CLRC Staff Memoranda 2015-23 and 2015-35.

(5) Scholarly views on informing mediation participants about the extent of protection for mediation communications

(6) Scholarly views on other means of addressing mediation misconduct.

Scholarly Views on Protection of Mediation Communications in General

The prevailing scholarly view is that mediation communications need special protection to some degree.[606] A few scholars disagree.[607] There is much commentary on this subject and it does not seem necessary to repeat it here.[608]

Some scholars stress the importance of providing *predictable* protection for mediation communications.[609] They emphasize that before a mediation participant discloses sensitive information, the

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606. See, e.g., Cole, *supra* note 5, at 426-28; Bernard, *supra* note 466, at 118-19; Deason (2001, re quest for uniformity), *supra* note 75, at 80-84; Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct,* 1997 B.Y.U. L. Rev. 715, 722-23 (1997); Kirtley, *The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest,* J. Disp. Resol. 1, 8-10 (1995); see also Harvard Note, *supra* note 54, at 444-46.

607. See, e.g., J. Brad Reich, *Call for Intellectual Honesty: A Response to the Uniform Mediation Act's Privilege Against Disclosure,* 2001 J. Disp. Resol. 1 (2001); Hughes (1998), *supra* note 467; Kevin Gibson, *Confidentiality in Mediation: A Moral Reassessment,* 1 J. Disp. Resol. 25 (1992); E. Green, *supra* note 467.

608. For discussion of arguments on both sides, see CLRC Staff Memorandum 2015-23 & sources cited therein. See also discussion of "Key Policy Underlying Mediation Confidentiality" *supra*.

609. See, e.g., Ehrhardt, *supra* note 467, at 121-22 ([m]aking confidentiality contingent upon a judge's subsequent evaluation of the relative importance of the competing interests' would eviscerate the effectiveness of the privilege'"); Kirtley, *supra* note 606, at 52 ("[c]ertainty of application is a critically important characteristic for mediation privilege provisions.").

participant should be able to reliably determine whether the information could later be used against the participant.[610]

Most scholars believe, however, that the protection for mediation communications should not be absolute.[611] They generally agree that the protection should be more nuanced; it should be subject to some limitations.[612] For example, a frequently-cited article says:

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610. See, e.g., Deason (2001, re quest for uniformity), *supra* note 75, at 84-85 ("In mediation, as in other settings in which privileges encourage communications, protection for those communications must be predictable if confidentiality is to have its intended effect. To optimize communication among mediation participants and provide a foundation for their perception of the mediator's … neutrality, the benefits of confidentiality must be effective *ex ante,* during the mediation process, and prior to any dispute over the scope of confidentiality.") (footnotes omitted); see also Ehrhardt, *supra* note 467, at 121-22.

611. See, e.g., Reuben, *supra* note 298, at 114 ("the simple 'mediation is confidential' statutes found in some state statutes and court rules … are seductive in their simplicity, [but] they are deceptive in that they raise more questions than they answer, promise much more than they deliver, and in the end contribute little to the reliability of mediation confidentiality."); Ehrhardt, *supra* note 467, at 124 ("Just as exceptions are recognized in limited situations to the attorney-client and psychotherapist-patient privileges, exceptions should be recognized to a mediation privilege when social policy outweighs the need for the privilege."); Gibson, *supra* note 607, at 2 ("[F]or mediation to be effective some degree of confidentiality may be required, but it is wrong to assume that mediation needs *absolute* confidentiality.") (emphasis in original); E. Green, *supra* note 461, at 11 (an absolute privilege would result in "tremendous harm" due to "the public perception that a mediation that takes place behind a curtain of confidentiality may produce unfair results."); see also Harvard Note, *supra* note 54, at 452 ("Recent legislative enactments in several states have provided near-absolute protection for communications made in mediation, whether among the parties or with the mediator. Though this approach creates a straightforward rule suitable to an informal process, it is an overreaction to the shortcomings of evidentiary rules and contractual arrangements.") (footnotes omitted).

612. See, e.g., Cole, *supra* note 5, at 1423, 1432, 1446-47, 1448-49, 1454 (emphasizing need for clearly drafted exceptions to mediation confidentiality statute, instead of providing absolute protection); Michael Perino, *Drafting*

> A confidentiality provision can be crafted with appropriate exceptions and flexibility to mitigate the disutilities of a blanket privilege. Professor Green, among others, says it is difficult to draft a statute. We agree. However, this difficulty does not override the need for a privilege where mediation is so vital to the effective functioning of our dispute settlement system and confidentiality is so important to mediation.[613]

The concept of a nuanced privilege is to some extent inconsistent with the concept of a predictable privilege. Prof. Ellen Deason[614] acknowledged this tension, explaining that an "adequate level of predictability requires, at a minimum, knowledge of *the boundaries at which uncertainty begins* for confidentiality."[615]

Scholarly Views on Use of Mediation Communications to Prove or Disprove a Misconduct Claim

Because this study is directed to "the relationship under current law between mediation confidentiality and attorney malpractice and other misconduct,"[616] it is important to consider what scholars have said about using mediation communications to prove or

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Mediation Privileges: Lessons from the Civil Justice Reform Act, 26 Seton Hall L. Rev. 1, 15 (1995) (Alternatives to an absolute privilege are (1) "a flexible privilege that gives courts wide discretion to qualify the privilege on a case-by-case basis," and (2) "a broad confidentiality rule with specific exceptions," but "[t]he better solution is to combine these two approaches."); but see E. Green, *supra* note 467, at 30 (mediation privilege should not be absolute but it would be prohibitively difficult and dangerous to draft less-than-absolute privilege, so there should not be any mediation privilege).

613. Lawrence Freedman & Michael Prigoff, *Confidentiality in Mediation: The Need for Protection,* 2 J. Disp. Resol. 37, 43 (1986).

614. Prof. Deason is currently on the faculty at Ohio State University Moritz College of Law. When she wrote the quoted article, she was a professor at the University of Illinois College of Law.

615. Deason (2001, re quest for uniformity), *supra* note 75, at 85 (emphasis added).

616. 2012 Cal. Stat. res. ch. 108.

disprove alleged misconduct. The Commission first describes scholarly views on this matter generally, focusing primarily on professional misconduct. Next, the Commission specifically examines scholarly views on the UMA and California approaches to this matter.

General View

As Prof. Alan Kirtley put it, "[t]he mediation privilege should not provide a safe haven for participant wrongdoing or injustice."[617] Consistent with that sentiment, the academic community seems to generally agree that a mediation privilege or other provision protecting mediation communications should be subject to one or more exceptions or limitations to facilitate resolution of misconduct claims.[618] Scholarly commentary taking a contrary viewpoint (arguing against the need for such constraints on mediation confidentiality) appears to be scarce.[619]

In expressing these views, commentators sometimes speak of several different types of misconduct collectively, rather than differentiating between attorney misconduct, mediator misconduct, other types of professional misconduct, and misconduct by parties or other laypersons. In addition, it is not always clear whether the comments pertain only to misconduct during mediation, or are also

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617. Kirtley, *supra* note 606, at 49.

618. See, e.g., Kirtley, *supra* note 606, at 49 ("a clear-cut exception to the privilege for mediator malpractice is appropriate."); Freedman & Prigoff, *supra* note 613, at 43 ("[e]xceptions mandating use of confidential information in actions against the mediator would assure redress against abuses of the process."); see also Harvard Note, *supra* note 54, at 452 (there should be exception "guard[ing] against abuse of the mediation process," which "allows confidentiality to be pierced when a party brings suit alleging the breach of a duty owed by another party or the mediator in the course of mediation.").

619. However, most scholars advise against creating a mediation confidentiality exception for evidence that a person failed to participate in a court-ordered mediation in "good-faith." See CLRC Staff Memorandum 2015-35, pp. 26-28 & sources cited therein; see also *supra* note 22.

meant to encompass the use of mediation communications to prove or disprove other misconduct.

There are, however, a number of sources that focus specifically on attorney misconduct. For example, Prof. Deason wrote:

> [D]espite th[e] evidence that confidentiality in mediation is accepted wisdom, confidentiality is, and should be, controversial. It can hinder accurate decision making by excluding salient information. It can run counter to democratic principles of transparency and participation in public processes. In the context of mediation, confidentiality may conflict with other important values that are served by reporting certain mediation conduct or statements. [For example], *disclosures may be important in preventing or punishing … attorney misconduct* …. These competing values mean that the appropriate scope of confidentiality is not a matter of absolute protection or absolute disclosure. It is instead *a matter of balance between protection and disclosure that requires difficult policy choices*.[620]

Along similar lines, Prof. Charles Ehrhardt[621] noted that if a mediator observes attorney misconduct, "a strong argument exists that the privilege should not extend to prohibit testimony concerning [the] misconduct."[622] In the same vein, Prof. Pamela

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620. Ellen Deason, *Secrecy and Transparency in Dispute Resolution: The Need for Trust as a Justification for Confidentiality in Mediation: A Cross-Disciplinary Approach,* 54 Kan. L. Rev. 1387, 1388 (2006) (hereafter, "Deason (2006)") (emphasis added, footnotes omitted).

621. When he wrote the quoted article, Prof. Ehrhardt was on the faculty of Florida State University School of Law. He is now a professor emeritus there.

622. Ehrhardt, *supra* note 467, at 123 n.145. Prof. Ehrhardt also advocated creation of a mediation confidentiality exception covering mediator misconduct. See *id*. at 123 & n.145.

Kentra[623] argued that mediation confidentiality should at times yield to facilitate proof of attorney misconduct.[624]

Aside from Prof. Deason's quote, the commentary discussed in this section all predates the approval of the UMA in 2001. Later commentary is similar in tenor, but tends to focus on the UMA provisions, California's approach, or the laws of other jurisdictions.

Views on the UMA Approach to Allegations of Professional Misconduct

The academic community was extensively involved in drafting the UMA.[625] As one might expect, the academic community did not, and does not, speak with one voice regarding it.[626] For the

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623. Prof. Kentra is on the faculty of Chicago-Kent College of Law.

624. See Kentra, *supra* note 606, at 717-18, 753-54. Prof. Kentra focused on how to handle a clash between (1) a mediation confidentiality requirement and (2) a professional responsibility rule that requires an attorney to report a fellow attorney's misconduct. She concluded that "mediation confidentiality statutes, local rules, and mediation program rules should contain an exception for reporting attorney misconduct." *Id*. at 754.

For a student publication arguing that the need for mediation confidentiality outweighs the policy interest in attorney accountability in resolving a clash between a mediation confidentiality rule and a professional responsibility rule requiring an attorney to report a fellow attorney's misconduct, see Cletus Hess, Comment, *To Disclose or Not to Disclose: The Relationship Between Confidentiality in Mediation and the Model Rules of Professional Conduct,* 95 Dick. L. Rev. 601, 623-24 (1991).

Such a situation should not arise in California, because California has a self-reporting system for its attorneys, not a rule that requires an attorney to report a fellow attorney's misconduct. See Bus. & Prof. Code § 6068(*o*).

625. The reporters for the UMA were Prof. Nancy Rogers (Ohio State University, Michael E. Moritz College of Law) and Prof. Richard Reuben (University of Missouri — Columbia School of Law), and the drafting committee included several other law professors, perhaps most notably Prof. Sander.

626. For sharp criticism of the UMA, see Scott Hughes, *The Uniform Mediation Act: To the Spoiled Go the Privileges,* 85 Marq. L. Rev. 9, 77 (2001) (hereafter, "Hughes (2001)") (UMA "demonstrate[s] favoritism for mediators

most part, however, academic debate has concentrated on details of the UMA, and there appears to be fairly widespread, if a bit grudging, support of the general concept.[627]

As previously discussed, the UMA privilege is subject to an exception for evidence bearing on professional misconduct (including attorney misconduct).[628] That provision precludes a court from compelling a mediator to testify in connection with a professional misconduct claim (other than a claim against the mediator).[629] Some scholars have questioned whether it is appropriate to provide special treatment to mediator testimony, as opposed to compelling the mediator to testify just like any other witness.[630]

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and may result in damage to the integrity of the process."); Shannon (2000), *supra* note 401, at 109 (Texas ADR Act "is vastly superior to the pending draft of the UMA.").

627. See, e.g., Coben (2017), *supra* note 503, at 6 ("[T]he Uniform Mediation Act was — and is — a great idea."); Maureen Laflin, *The Mediator as Fugu Chef: Preserving Protections Without Poisoning the Process,* 49 S. Tex. L. Rev. 943, 983 (2008) ("The UMA, the product of five years of research and debate, is a major step forward for the mediation community."); Eric van Ginkel, *Another Look at Mediation Confidentiality: Does It Serve Its Intended Purpose,* 32 Alternatives to the High Cost of Litig. 119, 121 (2014) (hereafter, "van Ginkel (2014)") ("The UMA Is Very Good, But Not Perfect"); Bernard, *supra* note 466, at 145 ("Despite long-standing apprehensions, this author was able to lend tentative support to the UMA, a sign of hope for the future."); see also Reuben, *supra* note 298, at 100 (UMA has support of "many if not most leading dispute scholars").

628. See UMA § 6(a)(6). The UMA includes a separate exception addressing allegations of mediator misconduct. For discussion of these exceptions, see discussion of "UMA Exceptions for Professional Misconduct and Mediator Misconduct" *supra*.

629. See UMA § 6(a)(6) & (c) & Comment.

630. *Compare* Rebecca Hiers, *Navigating Mediation's Uncharted Waters,* 57 Rutgers L. Rev. 531 (2005) (noting that UMA includes exception allowing person to report attorney misconduct, but its language "is, unfortunately, somewhat convoluted"; it "apparently would allow parties, attorneys and non-party participants both to report and to testify regarding professional misconduct, but would exempt mediators from being compelled to testify in

There was also debate during the UMA drafting process about whether the professional misconduct provision should be subject to the "gateway test" used for some of the other UMA exceptions.[631] In the end, the UMA drafters determined that such a "gateway test" was not necessary for professional misconduct, because "in these narrow circumstances, society's interest in the information clearly outweighs its interest in barring the admissibility of mediation communications evidence, and if applicable, should not require an additional judicial determination before the mediation communication may be received into evidence."[632]

Although legal scholars have expressed differences of opinion on details such as the ones described above, they seem to widely agree with the UMA's inclusion of an exception for professional misconduct.[633] Two years after the UMA was approved, for

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such a case.") *with* van Ginkel (2014), *supra* note 627, at 122 ("I am in favor of retaining the exclusion of mediator testimony in cases alleging malpractice ….").

631. The "gateway test" (used in UMA § 6(b)) permits a court to use mediation evidence only if the court first conducts an *in camera* hearing and then finds that "the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in a specified type of proceeding.

632. Reuben, *supra* note 298, at 122; see also *id*. at 121 (UMA exceptions not subject to gateway test represent "situations in which the justice system's need for the evidence may be said to categorically outweigh its interest in the confidentiality of mediation communications such that it would be either unnecessary or impractical for the parties, and administratively inefficient for the court system to hold a full evidentiary hearing on the applicability of the exception.").

633. See, e.g., van Ginkel (2014), *supra* note 627, at 122 (approvingly noting that UMA drafters "realized that the need for confidentiality does not apply to situations where either an attorney or the mediator himself is accused of malpractice …."); Cole, *supra* note 5, at 1448-49 (urging jurisdictions to "draft a clear statute that provides exceptions to mediation confidentiality for important public policy reasons," and referring to UMA as good example because its exceptions "are particularly helpful to courts charged with disciplining attorneys

example, one of the UMA reporters wrote that "the list of UMA privilege exceptions have been substantially uncontroversial."[634]

Views on California's Approach to Allegations of Professional Misconduct

As previously discussed, California's main statute on mediation confidentiality (Evidence Code Sections 1115-1128) does not have an exception for attorney misconduct, mediator misconduct, or professional misconduct generally.[635] The statute is, however, subject to another limitation: Its protection against admissibility or disclosure of a mediation communication applies only in an "arbitration, administrative adjudication, civil action, or other *noncriminal* proceeding."[636] The statute does not provide any protection if mediation evidence is sought in a criminal case;[637] it differs from the UMA in this respect.[638] The idea is to draw a

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and parties who misuse mediation communications."); Hiers, *supra* note 630, at 578 (encouraging lawmakers to address misconduct more directly: "Proactive jurisdictions may choose to address specific types of issues, such as … explicitly permitting disclosure of professional misconduct."); John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs,* 50 U.C.L.A. L. Rev. 69, 139 (2002) (observing that UMA exception for professional misconduct serves as "[a]nother protection against misrepresentations" in mediation).

634. Reuben, *supra* note 298, at 121.

635. See discussion of "California Law on Mediation Confidentiality" *supra*.

636. Evid. Code § 1119(a)-(b) (emphasis added).

637. In *Cassel,* for example, the Court said:

> [B]y their plain terms, section 1119, subdivisions (a) and (b), protect mediation-related communications from disclosure and admissibility only in "arbitration[s], administrative adjudication[s], *civil* action[s] [and] other *noncriminal* proceeding[s] …." Thus, we note, these statutes would afford no protection to an attorney who is *criminally prosecuted* for fraud on the basis of mediation-related oral communications.

51 Cal. 4th at 135 n.11, *quoting* Evid. Code § 1119 (emphasis in *Cassel*).

638. The UMA protects mediation evidence in some criminal cases under specified circumstances See UMA §§ 4, 6(b)(1) & Comments. For discussion of

bright-line, relatively predictable distinction between misconduct warranting criminal prosecution and other allegations of misconduct.

Consistent with their generally favorable view of the UMA's approach to professional misconduct, scholars have been critical of California's very different approach.[639] For example, Prof. Nancy Welsh[640] voiced concern about the "extreme position" California has taken with regard to mediation confidentiality, under which "mediation is sometimes being used inappropriately; to shield lawyers from potential claims of malpractice …."[641]

Scholarly Views on Use of Mediation Communications to Challenge a Mediated Settlement Agreement

The issue of whether to create a mediation confidentiality exception to facilitate resolution of a misconduct claim (for example, a legal malpractice claim or a State Bar disciplinary proceeding) is distinct from, but closely related to, the issue of whether to create a mediation confidentiality exception when a party seeks rescission or reformation of, or asserts a traditional contract defense such as fraud or duress to, a mediated settlement agreement. The first type of exception (discussed in the preceding

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scholarly views on the intersection of mediation confidentiality and criminal conduct, see CLRC Staff Memorandum 2015-35, pp. 32-34.

639. See, e.g., van Ginkel (2014), *supra* note 627, at 121 (people "can criticize the drafters of the UMA for not going far enough with the exceptions it provides, but compared to the California statute we are approaching Nirvana); Cole, *supra* note 5, at 1456 ("California decisions demonstrate the problem of going too far with a prohibition on use of mediation communications."); see also Brand, *supra* note 107, at 403 ("California should adopt … exception and permit the admission of mediation-related evidence.… The admission of such evidence will allow victims of mediation-related legal malpractice to finally have recourse against attorneys who engage in such malpractice.").

640. Prof. Welsh is on the faculty at Penn State University, Dickinson School of Law.

641. Nancy Welsh, *Musings on Mediation, Kleenex, and (Smudged) White Hats,* 33 U. La Verne L. Rev. 5, 17, 18 (2011) (hereafter, "Welsh (2011)").

section of this report) would allow a person to seek redress for misconduct, without undoing any settlement that participants may have reached in mediation. The second type of exception would allow an attack on a mediated settlement agreement; it might disrupt the finality of the mediation result.

There is considerable scholarly support for creating the second type of exception,[642] but it is "more controversial" than the first type.[643] California does not have such an exception[644] and some scholars have criticized its approach to this matter.[645]

Scholarly Views on *In Camera* Proceedings Relating to Mediation Evidence

An *in camera* proceeding is one that the court conducts in private, either by (1) holding it in the judge's chambers or other private location or (2) excluding all spectators from the courtroom.[646] If confidential information is disclosed in such a

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642. See, e.g., Ellen Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides With Confidentiality,* 35 U.C. Davis L. Rev. 33, 89-91, 102 (2001) (hereafter, "Deason (2001, re contract law)"); Hughes (2001), *supra* note 626, at 38-63, 66, 77; Kirtley, *supra* note 606, at 51-52; see also Harvard Note, *supra* note 54, at 452-53.

643. Hughes (2001), *supra* note 626, at 38-39; see also Reuben, *supra* note 298, at 121-22.

644. See discussion of "California Law on Mediation Confidentiality" *supra*.

645. See, e.g., van Ginkel (2014), *supra* note 627, at 122; Eric van Ginkel, *Mediation Under National Law: United States of America,* IBA Legal Prac. Div. Mediation Comm. Newsletter 43, 51 (Aug. 2005); Peter Robinson, *Centuries of Contract Common Law Can't Be All Wrong: Why the UMA's Exception to Mediation Confidentiality in Enforcement Proceedings Should be Embraced and Broadened,* 2003 J. Disp. Resol. 135, 137-68 (2003).

For further discussion of scholarly views on this type of exception, see CLRC Staff Memorandum 2015-35, pp. 19-26. See also discussions of (1) "UMA Exception Relating to the Validity and Enforceability of a Mediated Settlement Agreement" *supra,* (2) "Case Law" under "Other States" *supra* (particularly the part on "[c]ases that seek to undo mediated settlement agreements"), and (3) "No Undoing Settlements" *infra*.

646. Black's Law Dictionary (3d ed. 1933).

proceeding, the degree of intrusion on the interest in confidentiality is less than if the proceeding were held in public, because the information is shared with fewer people.[647] Courts have also made clear that disclosing evidence at an *in camera* proceeding is not a forfeiture of secrecy, a breach of a promise of confidentiality, or a waiver of any applicable privilege.[648]

In camera proceedings can take many different forms, involving a variety of different procedural techniques. The concept allows for considerable flexibility.[649]

A number of rules, statutes, and judicial doctrines require a court to conduct an *in camera* hearing when a party seeks to use mediation evidence.[650] For instance, Magistrate Judge Brazil followed such an approach in *Olam*,[651] and the UMA calls for an *in camera* hearing when a party seeks or proffers mediation evidence

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647. See, e.g., United Sates v. Zolin, 491 U.S. 554, 572 (1989) ("In fashioning a standard for determining when *in camera* review is appropriate, we begin with the observation that '*in camera* inspection … is a smaller intrusion upon the confidentiality of the attorney-client relationship than is public disclosure.'").

648. See, e.g., *Zolin,* 491 U.S. at 568-69 ("[D]isclosure of allegedly privileged materials to the district court for purposes of determining the merits of a claim of privilege does not have the legal effect of terminating the privilege."); Doe v. Tenet, 329 F.3d 1135, 1148 n.8 (9th Cir. 2002) ("[A] court's review of documents *in camera* here would not breach any obligation the Does may have to keep the agreement secret."), *rev'd on other grounds,* 544 U.S. 1 (2005); Burlington Northern Railroad Co. v. Omaha Public Power Dist., 888 F.2d 1228, 1232-33 (8th Cir. 1989) (contract reviewed *in camera* constitutes trade secret).

649. See Amelia Green, *Mediation Confidentiality and Attorney Malpractice: The Potential for the Use of* In Camera *Proceedings to Balance Confidentiality with Accountability* (Feb. 2, 2015), p. 9 (reproduced in CLRC Staff Memorandum 2015-13, Exhibit p. 9); see also CLRC Staff Memorandum 2015-55, pp. 5-6 & sources cited therein.

650. See CLRC Staff Memorandum 2016-28 & sources cited therein.

651. See 68 F. Supp. 2d at 1126-27, 1131-32. *Olam* is discussed in "Using Mediation Evidence to Prove or Disprove Allegations of Attorney Misconduct" under "Federal Law" *supra*.

in connection with a challenge to the enforcement of a mediated settlement agreement.[652]

There is considerable scholarly support for the concept of conducting an *in camera* hearing to assess the admissibility and discoverability of mediation evidence, at least in certain contexts.[653] As Prof. Deason noted, "in camera methods … can protect confidentiality while a court evaluates the need for mediation confidentiality …."[654] Importantly, however, not all commentators view this type of approach favorably.[655]

Scholarly Views on Informing Mediation Participants About the Extent of Protection for Mediation Communications

In addition to expressing views on the extent to which mediation communications should be kept confidential or otherwise protected, scholars have commented on a related matter: What a mediator or attorney should tell prospective mediation parties

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652. See UMA § 6(b)(2) & Comment. The UMA also calls for an *in camera* hearing when a party seeks or proffers mediation evidence in a felony case (or, in some jurisdictions, a misdemeanor case). See UMA § 6(b)(1) & Comment.

653. Several scholars have voiced support for having a court conduct an *in camera* hearing when a party seeks or proffers mediation evidence in connection with a challenge to the enforcement of a mediated settlement agreement. See Hiers, *supra* note 630, at 578; Deason (2001, re contract law), *supra* note 642, at 102; Hughes (2001), *supra* note 626, at 77; Kirtley, *supra* note 606, at 51-52; see also Brand, *supra* note 107, at 396.

Other scholars have proposed an *in camera* approach in crafting a mediation confidentiality exception that addresses an alleged failure to mediate in good faith. See, Weston, *supra* note 317, at 78; see also Samara Zimmerman, Note, *Judges Gone Wild: Why Breaking the Mediation Confidentiality Privilege for Acting in "Bad Faith" Should be Reevaluated in Court-Ordered Mandatory Mediation,* 11 Cardozo J. Conflict Resol. 353, 382 (2009).

Some scholars have suggested conducting *in camera* hearings in connection with other mediation confidentiality issues. See, e.g., Cole, *supra* note 5, at 1456.

654. Deason (2001, re contract law), *supra* note 642, at 102.

655. *Id*. at 101 & sources cited therein.

about how much protection their mediation communications will receive.

On this topic, the scholarly commentary appears to be unanimous. The articles that touch on it all emphasize the importance of being up-front and honest with prospective mediation parties by accurately informing them, before a mediation begins, about the extent of protection that their mediation communications will receive.[656]

For the most part, the literature stresses that mediators and attorneys should forthrightly acknowledge the existence of *weaknesses* in the protection of mediation communications.[657] For

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656. See, e.g., Laflin, *supra* note 627, at 944 ("Participants need to know that there are limits on confidentiality and that everything said in mediation is not necessarily privileged."); Stephen Bullock & Linda Gallagher, *Surveying the State of the Mediative Art: A Guide to Institutionalizing Mediation in Louisiana,* 57 La. L. Rev. 885, 964 (1997) (Instead of advising participants that confidentiality is only guaranteed "to the greatest extent permitted by law," a mediator should make "a full and more precise disclosure.").

A 1991 Comment published in the *Journal of Dispute Resolution* put it this way:

> Mediation is communication. It often requires disclosure of embarrassing and potentially damaging information. Such self-disclosure is a very threatening process for most people. It requires a willingness to assume the risk of rejection and abuse, but it is absolutely necessary to the proper functioning of the mediation process. Mediation is built on trust. Without trust participants will not disclose their true needs. But before participants can trust each other they must trust the mediator. If mediators are to be trusted they must be truthful. *Frankly informing parties to a mediation of the limitations to confidentiality may in the short run discourage some disclosures and hence reduce effectiveness. In the long run, however, it is the only viable solution.*

Kent Brown, *Comment, Confidentiality in Mediation: Status and Implications,* 1991 J. Disp. Resol. 307, 334 (1999) (emphasis added, footnotes omitted).

657. See, e.g., Weston, *supra* note 317, at 37 (arguing that constitutional limitations on mediation confidentiality should be made explicit); Harvard Note, *supra* note 54, at 441 n.4 (Lawrence Freedman of the ABA Standing Committee on Dispute Resolution "has said that 'it wouldn't really be honest to say [that mediation is confidential] to people who are considering participating.'").

instance, Prof. Maureen Laflin[658] expressly noted that such disclosures might inhibit candor, but she nonetheless urged mediators to make them.[659]

The academic literature does not seem to say much about disclosures alerting prospective mediation participants to the *strength* of the protection for mediation communications, particularly the possibility that mediation communications might be unavailable to show mediation misconduct. But the logic and principle of being honest with mediation participants also seems to apply to that type of disclosure.

It thus appears unlikely that the academic community would draw a distinction between the two situations. In fact, one recent article says:

> Explaining confidentiality to parties in mediation is analogous to the requirement that law enforcement officers inform suspects of their Miranda rights. A primary aspect of the orientation for mediation is informing parties about *what is and is not confidential*.[660]

Scholarly Views on Other Means of Addressing Mediation Misconduct

Allegations of coercion during the mediation process — by the mediator, an attorney, or an opponent — are central to many of the mediation confidentiality cases that the Commission reviewed.[661]

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658. Prof. Laflin is on the faculty at University of Idaho College of Law.

659. Laflin, *supra* note 627, at 982 ("[W]arning participants of the limits of confidentiality could inhibit full disclosure. Even with the potential adverse consequences, mediators must stop making broad and misleading assertions concerning confidentiality.").

660. Susan Oberman, *Confidentiality in Mediation: An Application of the Right to Privacy,* 27 Ohio St. J. on Disp. Resol. 539, 618-19 (2012) (emphasis added, footnotes omitted); see also Laflin, *supra* note 627, at 981 ("In order to make free and informed choices, participants need to know the parameters of confidentiality before they enter into the mediation process.").

661. See, e.g., *Cassel,* 51 Cal. 4th at 118 (plaintiff claimed that at mediation, his attorneys "by bad advice, deception, and coercion … induced him to settle

There is sentiment that "policy-makers should invent safeguards to insure that the confidentiality guaranteed to parties in mediation is not used to veil coercive tactics …." This report has already described scholarly suggestions about the proper degree of confidentiality and the importance of accurately disclosing the extent of protection.

In addition, some commentators have proposed other means to reduce the danger of coercion during mediation, ones that would not alter mediation confidentiality requirements. Two such suggestions are discussed below:

(1) Explicitly establishing that a party is entitled to bring a support person along to a mediation, and

(2) Creating a mandatory "cooling-off" period before a mediated settlement agreement becomes binding and enforceable.

Explicit Right to Bring Along a Support Person

Under UMA Section 10, a party is expressly entitled to bring an attorney or other individual along to a mediation:

SECTION 10. PARTICIPATION IN MEDIATION.
An attorney or other individual designated by a party may

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for a lower amount than he had told them he would accept, and for less than the case was worth."); *Porter,* 107 Cal. Rptr. 3d at 656 n.5 (superseded opinion) (plaintiffs alleged that they signed agreement releasing their attorney from liability for tax advice "under duress because they were concerned the [mediated] settlement would unravel if they refused."); In re Marriage of Woolsey, 220 Cal. App. 4th 881, 900, 163 Cal. Rptr. 3d 551 (2013) (husband contended that mediated settlement agreement was unenforceable because wife and/or mediator engaged in undue influence during mediation); *Provost*, 201 Cal. App. 4th at 1302 (plaintiff claimed that mediated settlement agreement was unenforceable because his counsel, his opponents' counsel, and mediator coerced him into signing it through threats of criminal prosecution). See also *Chan*, 188 Cal. App. 4th at 1164 (plaintiff contended that court should rescind mediated settlement agreement "because his purported consent was 'wrongfully coerced' through tactics of his … attorney that 'amounted legally to duress, undue influence, fraud, prohibited financial dealing with a client in violation of the [California] Rules of Professional Conduct, and undisclosed dual agency").

> accompany the party to and participate in a mediation. A waiver of participation given before the mediation may be rescinded.

The accompanying Comment explains that the provision was designed to help remedy imbalances of power and ensure that any settlement reached in the mediation is truly voluntary.[662]

To some, Section 10 may "seem a small and almost non-noteworthy addition to the UMA."[663] In contrast, Prof. Phyllis Bernard[664] considers it "a critical mechanism for re-balancing power in mediations and thereby addressing one of the chief areas of criticism."[665]

Prof. Bernard believes that "allowing individuals to bring someone with them will guard against coercion and power politics in the course of the mediation."[666] She anticipates that "if coercive mediations are eliminated through the use of section [10] of the

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662. The Comment says that the provision "is consistent with good practices that permit the *pro se* party to bring someone for support who is not a lawyer if the party cannot afford a lawyer." The Comment further explains:

> The fairness of mediation is premised upon the informed consent of the parties to any agreement reached. Some statutes permit the mediator to exclude lawyers from mediation, resting fairness guarantees on the lawyer's later review of the draft settlement agreement.…
>
> Some parties may prefer not to bring counsel. However, *because of the capacity of attorneys to help mitigate power imbalances, and in the absence of other procedural protections for less powerful parties, the Drafting Committees elected to let the parties, not the mediator, decide*.

UMA § 10 Comment (emphasis added).

663. Bernard, *supra* note 466, at 140.

664. Prof. Bernard is on the faculty at Oklahoma City University School of Law.

665. Bernard, *supra* note 466, at 140.

666. Andrea Schneider, *Which Means to an End Under the Uniform Mediation Act?*, 85 Marq. L. Rev. 1, 6 (2001) (summarizing Prof. Bernard's article).

UMA, … then *there will be less need to pierce mediation confidentiality* in order to reassess the fairness of agreements."[667]

California does not have a statutory provision like UMA Section 10. It appears to be widely assumed, however, that a party may bring an attorney and others to a California mediation if the party so desires. The Commission is not aware of any attempts to codify that rule.

Cooling-Off Period

In a 2001 article in *Harvard Negotiation Law Review,* Prof. Welsh expressed concern about coercive mediation tactics that could defeat the goal of party self-determination.[668] She suggested a number of possible means to protect parties' self-determination in mediation, most particularly "the adoption of a three-day, non-waivable cooling-off period before mediated settlement agreements may become enforceable."[669]

In proposing that approach, she noted that various jurisdictions use cooling-off periods in other contexts, especially situations involving high pressure sales tactics.[670] She further noted that cooling-off periods "have even been applied to particular types of mediation."[671]

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667. *Id*. (emphasis added); See Bernard, *supra* note 466, at 119 (contrasting her views with those of Prof. Hughes, who "seeks to assure party self-determination by allowing mediators and parties to testify about mediation communications").

668. Nancy Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?,* 6 Harv. Negotiation L. Rev. 1, 5 (2001) (hereafter, "Welsh (2001)").

669. *Id*. at 6-7; see also Welsh (2011), *supra* note 641, at 23-24 ("We could require, or at least urge, the inclusion of a cooling off period in the settlement agreements that emerge from our mediations.").

670. Welsh (2001), *supra* note 668, at 87-89.

671. See *id*. at 89 (referring to Cal. Ins. Code § 10089.82(c) (earthquake insurance dispute), former Fla. Family Law R. Proc. 12.740(f)(1) (family mediation), and Minn. Stat. § 572.35 (debtor-creditor dispute)).

Several other scholars have also indicated that a cooling-off period may serve as a tool to protect vulnerable participants from coercion or misrepresentations during the mediation process.[672] The Commission has not found much information on how well mediation cooling-off periods have functioned in the jurisdictions that have tried them.[673]

POSSIBLE APPROACHES

As may already be clear from the discussions of scholarly views and the law of other jurisdictions, California's existing approach is but one of many possible ways to address the intersection of mediation confidentiality and attorney misconduct. The Commission received numerous suggestions in the course of its study, while other ideas surfaced through its research and analysis. There are too many potential variations to list.

One possibility, of course, would be to leave existing law intact. Most of the reform ideas can be grouped into the following categories:

- Create some type of mediation confidentiality exception addressing attorney malpractice and other misconduct.
- Revise the law on waiving mediation confidentiality or modifying it by agreement.
- Add safeguards against attorney misconduct in the mediation process.

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672. See, e.g., Stephan Landsman, *Nothing for Something? Denying Legal Assistance to Those Compelled to Participate in ADR Proceedings,* 37 Fordham Urb. L.J. 273, 292 (2010); Hiers, *supra* note 630, at 577-78; Peter Thompson, *Enforcing Rights Generated in Court-Connected Mediation — Tension Between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice,* 19 Ohio St. J. on Disp. Resol. 509, 539 (2004); Lande, *supra* note 633, at 137.

673. The Florida provision cited by Prof. Welsh has since been revised to eliminate the cooling-off period. See Fla. Fam. Law R. Proc. 12.740(f)(1).

- Establish disclosure requirements.

Each category of possible reforms is discussed briefly below. These discussions introduce the ideas, rather than fully critiquing each concept.

Create Some Type of Mediation Confidentiality Exception Addressing Attorney Malpractice and Other Misconduct

Many sources have suggested creating some type of exception to the mediation confidentiality statutes to address attorney malpractice and other misconduct, or aspects thereof. There are numerous variables to consider in drafting this type of exception, which could be combined in different ways.

For example, an exception could be based or modeled on Evidence Code Section 958. Alternatively, an exception could require some type of *in camera* screening or preliminary filtering. The Commission describes these possibilities first, then mentions other ways of drafting an attorney misconduct exception.

Exception Based on or Modeled on Evidence Code Section 958

The legislative resolution relating to this study directs the Commission to consider Evidence Code Section 958 and its predecessors.[674] Section 958 is an exception to the lawyer-client privilege. [675] It says that there is no privilege "as to a

674. 2012 Cal. Stat. res. ch. 108.

675. Subject to certain exceptions and limitations, the lawyer-client privilege permits a client to refuse to disclose, and to prevent another from disclosing, a confidential lawyer-client communication. See Evid. Code §§ 950-962. A lawyer who received or made such a communication is obligated to claim the privilege "whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege …." Evid. Code § 955.

A lawyer also has an ethical duty to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Bus. & Prof. Code § 6068. "The duty of confidentiality is broader than the attorney-client privilege." Dietz v. Meisenheimer & Herron, 177 Cal. App. 4th 771, 786, 99 Cal. Rptr. 3d 464 (2009). But a lawyer can reveal confidences

communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship."[676] In other words, "[i]n a lawsuit between an attorney and a client based on an alleged breach of a duty arising from the attorney-client relationship, attorney-client communications relevant to the breach are not protected by the attorney-client privilege."[677]

In a simple bilateral lawyer-client relationship, the application of Section 958 is relatively straightforward. Complications can arise, however, when there is more than one client or the lawyer-client

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when there is a fee dispute or a malpractice claim. *Id.*; see also Styles v. Mumbert, 164 Cal. App. 4th 1163, 1168, 79 Cal. Rptr. 3d 880 (2008).

676. The Law Revision Commission's Comment to Section 958 explains that the exception is intended to prevent the unfairness that would result if a client could use evidence of confidential lawyer-client communications against a lawyer but the lawyer could not use such evidence in response:

> It would be unjust to permit a client either to accuse his attorney of a breach of duty and to invoke the privilege to prevent the attorney from bringing forth evidence in defense of the charge or to refuse to pay his attorney's fee and invoke the privilege to defeat the attorney's claim. Thus, for example, if the defendant in a criminal action claims that his lawyer did not provide him with an adequate defense, communications between the lawyer and client relevant to that issue are not privileged. The duty involved must, of course, be one arising out of the lawyer-client relationship, *e.g.*, the duty of the lawyer to exercise reasonable diligence on behalf of his client, the duty of the lawyer to care faithfully and account for his client's property, or the client's duty to pay for the lawyer's services.

(Citation omitted.) See also People v. Ledesma, 39 Cal. 4th 641, 694, 140 P.3d 657, 47 Cal. Rptr. 3d 326 (2006) (quoting Law Revision Commission Comment); *Dietz*, 177 Cal. App. 4th at 793 (explaining that lawyer-client privilege may not be used as both sword and shield).

The client typically (though not invariably) has less need for this exception, because the client is the holder of the lawyer-client privilege and thus can waive the privilege if the client wants to use privileged communications against a lawyer. See Evid. Code §§ 953, 954,

677. Anten v. Superior Court, 233 Cal. App. 4th 1254, 1256, 183 Cal. Rptr. 3d 422 (2015).

A few California cases have examined the intersection of Section 958 and the mediation confidentiality statutes. See discussions of "*Cassel*" and "*Porter*" *supra*.

relationship is otherwise complex.[678] In a few instances, a court even dismissed a legal malpractice suit because the lawyer-client privilege precluded the defendant from effectively presenting a defense and the plaintiff could not provide the necessary privilege waiver.[679]

One possibility in this study would be to let the policy of Section 958 completely override the mediation confidentiality statutes. In other words, California could revise those statutes such that a mediation communication would be admissible and discoverable in a subsequent dispute between a lawyer and a client whenever the communication is "relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship."

This type of approach would help to ensure attorney accountability, while decreasing the level of protection for mediation confidentiality and the interests underlying it. The approach could result not only in disclosure of mediation communications between the lawyer and client in question, but also in disclosure of mediation communications including other mediation participants.[680]

Another possibility would be to make the mediation confidentiality statutes inapplicable to a private lawyer-client communication. Under this approach, if Section 958 applied to a

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678. See CLRC Staff Memorandum 2015-22, pp. 4-8 & cases cited therein. The mediation context is more complicated than the multi-player situations encountered in applying Section 958, because a mediation typically involves a sizeable group of participants: There are two or more parties, their lawyers, the mediator, and perhaps also other participants, such as an insurance representative, accountant, other type of expert, or spouse. Yet even the Section 958 situations teach that accommodating the interests of all persons affected by a privilege may be difficult.

679. See, e.g., Solin v. O'Melveny & Myers, 89 Cal. App. 4th 451, 107 Cal. Rptr. 456 (2001); McDermott, Will & Emery v. Superior Court, 83 Cal. App. 4th 378, 99 Cal. Rptr. 2d 622 (2000).

680. For further discussion of this type of approach, see CLRC Staff Memorandum 2015-22, pp. 13-14 (Approach #1).

private lawyer-client communication, the communication would be admissible and subject to disclosure, even if the communication was made "for the purpose of, in the course of, or pursuant to, a mediation …."[681] Mediation communications that include other mediation participants would remain protected. That limitation would help protect the confidentiality expectations of mediation participants, but could pose complications similar to the ones that sometimes arise in complex situations under Section 958.[682]

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681. Evid. Code § 1119. Many variations on this approach are possible, such as:

(1) Only admit or disclose a private, mediation-related lawyer-client communication if Section 958 applies *and* the communication "contain[s] no information of anything said or done or any admission by a party made in the course of mediation." Cassel v. Superior Court, 101 Cal. Rptr. 3d 501, 509 (2009) (superseded opinion); see also CLRC Staff Memorandum 2016-59, pp. 31-32 & Exhibit pp. 51-53 (Ron Kelly's "Alternative Compromise Package"); CLRC Staff Memorandum 2015-33, Attachment p. T5 (Option A-4-a).

(2) Admit or disclose private, mediation-related lawyer-client communications "irrespective of whether such communications took place in the presence of the mediator or not." *Porter,* 107 Cal. Rptr. 3d at 662 (superseded opinion); see also CLRC Staff Memorandum 2015-33, Attachment p. T5 (Option A-4-b).

(3) Permit use of mediation communications in a subsequent lawyer-client dispute if Section 958 applies *and* all mediation participants aside from the ones involved in that dispute expressly waive mediation confidentiality in accordance with the existing waiver requirements. See CLRC Staff Memorandum 2015-33, pp. 15-16 (Approach #3).

(4) The approach used in the bill that led to this study. See discussion of "Assembly Bill 2025 and the Inception of the Commission's Study" *supra*.

682. See generally Kurwa v. Cheng, 2009 Cal. App. Unpub. LEXIS 2899, *20-*21 (Cheng needs to use evidence of mediation proceedings to defend

Exception With Mandatory In Camera Screening or Preliminary Filtering

A different type of approach would be to create a mediation confidentiality exception that focuses on attorney misconduct and mandates the use of *in camera* screening in assessing the admissibility and discoverability of mediation evidence. "Courts have commonly used *in camera* proceedings as a procedural technique to balance a need for disclosure of relevant information in a court proceeding against a need to limit access to that information."[683]

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against Kurwa's action to rescind mediated settlement agreement, but "statutory confidentiality rules remain fully in [f]orce, effectively foreclosing Cheng's ability to defend herself. As in *McDermott, Will & Emery,* such action may not proceed."); Wolf v. Loring Ward Internat'l Ltd. (No. BC445310 in L.A. Sup. Ct.), order entered April 6, 2016, p. 11 ("Defendants would be unable to defend themselves in this action pursuant to the mediation privilege. As such, the action may properly be dismissed."); see also *Benesch,* 2009 U.S. Dist. LEXIS 117641, at *23-*24.

For further discussion of this type of approach, see CLRC Staff Memorandum 2015-22, pp. 14-15 (Approach #2); see also Alfieri v. Solomon, 358 Or. 383, 365 P.3d 99 (2015); CLRC Staff Memorandum 2015-33, Attachment pp. T5 to T6 (General Approach A-4); CLRC Staff Memorandum 2014-43, pp. 12-13 (describing article by Abraham Gafni).

683. A. Green, *supra* note 649, at 9 (CLRC Staff Memorandum 2015-13, Exhibit p. 9); see, e.g., Kerr v. United States District Court, 426 U.S. 394, 405-06 (1976) ("[A]n *in camera* review of the documents is a relatively costless and eminently worthwhile method to insure that the balance between [prison officials'] claims of irrelevance and privilege and [prisoners'] asserted need for the documents is correctly struck. Indeed, this Court has long held the view that *in camera* review is a highly appropriate and useful means of dealing with claims of governmental privilege."); Ponte v. Real, 471 U.S. 491, 514-15 (1985) (Marshall, J., dissenting) ("The *in camera* solution has been widely recognized as the appropriate response to a variety of analogous disclosure clashes involving individual rights and government secrecy needs."); Foltz v. State Farm Mutual Auto Ins. Co., 331 F.3d 1122, 1136 n.6 (9th Cir. 2003) *("[I]n camera* inspection is a commonly used procedural method for determining whether information should be protected or revealed to other parties.").

There is considerable scholarly support for this concept, as previously described.[684] Indeed, some jurisdictions are already using *in camera* proceedings for mediation evidence;[685] notable examples already discussed include UMA Section 6(b)[686] and the Texas doctrine applied in *Avary* and *Alford*.[687]

The details of an *in camera* approach could vary widely.[688] Importantly, however, any *in camera* approach must comply with federal[689] and state[690] constitutional provisions entitling citizens to

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684. See discussion of "Scholarly Views on *In Camera* Proceedings Relating to Mediation Evidence" *supra*.

685. See CLRC Staff Memorandum 2016-28 & sources cited therein; see also CLRC Staff Memorandum 2015-33, Attachment pp. T13 to T17 & sources cited therein (General Approach A-9).

686. See discussion of "UMA Exception Relating to the Validity and Enforceability of a Mediated Settlement Agreement" *supra*.

687. See description of *Alford* in discussion of "Case Law" under "Other States" *supra*. Another important example is the *in camera* approach used in *Rinaker* and *Olam*. See description of *Olam* under "Using Mediation Evidence to Prove or Disprove Allegations of Attorney Misconduct" under "Federal Law" *supra*.

688. See sources cited in note 649 *supra*. It may be appropriate to combine an *in camera* approach with one or more other judicial techniques for protecting sensitive information, such as:

- Sealing a transcript or other court document.
- Issuance of a protective order restricting the dissemination of information.
- Strict control over copies.
- Redaction of information from a document and allocation of the costs of redaction as appears appropriate in the circumstances at hand.

For examples of cases using such techniques, see CLRC Staff Memorandum 2015-55, p. 7 nn.35-39. For further discussion of *in camera* approaches, see *id.* at pp. 3-42.

689. U.S. Const. amend. I, XIV. For a description of these constitutional constraints, see CLRC Staff Memorandum 2016-18, pp. 7-31.

690. Cal. Const. art. I, §§ 2(a), 3(b). For a description of these constitutional constraints, see CLRC Staff Memorandum 2016-18, pp. 31-32.

observe their courts in action (also known as "constitutional rights of access").[691]

That set of legal constraints may preclude the use of an *in camera* approach in certain circumstances, or restrict the use of such an approach to some extent. Compliance with these constitutional provisions might also entail significant procedural burdens when a court uses an *in camera* approach.[692]

In light of those considerations, the Commission specifically investigated whether there was any constitutionally permissible method of *in camera* screening or quasi-screening that a judicial officer could use as a filter at the inception of a legal malpractice case based on mediation misconduct (an early way to eliminate claims that have no basis and should not result in public disclosure of mediation communications).[693] There are many possible methods for such preliminary filtering, or other special treatment at the inception of a case alleging mediation misconduct, such as:

- Minnesota's approach, under which a party may satisfy the statute of limitations by serving a complaint, without filing the complaint in court.[694]
- A pre-filing meet and confer requirement.[695]
- An Early Neutral Evaluation Conference ("ENEC") or similar procedure.[696]

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691. There are also rights of access that are not constitutionally-based. These include Code of Civil Procedure Section 124, California Rules of Court 8.45 to 8.47, 2.550, and 2.552, and federal and state common law doctrines. For descriptions of these rights, see CLRC Staff Memorandum 2016-18, pp. 32-38.

692. See CLRC Staff Memorandum 2016-18, pp. 80-82; see also CLRC Staff Memorandum 2016-29; CLRC Staff Memorandum 2016-18, pp. 38-80.

693. CLRC Minutes (April 2016), p. 5.

694. See CLRC Staff Memorandum 2016-27, pp. 2-4.

695. See CLRC Staff Memorandum 2016-27, pp. 4-5.

696. See CLRC Staff Memorandum 2016-38, pp. 2-34; CLRC Staff Memorandum 2016-27, pp. 5-7.

- An early case management conference, conducted *in camera*.[697]
- A summary jury trial, conducted *in camera* at an early stage of the case.[698]
- An approach modeled on Civil Code Section 1714.10 (alleged conspiracy between attorney and client), but conducted in a manner that would protect mediation communications from public disclosure.[699]
- A specialist certification requirement.[700]
- A self-certification requirement.[701]

The Commission took a hard look at such ideas, but decided not to incorporate any of them into its proposal.[702]

Other Ways to Draft an Exception Addressing Attorney Misconduct

There are many other ways to draft a mediation confidentiality exception relating to allegations of attorney misconduct. The Commission considered a broad variety of approaches,[703] such as

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697. See CLRC Staff Memorandum 2016-27, pp. 8-9.

698. See CLRC Staff Memorandum 2016-27, pp. 9-12.

699. See CLRC Staff Memorandum 2016-38, pp. 34-46.

700. See First Supplement to CLRC Staff Memorandum 2016-38, pp. 1-6; CLRC Staff Memorandum 2016-49; First Supplement to CLRC Staff Memorandum 2016-49.

701. See First Supplement to CLRC Staff Memorandum 2016-38, pp. 6-7.

702. See CLRC Minutes (Sept. 2016), p. 5; CLRC Minutes (July 2016), pp. 3-4; CLRC Minutes (June 2016), pp. 4-5.

703. See, e.g., CLRC Staff Memorandum 2015-33, Attachment pp. T1 to T4, T11 to T12, T17 to T19 & sources cited therein (General Approaches A-1, A-2, A-3, A-8, A-10, A-11 to A-15). Among other ideas, the Commission considered the possibility of including some type of corroboration requirement. See Jordan Rice, *Balancing Mediation Confidentiality with the Need to Admit Evidence of Attorney Malpractice: Evidentiary Corroboration Requirements as a Potential Solution* (March 10, 2015) (reproduced in CLRC Staff Memorandum 2015-13, Exhibit pp. 21-44).

UMA Section 6(a)(6)[704] and some provisions used in non-UMA states.[705] The approach proposed in Parts II and III of this report draws on numerous sources in one respect or another.

Revise the Law on Waiving Mediation Confidentiality or Modifying It By Agreement

In requesting this study, the Legislature directed the Commission to consider the "availability and propriety of contractual waivers."[706] The Commission therefore looked into that topic and some other suggestions relating to waiver of California's mediation confidentiality protections.

This part of its report briefly discusses the waiver concepts. The report then describes a few related suggestions, which concern modification of mediation confidentiality by agreement of all of the mediation participants.

Suggestions to Change the Waiver Rules

Under existing law, a waiver of mediation confidentiality generally requires the express agreement of "*[a]ll* persons who conduct[ed] or otherwise participate[d] in the mediation …."[707] The Commission's 1996 report on *Mediation Confidentiality* explains that "[a]ll persons attending a mediation, parties as well as nonparties, should be able to speak frankly, without fear of having their words turned against them."[708]

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704. See discussion of "UMA Exceptions for Professional Misconduct and Mediator Misconduct" under "Uniform Mediation Act" *supra*.

705. See discussions of "Statutes and Rules" and "Extent of Variation in Expressly Addressing Attorney Misconduct and Other Professional Misconduct" under "Other States" *supra*.

706. 2012 Cal. Stat. res. ch. 108.

707. Evid. Code § 1122(a)(1) (emphasis added).

708. CLRC Mediation Recommendation #2, *supra* note 142, at 425. This report was presented to the Legislature in connection with the bill that became the current mediation confidentiality statute (Evid. Code §§ 1115-1128). It is properly regarded as legislative history. See *2014-2015 Annual Report,* 44 Cal. L. Revision Comm'n Reports 1, 16-22 (2014); Kaufman & Broad Communities,

In his *Cassel* concurrence, Justice Chin suggested that the Legislature consider the possibility of allowing disclosure of mediation communications when all mediation participants waive confidentiality *except* an attorney accused of malpractice or other misconduct. In other words, the mediation confidentiality statute would not apply "if every participant in the mediation *except the attorney* waives confidentiality."[709]

Variants on the above approach would be to:

- Allow mediation *parties* to contractually agree to a *prospective* waiver at the inception of a mediation, which their attorneys could not block.[710] This waiver would provide that "in the event one party determines, during or after a mediation, that their attorney, or another attorney/representative nonparty participant at the mediation, engaged in actions that compromised their rights or the rights of another party in the mediation and settlement process, the parties will cooperate in any action, which can range from complaints to the State Bar to potential legal action by a party to redress grievances for any such claims, in order to assist the party in redressing their claims."[711]
- *Require* an attorney representing a client in a mediation to "agree that mediation communications directly between the client and his or her attorney may be disclosed in any action for legal malpractice or in a State Bar disciplinary action, where

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Inc. v. Performance Plastering, Inc., 133 Cal. App. 4th 26, 34 Cal. Rptr. 3d 520 (2005).

709. *Cassel,* 51 Cal. 4th at 139 (Chin, J., concurring) (emphasis added).

710. See First Supplement to CLRC Staff Memorandum 2015-36, Exhibit pp. 24-25 (comments of Deborah Blair Porter).

711. *Id.* at Exhibit p. 24.

> professional negligence or misconduct forms the basis of the client's allegations against the attorney."[712]

Like Justice Chin's suggestion, these proposals might improve accountability for mediation-related attorney misconduct. All three approaches also appear to have some potential downsides.[713]

Modifying Mediation Confidentiality by Agreement of All Mediation Participants

Instead of proposing to change the waiver rules, some suggestions concern the extent to which mediation confidentiality can be adjusted by agreement of *all* of the mediation participants. For example, a few comments suggest making mediation confidentiality optional.[714]

Other commenters note that mediation participants can already modify the extent of confidentiality by an express written agreement,[715] but suggest taking steps to increase awareness of that option. For example, mediator Gary Weiner "hold[s] the view that the parties have always been free to adopt whatever rules regarding

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712. Memorandum 2014-6, Exhibit p. 2 (comments of Ron Kelly, which do not state his personal view).

713. For further discussion of these ideas, see CLRC Staff Memorandum 2016-59, pp. 18-21; First Supplement to CLRC Staff Memorandum 2015-36, Exhibit pp. 12-26 (comments of Deborah Blair Porter); CLRC Staff Memorandum 15-33, Attachment pp. T20 (General Approach B-1); CLRC Staff Memorandum 2015-22, pp. 18-25; see also First Supplement to CLRC Staff Memorandum 2015-36, Exhibit pp. 1-2, 3-12, 26-38 (comments of Deborah Blair Porter).

714. See Second Supplement to CLRC Staff Memorandum 2016-50, Exhibit p. 8 (comments of Herring Law Group, on behalf of client) (Parties should be presented with an express option to waive confidentiality.") (boldface deleted); Second Supplement to CLRC Staff Memorandum 2013-39, Exhibit p. 2 (comments of Kazuko Artus) ("[M]ediation confidentiality can be made an option for the participants rather than being imposed on them.").

715. See Evid. Code § 1122(a). Such a modification can also be made by an express oral agreement that is memorialized in a specified manner. See *id.*; Evid. Code § 1118.

confidentiality they choose."[716] He suggests adding a provision to the Evidence Code to make that point explicit:

> 1129. Notwithstanding any other section in this Chapter, nothing prohibits all the participants including the mediator from entering into an express written agreement, signed by all of them, in which they all agree to a different set of provisions regarding the confidentiality of mediation communications in a given mediation.[717]

In contemplating such an approach, it may be important to differentiate between increasing and decreasing the level of mediation confidentiality. Although mediation participants can expressly agree in writing to *decrease* the level of mediation confidentiality, existing California law may not always permit them to *increase* the level of mediation confidentiality.[718] For example, existing law probably would not permit mediation participants to contractually prevent use of their mediation communications in a criminal case; that seems contrary to the policy balance reflected in the mediation confidentiality statutes.[719]

Add Safeguards Against Attorney Misconduct in the Mediation Process

A number of suggested approaches focus on *decreasing the risk* of coercion, fraud, duress, malpractice, or other attorney misconduct in the mediation process. These suggestions would create various types of safeguards against such misconduct.

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716. First Supplement to CLRC Staff Memorandum 2013-47, Exhibit p. 28.

717. *Id.* at 29. For a similar suggestion, see CLRC Staff Memorandum 2015-46, Exhibit p. 24 (comments of Hank Burgoyne) ("Currently, parties can opt out of mediation confidentiality. If you want to take steps to remind parties of that option and the risks of not doing so, feel free.").

718. See Evid. Code § 1122(a). Whether mediation participants can make the terms of a settlement agreement confidential is a separate issue, not addressed here. See *supra* note 181 and accompanying text.

719. See Evid. Code § 1119; *Cassel,* 51 Cal. 4th at 135 n.11.

The safeguard suggestions can be grouped into the following categories:

- **Suggestions to provide time for reflection before committing to a deal.** A repeatedly mentioned possibility (already discussed to some extent) would be to establish a mandatory cooling-off period after a mediation, during which the parties to a mediated settlement agreement could think over the terms, or get more information, and then rescind the agreement if they change their minds about it.[720] Another possibility would be to place a time limit on each day's mediation session (such as no more than 8 hours of mediation per day).[721]
- **Suggestions to ensure that mediation participants receive appropriate assistance.** These suggestions focus on ensuring that disputants (particularly self-represented litigants) have people available to help them in the mediation process. One such idea would be to enact a provision similar to UMA Section 10, as Prof. Bernard recommends.[722] A different approach would be to require each mediation party to consult

720. See discussion of "Cooling-Off Period" under "Scholarly Views on Other Means of Addressing Mediation Misconduct" *supra*; see also CLRC Staff Memorandum 2016-59, pp. 23-26; CLRC Staff Memorandum 2015-35, pp. 41-44; CLRC Staff Memorandum 2015-33, Attachment p. T32 (General Approach D-5).

721. See CLRC Staff Memorandum 2016-59, p. 23; CLRC Staff Memorandum 2015-33, Attachment p. T31 (General Approach D-2); see also CLRC Staff Memorandum 2015-13, p. 6 & Exhibit p. 3 (comments of Eric van Ginkel on overly long mediation sessions).

722. See discussion of "Explicit Right to Bring Along a Support Person" under "Scholarly Views on Other Means of Addressing Mediation Misconduct" *supra*; see also CLRC Staff Memorandum 2016-59, pp. 26-27; CLRC Staff Memorandum 2015-35, pp. 40-41; CLRC Staff Memorandum 2015-33, Attachment p. T31 (General Approach D-4).

with independent counsel before signing a mediated settlement agreement.[723]

- **Suggestion to ensure that disputants act knowingly and voluntarily in entering into a settlement.** Another type of safeguard would be to require a mediator to orally ask each party a series of questions before signing a mediated settlement agreement (like "Have you read the proposed settlement agreement?" and "Did anyone force, threaten, or pressure you into signing this agreement?"). The questions would seek to confirm that the party is exercising free will and making an informed and deliberate decision.[724] Alternatively, a mediator or attorney could present such questions in written form.[725]
- **Suggestions to ensure that key representations are memorialized in an admissible manner.** Several suggestions focus specifically on ensuring that key representations — ones that are critical in convincing a disputant to settle — are memorialized in an admissible manner. For example, there could be a statutory requirement that mediation participants complete and sign a form in connection with any mediated settlement agreement, which says something like:

  (1) In entering into the mediated settlement agreement, Party A is relying on the following

723. See CLRC Staff Memorandum 2015-45, Exhibit p. 27 (comments of Shawn Skillin); see also CLRC Staff Memorandum 2016-59, pp. 26-27.

724. See http://www.pgpmediation.com/informed-consent (blogpost by Phyllis Pollack); see also CLRC Staff Memorandum 2016-59, pp. 27-28; CLRC Staff Memorandum 2016-30, pp. 15-16.

725. See CLRC Staff Memorandum 2016-59, p. 28. Under either alternative, it would be important to (1) make it possible to establish in court whether the mediator or attorney asked the questions as required and (2) specify the consequences of failing to ask the required questions.

> representations made by Party B during this mediation: [insert list].
>
> (2) In entering into the mediated settlement agreement, Party B is relying on the following representations made by Party A during this mediation: [insert list].
>
> (3) Notwithstanding Evidence Code Sections 1115-1128, Parties A and B and all other participants in this mediation agree that this form is admissible and subject to disclosure.

The goal is to protect a disputant from being unable to prove a key representation, and thus being unable to recover for breach of that representation, due to mediation confidentiality.[726]

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726. See CLRC Staff Memorandum 2016-59, pp. 28-29; see also CLRC Staff Memorandum 2015-33, Attachment p. T28 (General Approach C-6).

A similar suggestion would focus more specifically on representations relating to attorney's fees. It would have two components (a disclosure requirement and a safeguard suggestion), as follows:

> (1) Require the mediator and/or counsel to inform all mediation participants at the start of each mediation that any adjustment of an attorney-client fee agreement during a mediation must be properly memorialized in a writing, or in an oral recording meeting specified requirements, if it is to be effective; and
>
> (2) Require completion of a form at the end of each mediation, which would (a) ask each participant to indicate whether there has been any adjustment of an attorney-client fee agreement during the mediation, and (b) remind the participants of the need to properly memorialize any such adjustment.

See CLRC Staff Memorandum 2016-59, p. 29; CLRC Staff Memorandum 2015-45, p. 24 (Option B); CLRC Staff Memorandum 2015-33, Attachment p. T31 (General Approach C-12); CLRC Staff Memorandum 2016-30, Exhibit p. 17 (Lynnette Berg Robe's suggestion that "[i]f, during the mediation, as an inducement to settlement, the attorney agrees to accept a lower fee, or, if there is

In general, these safeguard suggestions are preventive in nature; they are meant to stop a dispute like *Cassel* from arising, or at least from maturing into a result like the one in *Cassel,* which may leave the merits of a mediation-related misconduct claim unclear.

Establish Disclosure Requirements

Lastly, many sources have raised the possibility of statutorily requiring that certain information be provided to a party before the party decides whether to mediate.[727] Those sources have referred to

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an agreement to enhance the attorney's fee, any modification of the fee agreement must be set forth in a writing signed by the party and his/her attorney before any overall settlement agreement is executed by the various parties and approved by the various attorneys.").

727. See, e.g., First Supplement to CLRC Staff Memorandum 2016-50, Exhibit pp. 14-37 (comments of Robert Flack); Exhibit p. 49 (article by Robert Flack); Second Supplement to CLRC Staff Memorandum 2016-50, Exhibit p. 8 (comments of Herring Law Group, on behalf of client); CLRC Staff Memorandum 2016-30, p. 30 (discussing blog post by Phyllis Pollack) & Exhibit p. 17 (comments of Lynnette Berg Robe); First Supplement to CLRC Staff Memorandum 2015-54, Exhibit pp. 39 (comments of Lynnette Berg Robe), 14-15 (comments of Hon. Keith Clemens, ret.); CLRC Staff Memorandum 2015-46, Exhibit p. 126 (comments of Scott O'Brien); First Supplement to CLRC Staff Memorandum 2015-46, Exhibit p. 57 (comments of Nancy Yeend); CLRC Staff Memorandum 2015-45, Exhibit pp. 11 (comments of Paul Dubow), 27 (comments of Shawn Skillin); First Supplement to CLRC Staff Memorandum 2015-36, Exhibit pp. 23-24, 26 (comments of Deborah Blair Porter); CLRC Staff Memorandum 2015-24, pp. 3-4 & Exhibit p. 3 (comments of Nancy Yeend); First Supplement to CLRC Staff Memorandum 2014-60, Exhibit p. 1 (comments of Edward Mason); CLRC Staff Memorandum 2014-43, pp. 13-14 (discussing comments of Abraham Gafni); CLRC Staff Memorandum 2014-6, Exhibit pp. 1-2 (comments of Ron Kelly), 15 (comments of Nancy Yeend); CLRC Staff Memorandum 2013-47, Exhibit pp. 28-29 (comments of Gary Weiner); First Supplement to CLRC Staff Memorandum 2013-47, Exhibit pp. 2-3 (comments of Ass'n for Dispute Resolution of Northern California), 4 (comments of Sidney Tinberg); Second Supplement to CLRC Staff Memorandum 2013-47, Exhibit p. 9 (comments of Jerome Sapiro, Jr.); Third Supplement to CLRC Staff Memorandum 2013-47, Exhibit pp. 3-4 (article by Nancy Yeend & Stephen Gizzi); Memorandum 2014-60, Exhibit p. 1 (comments

the concept in different ways, such as "written notifications,"[728] "informed consent,"[729] "safe harbor mediation agreements,"[730] "a standard list of admonitions,"[731] and a "warning to the parties."[732]

The suggestions also differ in content, with many variations.[733] To provide a flavor of them, here are just a few examples:

- Disclose that California's mediation confidentiality statute could prevent introduction of evidence that an attorney engaged in misconduct in a mediation,[734] including evidence of private discussions between an attorney and a client relating to a mediation.[735]

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of Nancy Yeend); First Supplement to CLRC Staff Memorandum 2013-39, Exhibit p. 2 (comments of Nancy Yeend).

See also discussion of "Scholarly Views on Informing Mediation Participants About the Extent of Protection for Mediation Communications" *supra*.

728. Second Supplement to CLRC Staff Memorandum 2016-50, Exhibit p. 8 (comments of Herring Law Group, on behalf of client).

729. First Supplement to CLRC Staff Memorandum 2015-46, Exhibit p. 57 (comments of Nancy Yeend).

730. CLRC Staff Memorandum 2016-59, Exhibit p. 49 (article by Robert Flack).

731. CLRC Staff Memorandum 2016-30, Exhibit p. 17 (comments of Lynnette Berg Robe).

732. CLRC Staff Memorandum 2015-45, Exhibit p. 11 (comments of Paul Dubow).

733. See CLRC Staff Memorandum 2016-59, pp. 6-18.

734. See Nancy Yeend & Stephen Gizzi, *Mediation Confidentiality: A Malpractice Exception or Not?,* Plaintiff 1, 2 (Oct. 2013) (The "state law sheltering evidence of attorney malpractice must be disclosed to clients …, in order to enable clients to provide valid 'informed consent' to the process.").

735. See CLRC Staff Memorandum 2015-45, Exhibit p. 11 (Paul Dubow's suggestion that attorneys should "be required to advise clients in writing when recommending mediation that conversations between them made during the course of the mediation will not be admissible should the client sue the attorney for malpractice committed during the mediation."); First Supplement to CLRC Staff Memorandum 2015-46, Exhibit p. 53 (Robert Sall's suggestion to disclose

- Disclose that any modification of an attorney-client fee agreement during a mediation must be put in a signed writing or otherwise properly memorialized to be enforceable.[736]
- Disclose that (1) any resolution of the dispute in mediation requires a *voluntary* agreement of the parties[737] and (2) any party may withdraw from the mediation process at any time for any reason.[738]

For the most part, the disclosure suggestions assume that California's mediation confidentiality rules will remain as is. It would also be possible, however to statutorily require an attorney

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that "if you are invited to attend a mediation, and you agree to do so, you should understand that you will not be able to use any evidence related to that mediation in the event that you later decide to pursue a claim against Attorneys relating to the events or communications that took place regarding that mediation."). See also A. Marco Turk, *Relax, It was Part of Mediation,* S.F. Daily Journal (Aug. 17, 2015).

736. See CLRC Staff Memorandum 2015-45, p. 25 ("Require the mediator and/or counsel to inform all mediation participants at the start of each mediation that any adjustment of an attorney-client fee agreement during a mediation must be properly memorialized in a writing, or in an oral recording meeting specified requirements, if it is to be effective."); CLRC Staff Memorandum 2016-30, Exhibit p. 17 (Lynnette Berg Robe's suggestion that clients considering mediation should be informed that "[i]f, during the mediation, as an inducement to settlement, the attorney agrees to accept a lower fee, or, if there is an agreement to enhance the attorney's fee, any modification of the fee agreement must be set forth in a writing signed by the party and his/her attorney before any overall settlement agreement is executed by the various parties and approved by the various attorneys.").

737. See CLRC Staff Memorandum 2015-33, Attachment p. T26 (bulletpoint #4 in General Approach C-4). See also First Supplement to CLRC Staff Memorandum 2016-50, Exhibit pp. 17-37 (collection of mediation agreements from Robert Flack, which address range of topics, including rule that mediation agreement must be voluntary).

738. See First Supplement to CLRC Staff Memorandum 2016-50, Exhibit pp. 17, 31, 33, 37 (mediation agreements from Robert Flack, which include information on right to withdraw from mediation).

or mediator to inform mediation participants about the existence of any attorney misconduct exception that is created.[739]

Any disclosure requirement should address the following matters:

- What must be disclosed?
- Who must make the disclosure to whom?
- When must the disclosure be made?
- In what manner must the disclosure be made?
- What are the consequences of making the disclosure? What are the consequences of failing to make the disclosure?
- Given existing mediation confidentiality protections, how will a mediation participant be able to establish whether the disclosure was made?[740]

Careful drafting would be critical.

Unlike creation of a new exception, a disclosure requirement would not reduce the current protection for mediation communications. That would serve the policy interests underlying the mediation confidentiality statutes, but it is debatable whether a disclosure requirement would sufficiently address the concerns that prompted this study.[741]

The Commission chose a different approach. In Parts II and III of this report, the Commission explains its conclusions and presents its proposed legislation.[742]

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739. See CLRC Staff Memorandum 2015-59, pp. 11-12.

740. See *id*. at 7-17.

741. For further discussion of possible disclosure requirements, see CLRC Staff Memorandum 2016-59, pp. 6-18; CLRC Staff Memorandum 2015-33, Attachment pp. T25-T30 (Category C).

742. For further discussion of possible approaches, see CLRC Staff Memorandum 2016-59; CLRC Staff Memorandum 2015-33; see also First Supplement to Memorandum 2016-60, pp. 7-10.

PART II. CONCLUSIONS

In the course of this study, the Commission held twenty-four public meetings, heard testimony from about seventy-five people (many of them repeatedly), received written comments from hundreds of individuals and about forty organizations, and considered almost a hundred staff memoranda on the subject (totaling thousands of pages). Based on the information received and the matters discussed in Part I of this report, the Commission has concluded that existing California law does not place enough weight on the interest in holding an attorney accountable for malpractice or other professional misconduct in a mediation context.

By precluding the use of mediation communications in a subsequent noncriminal proceeding, such as a legal malpractice case based on how an attorney handled a mediation, the mediation confidentiality provisions (particularly Evidence Code Section 1119) make it difficult and sometimes impossible for a client to provide any evidence in support of allegations of attorney misconduct during a mediation. Existing law may also prevent an attorney from proffering mediation communications to disprove such allegations.

The Commission believes that courts need to be able to effectively evaluate allegations that an attorney engaged in misconduct in the mediation process. In its view, public confidence in the administration of justice depends on providing such an opportunity to the citizens of this state.

PROPOSED NEW EXCEPTION TO MEDIATION CONFIDENTIALITY

To address this situation, the Commission recommends creating a new exception to Section 1119, which would focus on holding attorneys accountable for mediation misconduct, while also allowing attorneys to effectively rebut meritless misconduct claims.[743] The Commission considers this important not only for

743. See proposed Evid. Code § 1120.5 & Comment *infra*.

purposes of achieving justice, but also to ensure the appearance of justice.

In proposing this approach, the Commission recognizes that the policy interests underlying the mediation confidentiality statutes are significant and warrant protection. A careful balancing of the competing interests is necessary.

The proposed new exception would therefore be narrow, so as to help protect the confidentiality expectations of mediation participants. In particular, the proposed new exception would be subject to a number of important limitations, as explained below.

Limitations to Protect the Policies Underlying Mediation Confidentiality

Over a period of more than a year, the Commission considered the best means to draft a new exception to the mediation confidentiality statutes. The Commission recommends that the exception incorporate the following features to minimize harm to the policy interests served by those statutes.

No Undoing Settlements

The proposed new exception would not apply in resolving a claim relating to the enforcement of a mediated settlement agreement, such as a claim for rescission of such an agreement or a suit for specific performance.[744] This limitation is designed to preserve the finality of a mediated settlement agreement[745] and protect against claims based on buyer's remorse.[746] Once parties

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744. See proposed Evid. Code § 1120.5 Comment *infra*.

745. See *id*.; see also CLRC Staff Memorandum 2015-46, Exhibit p. 218 (Guy Kornblum's comment that "There has to be closure."); CLRC Staff Memorandum 2015-45, Exhibit p. 12 (Paul Dubow's comment that "One of the major attractions to mediation is that a successful outcome will buy peace, i.e., the matter is ended permanently and the parties can go on with their lives.").

746. See proposed Evid. Code § 1120.5 Comment *infra*; see also CLRC Staff Memorandum 2015-46, Exhibit p. 107 (Timothy D. Martin's comment that "Settlor's (Buyer's) remorse is a common reaction to settling a case."); CLRC

resolve a dispute through mediation and properly memorialize their agreement, they should be able to rely on that agreement and put the dispute behind them.[747]

The Exception Would Apply Only in a State Bar Disciplinary Proceeding, a Claim for Damages Due to Legal Malpractice, or an Attorney-Client Fee Dispute

The proposed new exception would only apply in the following types of claims:

(1) A disciplinary proceeding under the State Bar Act[748] or a rule or regulation promulgated pursuant to that Act.[749] Such a proceeding serves the critical function of protecting the public from attorney malfeasance.

(2) A cause of action seeking damages from a lawyer based on alleged malpractice (regardless of whether this cause of action is pending in court or in an arbitration).[750] This type of claim further promotes attorney accountability, while also providing a means of compensating a client for breach of an attorney's professional duties.

Staff Memorandum 2015-54, Exhibit p. 35 (Jessica Lee-Messer's comment to same effect).

747. Mediation participants can to some extent protect themselves against fraud by ensuring that a mediated settlement agreement incorporates any representations they are relying upon in agreeing to its terms (e.g., an opponent's assertion that he is bankrupt). Mediation participants also have some protection against coercion, because they are entitled to leave a mediation without settling. If a mediation participant is victimized by attorney misconduct despite these means of protection, the Commission's proposed new exception could help the participant obtain relief through a disciplinary proceeding, malpractice claim, or fee dispute against the errant attorney, rather than an attack on a mediated settlement agreement.

748. Bus. & Prof. Code § 6000 *et seq*. For a brief description of the process used in a State Bar disciplinary proceeding, see CLRC Staff Memorandum 2015-22, pp. 42-48.

749. See proposed Evid. Code § 1120.5(a)(2)(A) & Comment *infra*.

750. See proposed Evid. Code § 1120.5(a)(2)(B) & Comment *infra*.

(3) An attorney-client fee dispute.[751] This would encompass a mandatory fee arbitration under the State Bar Act,[752] which is an effective, low-cost means to resolve fee issues in a confidential setting.

The proposed new exception would not apply in any other type of claim, because that does not appear necessary to accomplish the Commission's objectives.[753]

The Exception Would Apply Only to Attorney Misconduct in a Professional Capacity

The proposed new exception would only apply to a mediation communication bearing on an allegation that an attorney breached a *professional obligation*.[754] The exception is thus limited to an attorney's conduct in a professional capacity. More precisely, the exception would apply "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."[755] Misconduct does not arise in the course of providing professional services merely because it occurs during a period of legal representation or because providing such representation brought an attorney and client together and thus gave the attorney an opportunity to engage in the misconduct.[756]

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751. See proposed Evid. Code § 1120.5(a)(2)(C) & Comment *infra*.

752. See *id*.

753. For further discussion of this point, see CLRC Staff Memorandum 2016-58, pp. 19-24.

754. See proposed Evid. Code § 1120.5(a)(1) & Comment *infra*.

755. Lee v. Hanley, 61 Cal. 4th 1225, 1229, 34 P.3d 334, 191 Cal. Rptr. 3d 536 (2015).

756. *Id*. at 1239. For further discussion of this point, see CLRC Staff Memorandum 2016-58, pp. 17-25; see also First Supplement to CLRC Staff Memorandum 2015-45, Exhibit pp. 2-3 (comments of Rachel Ehrlich).

The Exception Would Only Apply to Alleged Misconduct in Representing a Client, Not in Serving as a Mediator

The proposed new exception would only apply to allegations that an attorney committed misconduct in *representing a client*, not in serving as a mediator.[757] The exception is thus focused specifically on the concern raised in the cases that were the impetus for this study.[758] Expanding the exception further would pose many questions and complications, which could hinder or delay achievement of the Commission's objectives.[759]

The Exception Would Apply Only to Alleged Misconduct That Occurs in a Mediation Context

The proposed new exception would only apply to misconduct that allegedly occurred *in the context of* a mediation or a mediation consultation.[760] This situation is most problematic under existing law, because much, if not all, of the relevant evidence for both sides might fall within the scope of Section 1119 and thus be unavailable in resolving whether misconduct actually occurred.[761]

Importantly, however, the exception would extend to alleged misconduct at *any* stage of the mediation process: during a mediation consultation, a face-to-face mediation session with the mediator and all parties present, a private caucus with or without the mediator, a mediation brief, a mediation-related phone call, or

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757. See proposed Evid. Code § 1120.5(a)(1) & Comment *infra*.

758. See *supra* note 26 & accompanying text.

759. See CLRC Staff Memorandum 2015-45, pp. 9-17.

760. See proposed Evid. Code § 1120.5(a)(1) & Comment *infra*.

A similar limitation applies under the UMA's exception for professional misconduct, as well as in Florida, Maine, New Mexico, Texas, and Virginia. See UMA § 6(a)(6); Fla. Stat. § 44.405(4)(a)(4) & (6); Maine R. Evid. 514(c)(5); N.M. Stat. Ann. § 44-7B-5(a)(8); Va. Code Ann. §§ 8.01-576.10(vii), 8.01-581.22(vii); see also *Alford,* 137 S.W. 3d at 922; *Avary*, 72 S.W. 3d at 802-03.

761. See discussion of "Loss of Evidence May Mean Culpable Conduct Goes Unpunished or Another Inequitable Result Occurs" *supra*.

any other mediation-related activity.[762] The determinative factor is whether the misconduct allegedly occurred in a mediation context, not the time and date of the alleged misconduct.[763]

A Mediator Generally Could Not Testify or Provide Documentary Evidence Pursuant to the Exception

Subject to some exceptions and limitations, Evidence Code Section 703.5 makes a mediator incompetent to testify about a mediation in a subsequent civil proceeding:

> 703.5. No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure. However, this section does not apply to a mediator with regard to any mediation under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

Whether this restriction applies to a request for documentary evidence is not expressly stated. There does not appear to be any case law squarely resolving that point.

Section 703.5 serves to safeguard perceptions of mediator impartiality and protects a mediator from burdensome requests for testimony.[764] Rather than simply relying on Section 703.5 to

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762. See proposed Evid. Code § 1120.5 Comment *infra*.

763. See *id*. For further discussion of the requirement that the alleged misconduct be in a mediation context, see CLRC Staff Memorandum 2015-45, pp. 17-21.

764. See discussion of "Special Considerations Relating to Mediator Testimony" *supra*.

provide those important benefits in the context of its proposed new exception, the Commission proposes to include some language protecting a mediator in the exception itself.[765] The proposed language on this point is similar to Section 703.5,[766] but it makes explicit that a mediator is precluded from providing documentary evidence pursuant to the exception, not just oral testimony.[767]

In proposing this approach, the Commission takes no position on whether Section 703.5 also precludes a mediator from providing documentary evidence about a mediation. The proposed legislation is not intended to have any impact on that or any other aspect of Section 703.5. The new provision would expressly state as much.[768]

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765. For further discussion of this point, see Memorandum 2017-19, pp. 8-10; First Supplement to Memorandum 2017-9, pp. 3-8; CLRC Staff Memorandum 2017-8, pp. 5-8; see also CLRC Staff Memorandum 2015-45, pp. 41-43.

766. Like Section 703.5, the proposed new provision would generally preclude a mediator from providing evidence, whether voluntarily or under compulsion of process, regarding a mediation that the mediator conducted. That general rule would be subject to the same exceptions stated in the first sentence of Section 703.5. See proposed Evid. Code § 1120.5(e) *infra*. There would not be any language comparable to the second sentence of Section 703.5, because the entire chapter on mediation confidentiality is inapplicable to a mediation under Chapter 11 of Part 2 of Division 8 of the Family Code. See Evid. Code § 1117(b)(1).

767. See proposed Evid. Code § 1120.5(e) *infra*. For a court decision recognizing the need for both types of protection, see *Macaluso*, 618 F.2d at 55 (explaining that if conciliators could testify about their activities, or be compelled to produce notes or reports of their activities, not even strictest adherence to purely factual matters would prevent evidence from favoring or seeming to favor one side).

The Commission considered but rejected the possibility of revising Section 703.5 to expressly address documentary evidence. That section pertains not only to a mediator, but also to an arbitrator and a person who presides at a judicial or quasi-judicial proceeding. The section thus reaches beyond the scope of this study. To avoid possible unintended effects, the Commission decided to leave Section 703.5 alone.

768. See proposed Evid. Code § 1120.5(f) *infra*.

A Litigant Could Not Go to Another Source to Obtain or Learn the Content of a Mediator's Writing or Oral Communication

To bolster the above-described restrictions on obtaining evidence from a mediator, the proposed new exception would be subject to another important limitation: In general, it would not extend to any evidence that constitutes or discloses a writing[769] or oral communication of the mediator relating to a mediation conducted by the mediator.[770] Thus, a litigant generally[771] could not compel disclosure (from the mediator or anyone else) of what a mediator said during a mediation. Similarly, a litigant could not obtain a mediator's writing directly from the mediator,[772] nor circumvent that restriction by obtaining such a writing from another source.[773]

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769. "Writing" is defined in Evidence Code Section 250 to include:

> handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.

Courts have interpreted the term broadly. See, e.g., People v. Goldsmith, 59 Cal. 4th 258, 266, 326 P.3d 239, 172 Cal. Rptr. 3d 637 (2014) ("Photographs and video recordings with imprinted data are writings as defined by the Evidence Code.").

770. See proposed Evid. Code § 1120.5(a)(3) *infra*.

771. Subdivisions (a)(3) and (e) of proposed Section 1120.5(e) are subject to the same exceptions stated in the first sentence of Section 703.5. Compare proposed Evid. Code § 1120.5(a)(3) & (e) *infra* with Evid. Code § 703.5; see also note 766 *supra*.

772. See discussion of "A Mediator Generally Could Not Testify or Provide Documentary Evidence Pursuant to the Exception" *supra*.

773. With respect to electronic communications and records, federal legislation known as the Stored Communications Act ("SCA"), 18 U.S.C. §§ 2701-2712, provides additional protection. Under the SCA, a provider of an electronic communication service (like email) "shall not knowingly divulge to any person or entity the contents of a communication …." 18 U.S.C. §

Further, unless an exception applies, a litigant could not learn the content of such a writing through other materials in the custody of another source. For instance, if the *response* to a mediator's email message reflects the content of that message, the response generally would not be discoverable under the proposed new exception unless the portion of it reflecting the content of the mediator's message could be effectively redacted.[774] Otherwise, the response would impermissibly "disclose a writing of the mediator relating to a mediation conducted by the mediator."[775]

The Same Standard Would Govern Admissibility and Disclosure Under the Exception

The proposed new exception would use the same standard for both admissibility and disclosure of mediation evidence: To be admissible or subject to disclosure, mediation evidence must be *relevant* and must satisfy the other requirements stated in the exception.[776] To help safeguard the interests underlying mediation

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2702(a)(1). A similar rule applies to a remote computing service (like iCloud). See 18 U.S.C. § 2702(a)(2).

Those rules are subject to some exceptions and limitations, but there is no express exception for civil discovery, such as a subpoena seeking a mediator's electronic communications for purposes of a legal malpractice case. See 18 U.S.C. § 2702(b). Nor have courts been willing to imply such an exception. See, e.g., *In re* Subpoena Duces Tecum to AOL, LLC, 550 F. Supp. 2d 606, 609-12; O'Grady v. Superior Court, 139 Cal. App. 4th 1442-47, 44 Cal. Rptr. 3d 72 (2006).

For further discussion of this point, see CLRC Staff Memorandum 2017-30, pp. 6-9.

774. To be discoverable under the proposed new exception, the response would also have to satisfy the other requirements enumerated in the exception.

775. Proposed Evid. Code § 1120.5(a)(3) *infra*. For further discussion of these matters, see CLRC Staff Memorandum 2017-61, pp. 37-46; CLRC Staff Memorandum 2017-30, pp. 3-12.

776. See proposed Evid. Code § 1125(a)(1) *infra*. For further discussion of this point, see CLRC Staff Memorandum 2016-58, pp. 10-17; see also CLRC Staff Memorandum 2015-55, pp. 18 (Texas approach), 27-28 (*Olam* approach).

confidentiality, that is a stricter standard for disclosure than the one governing a routine discovery request.[777]

The Exception Would Limit the Extent of Disclosure

If a mediation communication satisfies the requirements of the proposed new exception (e.g., it is proffered in the correct type of case and it is relevant to an allegation that an attorney "breached a professional requirement in the context of a mediation or a mediation consultation"), then *only the portion of the communication necessary for application of the exception* could be admitted or disclosed.[778] Further, admission or disclosure of a mediation communication pursuant to the exception would not render that evidence (or any other mediation communication) admissible or discoverable for any other purpose.[779]

This restriction is modeled on a provision in the UMA.[780] It would serve to minimize the extent of disclosure of mediation communications and thus help to preserve the confidentiality expectations of mediation participants,[781] particularly persons who

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777. *Cf.* Code Civ. Proc. § 2017.010 ("Unless otherwise limited by order of the court in accordance with this title, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence *or appears reasonably calculated to lead to the discovery of admissible evidence*." (emphasis added).)

778. See proposed Evid. Code § 1120.5(b) *infra*.

779. See *id*. For example, if a court admitted a mediation communication in a legal malpractice case stemming from a mediation, that evidence would not be admissible under the proposed new exception in the mediated dispute. Further, only the portion of the mediation communication that is relevant to the legal malpractice case could be admitted for purposes of that case, not any other portion.

780. See UMA § 6(d).

781. Consistent and careful compliance with this restriction would be key, because predictability of an evidentiary protection for sensitive communications may be necessary to accomplish its objectives. See, e.g., *Jaffee*, 518 U.S. at 18. Application of California's mediation confidentiality protections is already unpredictable to some extent. See discussion of "Federal Law" *supra*.

have no part in the attorney-client dispute triggering use of the Commission's proposed new exception.[782]

A Court Could Use Judicial Tools to Limit Public Exposure of Mediation Communications

The proposed new exception would expressly permit a court to "use a sealing order, a protective order, a redaction requirement, an in camera hearing, or a similar judicial technique to prevent public disclosure of mediation evidence, consistent with the requirements of the First Amendment to the United States Constitution, Sections 2 and 3 of Article I of the California Constitution, Section 124 of the Code of Civil Procedure, and other provisions of law."[783] A court would thus have discretion to use existing procedural mechanisms to prevent widespread dissemination of mediation evidence admitted or disclosed pursuant to the new provision, so long as the court complies with the First Amendment right of access and other laws that promote government transparency.[784] Like the UMA-based restriction discussed above, the use of such procedural mechanisms would help to preserve the confidentiality expectations of mediation participants.

Mediation Participants Would Receive Notice and Could Thus Take Steps to Prevent Improper Disclosure of Mediation Communications

If a party to a mediation misconduct dispute seeks to invoke the proposed new exception, reasonable advance notice[785] to the other

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782. For sources discussing the importance of protecting the confidentiality expectations of mediation participants who have no part in a post-mediation dispute, see, e.g., *Cassel,* 51 Cal. 4th at 136; *id.* at 139 (Chin, J., concurring); *Grubaugh,* 238 Ariz. at 268-69; Brand, *supra* note 107, at 395, 401 & n.233; Gafni, *supra* note 398, at 1.

783. See proposed Evid. Code § 1120.5(c) *infra*.

784. For further discussion of this point, see CLRC Staff Memorandum 2016-18; CLRC Staff Memorandum 2015-55; CLRC Staff Memorandum 2015-45, pp. 27-30, 33-41.

785. To provide flexibility, the proposed exception does not attempt to specify precisely what constitutes "reasonable advance notice" for each type of dispute

mediation participants would be necessary.[786] Each mediation participant (including the mediator) would be entitled to such notice, so long as the participant's identity and address are reasonably ascertainable.[787] The notice would have to:

(1) State the names of the parties to the dispute over alleged mediation misconduct.

(2) Warn the other mediation participants that resolving the dispute might involve the disclosure of mediation communications or writings.

(3) Identify the specific statutory basis for such potential disclosure.

(4) Include a copy of the complaint or other initial pleading alleging mediation misconduct.[788]

This notice requirement would alert mediation participants who would not otherwise be involved in the misconduct dispute to the possibility of disclosure of mediation communications in connection with that case. Such participants would thus have an opportunity to speak up and guard against any improper disclosure.[789]

Other Features of the Proposed New Exception

In addition to the above-described features, which would help minimize harm to the policy interests underlying the mediation confidentiality statutes, the proposed new exception would have a number of other noteworthy features. These include:

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in which it would apply. If it appears appropriate, the Judicial Council and/or State Bar could address that point by court rule.

786. See proposed Evid. Code § 1120.5(d) & Comment *infra*.

787. See *id*.

788. See *id*.

789. See proposed Evid. Code § 1120.5 Comment *infra*. For further discussion of this point, see CLRC Staff Memorandum 2017-61, pp. 46-54; CLRC Staff Memorandum 2016-58, p. 36.

- The exception would apply evenhandedly. It would permit use of mediation communications in specified circumstances to prove *or* disprove allegations against an attorney.[790]
- The exception would apply to all types of mediation communications and writings, not just to a particular category (such as communications made in a private caucus between an attorney and a client).[791]
- The exception would apply across-the-board; there would not be any carveouts for particular types of mediations.[792]
- The exception would expressly state that "[n]othing in this section is intended to affect the extent to which a mediator is, or is not, immune from liability under existing law."[793] It would thus be clear that existing law governing mediator immunity would remain unchanged.[794]
- The exception would expressly state that any contractual agreement purporting to override the exception "is null and void."[795] This would help

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790. See proposed Evid. Code § 1120.5(a)(1) & Comment *infra*. For further discussion of this point, see CLRC Staff Memorandum 2015-45, pp. 25-27; CLRC Staff Memorandum 2014-43, p. 13; CLRC Staff Memorandum 2014-6, p. 16; see also Brand, *supra* note 107, at 397.

791. See proposed Evid. Code § 1120.5 *infra*. For further discussion of this point, see CLRC Staff Memorandum 2015-45, pp. 31-33.

792. See proposed Evid. Code § 1120.5 *infra*. For further discussion of this point, see CLRC Staff Memorandum 2016-58, pp. 25-33 (discussing exemption requests for (1) family law mediations and (2) community-based mediation programs funded under Dispute Resolution Programs Act); see also CLRC Staff Memorandum 2017-8, pp. 5-7 (discussing PERB request for exemption).

793. See proposed Evid. Code § 1120.5(g) *infra*.

794. For further discussion of this point, see CLRC Staff Memorandum 2015-45, pp. 15-17; CLRC Staff Memorandum 2015-22, pp. 34-42.

795. See proposed Evid. Code § 1120.5(h).

prevent disputes regarding whether such an agreement is effective.

- The exception would not include any sanctions provision. The Commission believes that existing law governing the availability of sanctions will be sufficient to address any potential abuse of the new exception.[796]
- The exception would only apply to evidence relating to a mediation or mediation consultation that commences on or after the exception becomes operative. To avoid disrupting confidentiality expectations of mediation participants, the new exception would not apply retroactively.[797]

CONCLUSION

Part III of this report presents the Commission's proposed legislation and accompanying Comments. In comparison with existing law, the suggested approach would place a higher priority on holding attorneys accountable for mediation misconduct.

Although the area is controversial and many of the participants in this study view the situation differently, the Commission believes that this is the best approach for the state and its citizens in the long-term. In submitting this report, the Commission extends its thanks to all of the participants in this study, regardless of their point of view.

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796. See proposed Evid. Code § 1120.5 & Comment *infra*. For further discussion of this point, see CLRC Staff Memorandum 2017-61, pp. 53-54; CLRC Staff Memorandum 2015-45, pp. 43-44.

797. See proposed uncodified provision & Comment *infra*. For further discussion of this point, see CLRC Staff Memorandum 2017-61, pp. 57-58; CLRC Staff Memorandum 2015-45, p. 44.

PART III. PROPOSED LEGISLATION

Evid. Code § 1120.5 (added). Alleged misconduct of lawyer when representing client in mediation context

SECTION 1. Section 1120.5 is added to the Evidence Code, to read:

1120.5. (a) A communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if all of the following requirements are satisfied:

(1) The evidence is relevant to prove or disprove an allegation that a lawyer breached a professional obligation when representing a client in the context of a mediation or a mediation consultation.

(2) The evidence is sought or proffered in connection with, and is used pursuant to this section solely in resolving, one or more of the following:

(A) A disciplinary proceeding against the lawyer under the State Bar Act, Chapter 4 (commencing with Section 6000) of Division 3 of the Business and Professions Code, or a rule or regulation promulgated pursuant to the State Bar Act.

(B) A cause of action for damages against the lawyer based upon alleged malpractice, regardless of whether this cause of action is pending in court or in an arbitration.

(C) A dispute between the lawyer and client concerning fees, costs, or both, including, but not limited to, a proceeding under Article 13 (commencing with Section 6200) of Chapter 4 of Division 3 of the Business and Professions Code.

(3) The evidence does not constitute or disclose a writing or an oral communication of the mediator relating to a mediation conducted by the mediator. This paragraph does not apply to a writing or an oral communication that could (i) give rise to civil or criminal contempt, (ii) constitute a crime, (iii) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (iv) give rise to disqualification proceedings under

paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure.

(b) If a mediation communication or writing satisfies the requirements of subdivision (a), only the portion of it necessary for the application of subdivision (a) may be admitted or disclosed. Admission or disclosure of evidence under subdivision (a) does not render the evidence, or any other mediation communication or writing, admissible or discoverable for any other purpose.

(c) In applying this section, a court may, but is not required to, use a sealing order, a protective order, a redaction requirement, an in camera hearing, or a similar judicial technique to prevent public disclosure of mediation evidence, consistent with the requirements of the First Amendment to the United States Constitution, Sections 2 and 3 of Article I of the California Constitution, Section 124 of the Code of Civil Procedure, and other provisions of law.

(d)(1) This section only applies if one or more of the parties to the dispute over alleged mediation misconduct provides reasonable advance notice to all of the mediation participants whose identities and addresses are reasonably ascertainable, including, but not limited to, the mediator.

(2) The notice provided pursuant to this subdivision shall do all of the following:

(A) State the names of the parties to the dispute over alleged mediation misconduct.

(B) Warn the other mediation participants that resolving the dispute might involve disclosure of mediation communications or writings.

(C) Specify which subparagraph of paragraph (2) of subdivision (a) applies.

(D) Include a copy of the complaint or other initial pleading alleging mediation misconduct.

(3) This requirement is in addition to, not in lieu of, any requirements relating to service of the complaint or other initial pleading.

(e) No mediator shall be competent to provide evidence pursuant to this section, through oral or written testimony, production of

documents, or otherwise, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with a mediation that the mediator conducted, except as to a statement or conduct that could (i) give rise to civil or criminal contempt, (ii) constitute a crime, (iii) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (iv) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure.

(f) Nothing in this section is intended to alter or affect Section 703.5.

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

(h) Any agreement purporting to override this section is null and void.

Comment. Section 1120.5 is added to promote attorney accountability in the mediation context, while also enabling an attorney to defend against a baseless allegation of mediation misconduct. It creates an exception to the general rule that makes mediation communications and writings confidential and protects them from admissibility and disclosure in a noncriminal proceeding (Section 1119). The exception is narrow and subject to specified limitations to avoid unnecessary impingement on the policy interests served by mediation confidentiality.

Under paragraph (1) of subdivision (a), this exception pertains to an attorney's conduct in a professional capacity. More precisely, the exception 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. The exception applies only with respect to alleged misconduct of an attorney acting as an advocate, not with respect to alleged misconduct of an attorney-mediator.

Paragraph (1) also makes clear that the alleged misconduct must occur in the context of a mediation or a mediation consultation. 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 with the mediator and all parties present, a private caucus with or without the mediator, a mediation brief, a mediation-related phone call, or other mediation-related activity). The determinative factor is whether the misconduct allegedly occurred in a mediation context, not the time and date of the alleged misconduct.

Paragraph (1) further clarifies that the exception applies evenhandedly. It permits use of mediation evidence in specified circumstances to prove *or* disprove allegations against an attorney.

To be admissible or subject to disclosure under this section, however, mediation evidence must be relevant and must satisfy the other stated requirements. To safeguard the interests underlying mediation confidentiality, that is a stricter standard than the one governing a routine discovery request. *Cf.* Code Civ. Proc. § 2017.010 ("Unless otherwise limited by order of the court in accordance with this title, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence *or appears reasonably calculated to lead to the discovery of admissible evidence*." (emphasis added).)

Paragraph (2) of subdivision (a) specifies the types of claims in which the exception applies:

- A State Bar disciplinary proceeding, which focuses on protecting the public from attorney malfeasance.
- A legal malpractice claim, which further promotes attorney accountability and provides a means of compensating a client for damages from breach of an attorney's professional duties in the mediation context.
- An attorney-client fee dispute, such as a mandatory fee arbitration under the State Bar Act, which is an effective, low-cost means to resolve fee issues in a confidential setting.

The exception does not apply for purposes of any other kind of claim. Of particular note, the exception does not apply in resolving a claim relating to enforcement of a mediated settlement agreement (e.g., a claim for rescission of a mediated settlement agreement or a claim for enforcement of a mediated settlement agreement). That restriction promotes finality in

settling disputes and protects the policy interests underlying mediation confidentiality.

Under paragraph (3) of subdivision (a), the mediation confidentiality exception created by this section is inapplicable to evidence that constitutes or discloses a writing or an oral communication of a mediator relating to a mediation conducted by the mediator. This limitation complements the mediator competency restrictions stated in subdivision (e) and Section 703.5, and it is subject to the same four exceptions as those provisions.

Thus, unless one of the four exceptions applies, a litigant could not compel disclosure (from the mediator or anyone else) of what a mediator said during a mediation. Similarly, a litigant could not obtain a mediator's writing directly from the mediator nor circumvent that restriction by obtaining such a writing from another source. Further, a litigant could not learn the content of such a writing through other materials in the custody of another source. For instance, if the *response* to a mediator's email message reflects the content of that message, the response would not be discoverable under this section unless the portion of it reflecting the content of the mediator's message could be effectively redacted. Otherwise, the response would impermissibly "disclose a writing … of the mediator relating to a mediation conducted by the mediator."

Subdivision (b) is modeled on Section 6(d) of the Uniform Mediation Act. It establishes an important limitation on the admissibility or disclosure of mediation communications pursuant to this section.

Subdivision (c) gives a court discretion to use existing procedural mechanisms to prevent widespread dissemination of mediation evidence that is admitted or disclosed pursuant to this section. For example, a party could seek a sealing order pursuant to the existing rules governing sealing of court records (Cal. R. Ct. 8.45-8.47, 2.550-2.552). Any restriction on public access must comply with constitutional constraints and other applicable law. See, e.g., NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 20 Cal. 4th 1178, 980 P.2d 330, 86 Cal. Rptr. 2d 778 (1999).

Under subdivision (d), before a party to a mediation misconduct dispute seeks disclosure or introduction of mediation communications or writings pursuant to this section, the other mediation participants must be given reasonable advance notice, which satisfies four stated requirements. Each mediation participant is entitled to such notice, so long as the participant's identity and address are reasonably

ascertainable. This affords an opportunity for a mediation participant who would not otherwise be involved in the misconduct dispute to take steps to prevent improper disclosure of mediation communications or writings of particular consequence to that participant. For instance, a mediation participant could move to intervene and could then seek a protective order or oppose an overbroad discovery request. To provide flexibility to tailor to different contexts, subdivision (d) does not specify precisely what constitutes "reasonable advance notice." That could be the subject of one or more court rules, as appears appropriate.

Under subdivision (e), a mediator generally cannot testify or produce documents pursuant to this section, whether voluntarily or under compulsion of process, regarding a mediation that the mediator conducted. That general rule is subject to the same exceptions stated in Section 703.5, which does not expressly refer to documentary evidence.

For federal restrictions on obtaining a mediator's electronic records from the mediator's service provider, see 18 U.S.C. § 2702(a); O'Grady v. Superior Court, 139 Cal. App. 4th 1423, 44 Cal. Rptr. 3d 72 (2006).

Subdivision (f) makes clear that the enactment of this section in no way changes the effect of Section 703.5.

Subdivision (g) makes clear that the enactment of this section has no impact on the state of the law relating to mediator immunity.

To help ensure that attorneys are held accountable for mediation misconduct, subdivision (h) prevents mediation participants from contractually avoiding the impact of this section.

See Sections 250 ("writing"), 1115(a), (c) ("mediation" and "mediation consultation"). For availability of sanctions, see, e.g., Section 1127; Code Civ. Proc. §§ 128.5, 128.7.

Uncodified (added). Operative date

SEC. 2. (a) This act shall become operative on January 1, 2019.

(b) This act only applies with respect to a mediation or a mediation consultation that commenced on or after January 1, 2019.

Comment. To avoid disrupting confidentiality expectations of mediation participants, this act only applies to evidence that relates to a mediation or a mediation consultation commencing on or after the operative date of the act.

APPENDIX: EVIDENCE CODE SECTIONS 703.5 AND 1115-1128 AND CORRESPONDING COMMENTS (AS OF 1/1/18)

Evid. Code § 703.5. Testimony by judge, arbitrator, or mediator

703.5. No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure. However, this section does not apply to a mediator with regard to any mediation under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

Comment. Section 703.5 is amended to correct the cross-reference to former Family Code Section 3155 to reflect the reorganization of those sections in 1993 Cal. Stat. ch. 219. This is a technical, nonsubstantive change. [24 Cal. L. Revision Comm'n Reports 621 (1994).]

Evid. Code § 1115. Definitions

1115. For purposes of this chapter:

(a) "Mediation" means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement.

(b) "Mediator" means a neutral person who conducts a mediation. "Mediator" includes any person designated by a mediator either to assist in the mediation or to communicate with the participants in preparation for a mediation.

(c) "Mediation consultation" means a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator.

Comment. Subdivision (a) of Section 1115 is drawn from Code of Civil Procedure Section 1775.1. To accommodate a wide range of

mediation styles, the definition is broad, without specific limitations on format. For example, it would include a mediation conducted as a number of sessions, only some of which involve the mediator. The definition focuses on the nature of a proceeding, not its label. A proceeding may be a "mediation" for purposes of this chapter, even though it is denominated differently.

Under subdivision (b), a mediator must be neutral. The neutrality requirement is drawn from Code of Civil Procedure Section 1775.1. An attorney or other representative of a party is not neutral and so does not qualify as a "mediator" for purposes of this chapter.

A "mediator" may be an individual, group of individuals, or entity. See Section 175 ("person" defined). See also Section 10 (singular includes the plural). This definition of mediator encompasses not only the neutral person who takes the lead in conducting a mediation, but also any neutral who assists in the mediation, such as a case-developer, interpreter, or secretary. The definition focuses on a person's role, not the person's title. A person may be a "mediator" under this chapter even though the person has a different title, such as "ombudsperson." Any person who meets the definition of "mediator" must comply with Section 1121 (mediator reports and communications), which generally prohibits a mediator from reporting to a court or other tribunal concerning the mediated dispute.

Subdivision (c) is drawn from former Section 1152.5, which was amended in 1996 to explicitly protect mediation intake communications. See 1996 Cal. Stat. ch. 174, § 1. Subdivision (c) is not limited to communications to retain a mediator. It also encompasses contacts concerning whether to mediate, such as where a mediator contacts a disputant because another disputant desires to mediate, and contacts concerning initiation or recommencement of mediation, such as where a case-developer meets with a disputant before mediation.

For the scope of this chapter, see Section 1117.

[*1997-1998 Annual Report,* 27 Cal. L. Revision Comm'n Reports 531, 595-621 (Appendix 5) (1997).]

Evid. Code § 1116. Effect of chapter

1116. (a) Nothing in this chapter expands or limits a court's authority to order participation in a dispute resolution proceeding. Nothing in this chapter authorizes or affects the enforceability of a contract clause in which parties agree to the use of mediation.

(b) Nothing in this chapter makes admissible evidence that is inadmissible under Section 1152 or any other statute.

Comment. Subdivision (a) of Section 1116 establishes guiding principles for applying this chapter.

Subdivision (b) continues the first sentence of former Section 1152.5 without substantive change.

[*1997-1998 Annual Report,* 27 Cal. L. Revision Comm'n Reports 531, 595-621 (Appendix 5) (1997).]

Evid. Code § 1117. Scope of chapter

1117. (a) Except as provided in subdivision (b), this chapter applies to a mediation as defined in Section 1115.

(b) This chapter does not apply to either of the following:

(1) A proceeding under Part 1 (commencing with Section 1800) of Division 5 of the Family Code or Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

(2) A settlement conference pursuant to Rule 3.1380 of the California Rules of Court.

Comment. Under subdivision (a) of Section 1117, mediation confidentiality and the other safeguards of this chapter apply to a broad range of mediations. See Section 1115 Comment.

Subdivision (b) sets forth two exceptions. Section 1117(b)(1) continues without substantive change former Section 1152.5(b). Special confidentiality rules apply to a proceeding in family conciliation court or a mediation of child custody or visitation issues. See Section 1040; Fam. Code §§ 1818, 3177.

Section 1117(b)(2) establishes that a court settlement conference is not a mediation within the scope of this chapter. A settlement conference is conducted under the aura of the court and is subject to special rules.

[*1997-1998 Annual Report,* 27 Cal. L. Revision Comm'n Reports 531, 595-621 (Appendix 5) (1997).]

Evid. Code § 1118. Recorded oral agreement

1118. An oral agreement "in accordance with Section 1118" means an oral agreement that satisfies all of the following conditions:

(a) The oral agreement is recorded by a court reporter or reliable means of audio recording.

(b) The terms of the oral agreement are recited on the record in the presence of the parties and the mediator, and the parties express on the record that they agree to the terms recited.

(c) The parties to the oral agreement expressly state on the record that the agreement is enforceable or binding, or words to that effect.

(d) The recording is reduced to writing and the writing is signed by the parties within 72 hours after it is recorded.

Comment (1997). Section 1118 establishes a procedure for orally memorializing an agreement, in the interest of efficiency. Provisions permitting use of that procedure for certain purposes include Sections 1121 (mediator reports and communications), 1122 (disclosure by agreement), 1123 (written settlement agreements reached through mediation), and 1124 (oral agreements reached through mediation). See also Section 1125 (when mediation ends). For guidance on authority to bind a litigant, see Williams v. Saunders, 55 Cal. App. 4th 1158, 64 Cal. Rptr. 2d 571 (1997) ("The litigants' direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent."). [*1997-1998 Annual Report,* 27 Cal. L. Revision Comm'n Reports 531, 595-621 (Appendix 5) (1997).]

Comment (2009). Section 1118 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to "audiotape" in Civil Discovery Act with either "audio technology," "audio recording," or "audio record," as context required). [37 Cal. L. Revision Comm'n Reports 211 (2007).]

Evid. Code § 1119. Mediation confidentiality

1119. Except as otherwise provided in this chapter:

(a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and

disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

Comment. Subdivision (a) of Section 1119 continues without substantive change former Section 1152.5(a)(1), except that its protection explicitly applies in a subsequent arbitration or administrative adjudication, as well as in any civil action or proceeding. See Section 120 ("civil action" includes civil proceedings). In addition, the protection of Section 1119(a) extends to oral communications made for the purpose of or pursuant to a mediation, not just oral communications made in the course of the mediation.

Subdivision (b) continues without substantive change former Section 1152.5(a)(2), except that its protection explicitly applies in a subsequent arbitration or administrative adjudication, as well as in any civil action or proceeding. See Section 120 ("civil action" includes civil proceedings). In addition, subdivision (b) expressly encompasses any type of "writing" as defined in Section 250, regardless of whether the representations are on paper or on some other medium.

Subdivision (c) continues former Section 1152.5(a)(3) without substantive change. A mediation is confidential notwithstanding the presence of an observer, such as a person evaluating or training the mediator or studying the mediation process.

See Sections 1115(a) ("mediation" defined), 1115(c) ("mediation consultation" defined). See also Section 703.5 (testimony by a judge, arbitrator, or mediator).

For examples of specialized mediation confidentiality provisions, see Bus. & Prof. Code §§ 467.4-467.5 (community dispute resolution programs), 6200 (attorney-client fee disputes); Code Civ. Proc. §§ 1297.371 (international commercial disputes), 1775.10 (civil action mediation in participating courts); Fam. Code §§ 1818 (family conciliation court), 3177 (child custody); Food & Agric. Code § 54453 (agricultural cooperative bargaining associations); Gov't Code §§ 11420.20-11420.30 (administrative adjudication), 12984-12985 (housing discrimination), 66032-66033 (land use); Ins. Code § 10089.80 (earthquake insurance); Lab. Code § 65 (labor disputes); Welf. & Inst.

Code § 350 (dependency mediation). See also Cal. Const. art. I, § 1 (right to privacy); Garstang v. Superior Court, 39 Cal. App. 4th 526, 46 Cal. Rptr. 2d 84, 88 (1995) (constitutional right of privacy protected communications made during mediation sessions before an ombudsperson).

[*1997-1998 Annual Report,* 27 Cal. L. Revision Comm'n Reports 531, 595-621 (Appendix 5) (1997).]

Evid. Code § 1120. Types of evidence not covered

1120. (a) Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation.

(b) This chapter does not limit any of the following:

(1) The admissibility of an agreement to mediate a dispute.

(2) The effect of an agreement not to take a default or an agreement to extend the time within which to act or refrain from acting in a pending civil action.

(3) Disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute.

(4) The admissibility of declarations of disclosure required by Sections 2104 and 2105 of the Family Code, even if prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation.

Comment. Subdivision (a) of Section 1120 continues former Section 1152.6(a)(6) without change. It limits the scope of Section 1119 (mediation confidentiality), preventing parties from using a mediation as a pretext to shield materials from disclosure.

Subdivision (b)(1) makes explicit that Section 1119 does not restrict the admissibility of an agreement to mediate. Subdivision (b)(2) continues former Section 1152.5(e) without substantive change, but also includes an express exception for extensions of litigation deadlines. Subdivision (b)(3) makes clear that Section 1119 does not preclude a disputant from obtaining basic information about a mediator's track record, which may be significant in selecting an impartial mediator. Similarly, mediation participants may express their views on a

mediator's performance, so long as they do not disclose anything said or done at the mediation.

See Sections 1115(a) ("mediation" defined), 1115(b) ("mediator" defined), 1115(c) ("mediation consultation" defined).

[*1997-1998 Annual Report,* 27 Cal. L. Revision Comm'n Reports 531, 595-621 (Appendix 5) (1997).]

Evid. Code § 1121. Mediator reports and communications

1121. Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that is mandated by court rule or other law and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise in writing, or orally in accordance with Section 1118.

Comment. Section 1121 continues the first sentence of former Section 1152.6 without substantive change, except to make clear that (1) the section applies to all submissions, not just filings, (2) the section is not limited to court proceedings, but rather applies to all types of adjudications, including arbitrations and administrative adjudications, (3) the section applies to any report or statement of opinion, however denominated, and (4) neither a mediator nor anyone else may submit the prohibited information. The section does not prohibit a mediator from providing a mediation participant with feedback on the dispute in the course of the mediation.

Rather, the focus is on preventing coercion. As Section 1121 recognizes, a mediator should not be able to influence the result of a mediation or adjudication by reporting or threatening to report to the decisionmaker on the merits of the dispute or reasons why mediation failed to resolve it. Similarly, a mediator should not have authority to resolve or decide the mediated dispute, and should not have any function for the adjudicating tribunal with regard to the dispute, except as a non-decisionmaking neutral. See Section 1117 (scope of chapter), which excludes settlement conferences from this chapter.

The exception to Section 1121 (permitting submission and consideration of a mediator's report where "all parties to the mediation expressly agree" in writing) is modified to allow use of the oral

procedure in Section 1118 (recorded oral agreement) and to permit making of the agreement at any time, not just before the mediation. A mediator's report to a court may disclose mediation communications only if all parties to the mediation agree to the reporting and all persons who participate in the mediation agree to the disclosure. See Section 1122 (disclosure by agreement).

The second sentence of former Section 1152.6 is continued without substantive change in Section 1117 (scope of chapter), except that Section 1117 excludes proceedings under Part 1 (commencing with Section 1800) of Division 5 of the Family Code, as well as proceedings under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

See Sections 1115(a) ("mediation" defined), 1115(b) ("mediator" defined). See also Sections 703.5 (testimony by a judge, arbitrator, or mediator), 1127 (attorney's fees), 1128 (irregularity in proceedings).

[*1997-1998 Annual Report,* 27 Cal. L. Revision Comm'n Reports 531, 595-621 (Appendix 5) (1997).]

Evid. Code § 1122. Disclosure by agreement

1122. (a) A communication or a writing, as defined in Section 250, that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if either of the following conditions is satisfied:

(1) All persons who conduct or otherwise participate in the mediation expressly agree in writing, or orally in accordance with Section 1118, to disclosure of the communication, document, or writing.

(2) The communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree in writing, or orally in accordance with Section 1118, to its disclosure, and the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation.

(b) For purposes of subdivision (a), if the neutral person who conducts a mediation expressly agrees to disclosure, that agreement also binds any other person described in subdivision (b) of Section 1115.

Comment. Section 1122 supersedes former Section 1152.5(a)(4) and part of former Section 1152.5(a)(2), which were unclear regarding precisely whose agreement was required for admissibility or disclosure of mediation communications and documents.

Subdivision (a)(1) states the general rule that mediation documents and communications may be admitted or disclosed only upon agreement of all participants, including not only parties but also the mediator and other nonparties attending the mediation (e.g., a disputant not involved in litigation, a spouse, an accountant, an insurance representative, or an employee of a corporate affiliate). Agreement must be express, not implied. For example, parties cannot be deemed to have agreed in advance to disclosure merely because they agreed to participate in a particular dispute resolution program.

Subdivision (a)(2) facilitates admissibility and disclosure of unilaterally prepared materials, but it only applies so long as those materials may be produced in a manner revealing nothing about the mediation discussion. Materials that necessarily disclose mediation communications may be admitted or disclosed only upon satisfying the general rule of subdivision (a)(1).

Mediation materials that satisfy the requirements of subdivisions (a)(1) or (a)(2) are not necessarily admissible or subject to disclosure. Although the provisions on mediation confidentiality do not bar admissibility or disclosure, there may be other bases for exclusion.

Subdivision (b) makes clear that if the person who takes the lead in conducting a mediation agrees to disclosure, it is unnecessary to seek out and obtain assent from each assistant to that person, such as a case developer, interpreter, or secretary.

For exceptions to Section 1122, see Sections 1123 (written settlement agreements reached through mediation) and 1124 (oral agreements reached through mediation) & Comments.

See Section 1115(a) ("mediation" defined), 1115(c) ("mediation consultation" defined). See also Sections 703.5 (testimony by a judge, arbitrator, or mediator), 1119 (mediation confidentiality), 1121 (mediator reports and communications).

[*1997-1998 Annual Report,* 27 Cal. L. Revision Comm'n Reports 531, 595-621 (Appendix 5) (1997).]

Evid. Code § 1123. Written settlement agreements reached through mediation

1123. A written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if the agreement is signed by the settling parties and any of the following conditions are satisfied:

(a) The agreement provides that it is admissible or subject to disclosure, or words to that effect.

(b) The agreement provides that it is enforceable or binding or words to that effect.

(c) All parties to the agreement expressly agree in writing, or orally in accordance with Section 1118, to its disclosure.

(d) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

Comment. Section 1123 consolidates and clarifies provisions governing written settlements reached through mediation. For guidance on binding a disputant to a written settlement agreement, see Williams v. Saunders, 55 Cal. App. 4th 1158, 64 Cal. Rptr. 2d 571 (1997) ("The litigants' direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent.").

As to an executed written settlement agreement, subdivision (a) continues part of former Section 1152.5(a)(2). See also Ryan v. Garcia, 27 Cal. App. 4th 1006, 1012, 33 Cal. Rptr. 2d 158, 162 (1994) (Section 1152.5 "provides a simple means by which settlement agreements executed during mediation can be made admissible in later proceedings," i.e., the "parties may consent, as part of a writing, to subsequent admissibility of the agreement").

Subdivision (b) is new. It is added due to the likelihood that parties intending to be bound will use words to that effect, rather than saying their agreement is intended to be admissible or subject to disclosure.

As to fully executed written settlement agreements, subdivision (c) supersedes former Section 1152.5(a)(4). To facilitate enforceability of such agreements, disclosure pursuant to subdivision (c) requires only agreement of the parties. Agreement of the mediator and other mediation participants is not necessary. Subdivision (c) is thus an exception to the general rule governing disclosure of mediation communications by agreement. See Section 1122.

Subdivision (d) continues former Section 1152.5(a)(5) without substantive change.

A written settlement agreement that satisfies the requirements of subdivision (a), (b), (c), or (d) is not necessarily admissible or subject to disclosure. Although the provisions on mediation confidentiality do not bar admissibility or disclosure, there may be other bases for exclusion.

See Section 1115(a) ("mediation" defined).

[*1997-1998 Annual Report,* 27 Cal. L. Revision Comm'n Reports 531, 595-621 (Appendix 5) (1997).]

Evid. Code § 1124. Oral agreements reached through mediation

1124. An oral agreement made in the course of, or pursuant to, a mediation is not made inadmissible, or protected from disclosure, by the provisions of this chapter if any of the following conditions are satisfied:

(a) The agreement is in accordance with Section 1118.

(b) The agreement is in accordance with subdivisions (a), (b), and (d) of Section 1118, and all parties to the agreement expressly agree, in writing or orally in accordance with Section 1118, to disclosure of the agreement.

(c) The agreement is in accordance with subdivisions (a), (b), and (d) of Section 1118, and the agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

Comment. Section 1124 sets forth specific circumstances under which mediation confidentiality is inapplicable to an oral agreement reached through mediation. Except in those circumstances, Sections 1119 (mediation confidentiality) and 1124 codify the rule of Ryan v. Garcia, 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (1994) (mediation confidentiality applies to oral statement of settlement terms), and reject the contrary approach of Regents of University of California v. Sumner, 42 Cal. App. 4th 1209, 50 Cal. Rptr. 2d 200 (1996) (mediation confidentiality does not protect oral statement of settlement terms).

Subdivision (a) of Section 1124 facilitates enforcement of an oral agreement that is recorded and memorialized in writing in accordance with Section 1118. For guidance in applying subdivision (a), see Section 1125 (when mediation ends) & Comment.

Subdivision (b) parallels Section 1123(c).

Subdivision (c) parallels Section 1123(d).

An oral agreement that satisfies the requirements of subdivision (a), (b), or (c) is not necessarily admissible or subject to disclosure. Although the provisions on mediation confidentiality do not bar admissibility or disclosure, there may be other bases for exclusion. For guidance on binding a disputant to a settlement agreement, see Williams v. Saunders, 55 Cal. App. 4th 1158, 64 Cal. Rptr. 2d 571 (1997) ("The litigants' direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent.").

See Section 1115(a) ("mediation" defined).

[*1997-1998 Annual Report,* 27 Cal. L. Revision Comm'n Reports 531, 595-621 (Appendix 5) (1997).]

Evid. Code § 1125. When mediation ends

1125. (a) For purposes of confidentiality under this chapter, a mediation ends when any one of the following conditions is satisfied:

(1) The parties execute a written settlement agreement that fully resolves the dispute.

(2) An oral agreement that fully resolves the dispute is reached in accordance with Section 1118.

(3) The mediator provides the mediation participants with a writing signed by the mediator that states that the mediation is terminated, or words to that effect, which shall be consistent with Section 1121.

(4) A party provides the mediator and the other mediation participants with a writing stating that the mediation is terminated, or words to that effect, which shall be consistent with Section 1121. In a mediation involving more than two parties, the mediation may continue as to the remaining parties or be terminated in accordance with this section.

(5) For 10 calendar days, there is no communication between the mediator and any of the parties to the mediation relating to the dispute. The mediator and the parties may shorten or extend this time by agreement.

(b) For purposes of confidentiality under this chapter, if a mediation partially resolves a dispute, mediation ends when either of the following conditions is satisfied:

(1) The parties execute a written settlement agreement that partially resolves the dispute.

(2) An oral agreement that partially resolves the dispute is reached in accordance with Section 1118.

(c) This section does not preclude a party from ending a mediation without reaching an agreement. This section does not otherwise affect the extent to which a party may terminate a mediation.

Comment. By specifying when a mediation ends, Section 1125 provides guidance on which communications are protected by Section 1119 (mediation confidentiality).

Under subdivision (a)(1), if mediation participants reach an oral compromise and reduce it to a written settlement fully resolving their dispute, confidentiality extends until the agreement is signed by all the parties. For guidance on binding a disputant to a settlement agreement, see Williams v. Saunders, 55 Cal. App. 4th 1158, 64 Cal. Rptr. 2d 571 (1997) ("The litigants' direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent.").

Subdivision (a)(2) applies where mediation participants fully resolve their dispute by an oral agreement that is recorded and memorialized in writing in accordance with Section 1118. The mediation is over upon completion of that procedure, and the confidentiality protections of this chapter do not apply to any later proceedings, such as attempts to further refine the content of the agreement. See Section 1124 (oral agreements reached through mediation). Subdivisions (a)(3) and (a)(4) are drawn from Rule 14 of the American Arbitration Association's Commercial Mediation Rules (as amended, Jan. 1, 1992). Subdivision (a)(5) applies where an affirmative act terminating a mediation for purposes of this chapter does not occur.

Subdivision (b) applies where mediation partially resolves a dispute, such as when the disputants resolve only some of the issues (e.g., contract, but not tort, liability) or when only some of the disputants settle.

Subdivision (c) limits the effect of Section 1125.

See Sections 1115(a) ("mediation" defined), 1115(b) ("mediator" defined).

[*1997-1998 Annual Report,* 27 Cal. L. Revision Comm'n Reports 531, 595-621 (Appendix 5) (1997).]

Evid. Code § 1126. Effect of end of mediation

1126. Anything said, any admission made, or any writing that is inadmissible, protected from disclosure, and confidential under this chapter before a mediation ends, shall remain inadmissible, protected from disclosure, and confidential to the same extent after the mediation ends.

Comment. Section 1126 clarifies that mediation materials are confidential not only during a mediation, but also after the mediation ends pursuant to Section 1125 (when mediation ends).

See Section 1115(a) ("mediation" defined).

[*1997-1998 Annual Report,* 27 Cal. L. Revision Comm'n Reports 531, 595-621 (Appendix 5) (1997).]

Evid. Code § 1127. Attorney's fees

1127. If a person subpoenas or otherwise seeks to compel a mediator to testify or produce a writing, as defined in Section 250, and the court or other adjudicative body determines that the testimony or writing is inadmissible under this chapter, or protected from disclosure under this chapter, the court or adjudicative body making the determination shall award reasonable attorney's fees and costs to the mediator against the person seeking the testimony or writing.

Comment. Section 1127 continues former Section 1152.5(d) without substantive change, except to clarify that either a court or another adjudicative body (e.g., an arbitrator or administrative tribunal) may award the fees and costs. Because Section 1115 (definitions) defines "mediator" to include not only the neutral person who takes the lead in conducting a mediation, but also any neutral who assists in the mediation, fees are available regardless of the role played by the person subjected to discovery.

See Section 1115(b) ("mediator" defined).

[*1997-1998 Annual Report,* 27 Cal. L. Revision Comm'n Reports 531, 595-621 (Appendix 5) (1997).]

Evid. Code § 1128. Irregularity in proceedings

1128. Any reference to a mediation during any subsequent trial is an irregularity in the proceedings of the trial for the purposes of Section 657 of the Code of Civil Procedure. Any reference to a

mediation during any other subsequent noncriminal proceeding is grounds for vacating or modifying the decision in that proceeding, in whole or in part, and granting a new or further hearing on all or part of the issues, if the reference materially affected the substantial rights of the party requesting relief.

Comment. Section 1128 is drawn from Code of Civil Procedure Section 1775.12. The first sentence makes it an irregularity to refer to a mediation in a subsequent civil trial; the second sentence extends that rule to other noncriminal proceedings, such as an administrative adjudication. An appropriate situation for invoking this section is where a party urges the trier of fact to draw an adverse inference from an adversary's refusal to disclose mediation communications.

See Section 1115 ("mediation" defined).

[*1997-1998 Annual Report,* 27 Cal. L. Revision Comm'n Reports 531, 595-621 (Appendix 5) (1997).]

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

2017-2018 Annual Report

California Law Revision Commission
c/o UC Davis School of Law
Davis, CA 95616
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Cite this report as *2017-2018 Annual Report*, 45 Cal. L. Revision Comm'n Reports 283 (2017).

SUMMARY OF WORK OF COMMISSION

Recommendations to the 2017 Legislature

In 2017, bills effectuating three Commission recommendations were enacted, relating to the following subjects:

- Recognition of Tribal and Foreign Court Money Judgments
- Government Interruption of Communication Service
- Mechanics Liens in Common Interest Developments

Recommendations to the 2018 Legislature

In 2018, the Commission plans to seek the introduction of legislation effectuating Commission recommendations on the following subjects:

- Homestead Exemption: Dwelling
- Deadly Weapons: Minor Clean-Up Issues
- Revocable Transfer on Death Deed: Recordation
- Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct

Commission Activities Planned for 2018

During 2018, the Commission intends to work on the following major topics: revision of the Fish and Game Code, California Public Records Act clean-up, liability of nonprobate transfers for creditor claims and family protections, revocable transfer on death deeds, estate disposition without administration, trial court restructuring, and eminent domain pre-condemnation activities.

The Commission will work on other topics as time permits.

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STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION
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SENATOR RICHARD ROTH

December 1, 2017

To: The Honorable Edmund G. Brown, Jr.
Governor of California, and
The Legislature of California

In conformity with Government Code Section 8293, the California Law Revision Commission submits this report of its activities during 2017 and its plans for 2018.

Three Commission recommendations considered by the Legislature in 2017 were enacted into law.

The Commission is grateful to the members of the Legislature who carried Commission-recommended legislation in 2017:

- Assembly Member Brian Maienschein (Recognition of Tribal and Foreign Court Money Judgments)
- Assembly Member Ed Chau (Government Interruption of Communication Service)

- Assembly Member James Gallagher (Mechanics Liens in Common Interest Developments)

The Commission held six one-day meetings in 2017. Meetings were held in Sacramento, Oakland, and Los Angeles.

Respectfully submitted,

Tom Hallinan
Chairperson

2017-2018 ANNUAL REPORT

Introduction

The California Law Revision Commission was created in 1953 and commenced operation in 1954 as the permanent successor to the Code Commission,[1] with responsibility for a continuing substantive review of California statutory and decisional law.[2] The Commission studies the law to discover defects and anachronisms and recommends legislation to make needed reforms.

The Commission ordinarily works on major topics, assigned by the Legislature, that require detailed study and cannot easily be handled in the ordinary legislative process. The Commission's work is independent, nonpartisan, and objective.

The Commission consists of:[3]

- A Member of the Senate appointed by the Rules Committee
- A Member of the Assembly appointed by the Speaker
- Seven members appointed by the Governor with the advice and consent of the Senate
- The Legislative Counsel, who is an ex officio member

The Commission may study only topics that the Legislature has authorized.[4]

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1. See 1953 Cal. Stat. ch. 1445, operative September 9, 1953. The first meeting of the Commission was held on February 23, 1954.

2. See Gov't Code §§ 8280-8298 (statute establishing Law Revision Commission) (Appendix 1 *infra*). See also *1955 Report* [Annual Report for 1954] at 7, 1 Cal. L. Revision Comm'n Reports (1957).

3. For current membership, see "Personnel of Commission" *infra*.

4. Under its general authority, the Commission may study only topics that the Legislature, by concurrent resolution, authorizes for study. See *Calendar of Topics Authorized for Study,* Appendix 2 *infra*. However, the Commission may study and recommend revisions to correct technical or minor substantive defects in state statutes without a prior concurrent resolution. Gov't Code § 8298. Additionally, a concurrent resolution or statute may directly confer authority to study a particular subject. See, e.g., 2016 Cal. Stat. ch. 179 [AB 1779] and 2015

The Commission has submitted 410 recommendations to the Legislature, of which 380 (more than 90%) have been enacted in whole or in substantial part.[5] Commission recommendations have resulted in the enactment of legislation affecting 25,287 sections of California law: 5,227 sections amended, 11,097 sections added, and 8,963 sections repealed.

The Commission's recommendations, reports, and other selected materials are published annually in hardcover volumes. Recent materials are also available through the Internet. A list of past publications and information on obtaining printed or electronic versions of Commission material can be found at the end of this Annual Report.[6]

2018 Legislative Program

In 2018, the Commission plans to seek the introduction of legislation implementing Commission recommendations on the following subjects:

- Homestead Exemption: Dwelling
- Deadly Weapons: Minor Clean-Up Issues
- Revocable Transfer on Death Deed: Recordation
- Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct

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Cal. Stat. ch. 293 [AB 139] (revocable transfer on death deeds); 2014 Cal. Stat. ch. 243 [SB 406] (standards for recognition of tribal and foreign court money judgments); 2013 Cal. Stat. res. ch. 115 [SCR 54] (state and local agency access to customer information from communications service providers); 2006 Cal. Stat. res. ch. 128 [ACR 73] (nonsubstantive reorganization of weapon statutes); 2006 Cal. Stat. ch. 216 [AB 2034] (donative transfer restrictions).

5. See *Legislative Action on Commission Recommendations*, Appendix 3 *infra*.

6. See *Commission Publications*, Appendix 6 *infra*.

Major Studies in Progress

During 2018, the Commission intends to work on the following major topics: revision of the Fish and Game Code, California Public Records Act clean-up, liability of nonprobate transfers for creditor claims and family protections, revocable transfer on death deeds, estate disposition without administration, trial court restructuring, and eminent domain pre-condemnation activities.

The Commission will work on other topics as time permits.

Revision of the Fish and Game Code

The Commission will continue to study the revision of the Fish and Game Code and related statutory law to improve organization, clarify meaning, resolve inconsistencies, eliminate unnecessary or obsolete provisions, standardize terminology, clarify program authority and funding sources, and make other minor improvements, without making any significant substantive change to the effect of the law.[7]

California Public Records Act Clean-Up

The Commission will continue to study the nonsubstantive revision of the California Public Records Act (Gov't Code §§ 6250-6276.48) and related provisions.[8]

Nonprobate Transfers for Creditor Claims and Family Protections

The Commission will continue to study the treatment of creditor claims and family protections, with respect to property passing outside of probate.[9]

Revocable Transfer on Death Deeds

The Commission will continue to study the effect of California's revocable transfer on death deed.[10]

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7. See 2016 Cal. Stat. res. ch. 150.

8. *Id.*

9. *Id.*

10. See 2016 Cal. Stat. ch. 179, § 1 (AB 1779 (Gatto)); 2015 Cal. Stat. ch. 293, § 21 (AB 139 (Gatto)).

Estate Disposition Without Administration

The Commission will continue to study possible defects in existing statutes governing disposition of estates without administration.[11]

Trial Court Restructuring

The Commission will resume work on cleaning up the codes to reflect three major trial court restructuring reforms: (1) trial court unification, (2) enactment of the Lockyer-Isenberg Trial Court Funding Act, and (3) enactment of the Trial Court Employment Protection and Governance Act.[12]

Eminent Domain Pre-Condemnation Activities

The Commission will continue to study whether to codify the holding of *Property Reserve Inc. v Superior Court*, 1 Cal. 5th 151 (2016).[13]

Other Subjects

The studies described above will dominate the Commission's time and resources during 2018. As time permits, the Commission will consider other subjects authorized for study.

Calendar of Topics for Study

The Commission's calendar includes 24 topics authorized by the Legislature for study.[14]

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11. See 2016 Cal. Stat. res. ch. 150.
12. See Gov't Code § 71674; see also 2016 Cal. Stat. res. ch. 150.
13. See 2016 Cal. Stat. res. ch. 150.
14. See *Calendar of Topics Authorized for Study*, Appendix 2 *infra*.

Function and Procedure of Commission

The principal duties of the Commission are to:[15]

(1) Examine the common law and statutes for the purpose of discovering defects and anachronisms.

(2) Receive and consider suggestions and proposed changes in the law from the American Law Institute, the National Conference of Commissioners on Uniform State Laws,[16] bar associations, and other learned bodies, and from judges, public officials, lawyers, and the public generally.

(3) Recommend such changes in the law as it deems necessary to bring California law into harmony with modern conditions.[17]

The Commission is required to file a report at each regular session of the Legislature containing a calendar of topics selected by it for study, listing both studies in progress and topics intended for future consideration. Under its general authority, the Commission may study only topics that the Legislature, by concurrent resolution, authorizes for study.[18] However, the Commission may study and recommend revisions to correct technical or minor substantive

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15. Gov't Code §§ 8280-8298 (statute governing California Law Revision Commission). See Appendix 1 *infra*.

16. The Legislative Counsel, an ex officio member of the Law Revision Commission, serves as a Commissioner of the Commission on Uniform State Laws. See Gov't Code § 10271.

17. Gov't Code § 8289. The Commission is also directed to recommend the express repeal of all statutes repealed by implication, or held unconstitutional by the California Supreme Court or the United States Supreme Court. Gov't Code § 8290. See "Report on Statutes Repealed by Implication or Held Unconstitutional" *infra*.

18. Gov't Code § 8293. Section 8293 requires a concurrent resolution authorizing the Commission to study topics contained in the calendar of topics set forth in the Commission's regular report to the Legislature. Section 8293 also requires that the Commission study any topic that the Legislature by concurrent resolution or statute refers to the Commission for study.

defects in state statutes without a prior concurrent resolution.[19] Additionally, a concurrent resolution[20] or statute[21] may directly confer authority to study a particular subject.

Background Studies and Expert Consultants

The Commission's work on a recommendation typically begins after a background study has been prepared. The background study may be prepared by a member of the Commission's staff or by a specialist in the field who is retained as a consultant. Law professors and practicing attorneys who serve as consultants have already acquired the considerable knowledge necessary to understand the specific problems under consideration, and receive little more than an honorarium for their services.

From time to time, the Commission requests expert assistance from law professors and other legal professionals, who may provide written input or testify at meetings.

Recommendations

After making its preliminary decisions on a subject, the Commission ordinarily distributes a tentative recommendation to

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19. Gov't Code § 8298.

20. For an example of a concurrent resolution referring a specific topic to the Commission for study, see 2013 Cal. Stat. res. ch. 115 [SCR 54] (state and local agency access to customer information from communications service providers).

21. For example, Government Code Section 70219 requires the Commission, in consultation with the Judicial Council, to perform follow-up studies taking into consideration the experience in courts that have unified. For a list of specific studies, see *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm'n Reports 51, 82-86 (1998).

Government Code Section 71674 requires the Commission to recommend repeal of provisions made obsolete by the Trial Court Employment Protection and Governance Act (Gov't Code § 71600 *et seq.*), Lockyer-Isenberg Trial Court Funding Act of 1997 (1997 Cal. Stat. ch. 850), and the implementation of trial court unification.

Pursuant to Code of Civil Procedure Section 681.035, the Commission also has continuing authority to study enforcement of judgments.

Statutory authority may be uncodified. See, e.g., 2016 Cal. Stat. ch. 179 (revocable transfer on death deeds).

interested persons and organizations, including the State Bar, local and specialized bar associations, public interest organizations, and business and professional associations. Notice of the availability of the tentative recommendation is mailed to interested persons on the Commission's mailing list and publicized in legal newspapers and other relevant publications. Notice is also posted on the Commission's website and emailed to interested persons.

Comments received on the tentative recommendation are considered by the Commission in determining what recommendation, if any, will be made to the Legislature.[22] When the Commission has reached a conclusion on the matter,[23] its recommendation to the Legislature (including a draft of any necessary legislation) is published and distributed in printed form and on the Internet. If a background study has been prepared in connection with the recommendation, it may be published by the Commission or in a law review.[24]

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22. For a step-by-step description of the procedure followed by the Commission in preparing the 1963 governmental liability statute, see DeMoully, *Fact Finding for Legislation: A Case Study,* 50 A.B.A. J. 285 (1964). The procedure followed in preparing the Evidence Code is described in 7 Cal. L. Revision Comm'n Reports 3 (1965). See also Gaal, *Evidence Legislation in California,* 36 S.W.U. L. Rev. 561, 563-69 (2008); Quillinan, *The Role and Procedures of the California Law Revision Commission in Probate and Trust Law Changes,* 8 Est. Plan. & Cal. Prob. Rep. 130-31 (Cal. Cont. Ed. Bar 1987).

23. Occasionally, one or more members of the Commission may not join in all or part of a recommendation submitted to the Legislature by the Commission. Dissents are noted in the minutes of the meeting at which the recommendation is approved.

24. For recent background studies published in law reviews, see Méndez, *California Evidence Code—Federal Rules of Evidence, IX. General Provisions*, 44 U.S.F. L. Rev. 891 (2010); Méndez, *California Evidence Code—Federal Rules of Evidence, VIII. Judicial Notice*, 44 U.S.F. L. Rev. 141 (2009); Méndez, *California Evidence Code—Federal Rules of Evidence, VII. Relevance: Definition and Limitations*, 42 U.S.F. L. Rev. 329 (2007); Méndez, *California Evidence Code—Federal Rules of Evidence, VI. Authentication and the Best and Secondary Evidence Rules*, 41 U.S.F. L. Rev. 1 (2006); Méndez, *California Evidence Code—Federal Rules of Evidence, V. Witnesses: Conforming the*

Official Comments

The Commission ordinarily prepares an official Comment explaining each section it recommends for enactment, amendment, or repeal. The Comments are included in the Commission's published recommendations. A Comment indicates the derivation of a section and often explains its purpose, its relation to other law, and potential issues concerning its meaning or application.[25]

Commission Materials as Legislative History

Commission recommendations are printed and sent to both houses of the Legislature, as well as to the Legislative Counsel and Governor.[26] Receipt of a recommendation by the Legislature is

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California Evidence Code to the Federal Rules of Evidence, 39 U.S.F. L. Rev. 455 (2005); Alford, *Report to Law Revision Commission Regarding Recommendations for Changes to California Arbitration Law*, 4 Pepp. Disp. Resol. L.J. 1 (2004); Méndez, *California Evidence Code—Federal Rules of Evidence, IV. Presumptions and Burden of Proof: Conforming the California Evidence Code to the Federal Rules of Evidence*, 38 U.S.F. L. Rev. 139 (2003); Méndez, *California Evidence Code—Federal Rules of Evidence, I. Hearsay and Its Exceptions: Conforming the Evidence Code to the Federal Rules*, 37 U.S.F. L. Rev. 351 (2003); Méndez, *California Evidence Code—Federal Rules of Evidence, II. Expert Testimony and the Opinion Rule: Conforming the Evidence Code to the Federal Rules*, 37 U.S.F. L. Rev. 411 (2003); Méndez, *California Evidence Code—Federal Rules of Evidence, III. The Role of Judge and Jury: Conforming the Evidence Code to the Federal Rules,* 37 U.S.F. L. Rev. 1003 (2003).

For a list of background studies published in law reviews before 2003, see 32 Cal. L. Revision Comm'n Reports 585 n.14 (2002); 20 Cal. L. Revision Comm'n Reports 198 n.16 (1990); 19 Cal. L. Revision Comm'n Reports 513 n.22 (1988); 18 Cal. L. Revision Comm'n Reports 212 n.17, 1713 n.20 (1986); 17 Cal. L. Revision Comm'n Reports 819 n.6 (1984); 16 Cal. L. Revision Comm'n Reports 2021 n.6 (1982); 13 Cal. L. Revision Comm'n Reports 1628 n.5 (1976); 11 Cal. L. Revision Comm'n Reports 1008 n.5, 1108 n.5 (1973); 10 Cal. L. Revision Comm'n Reports 1108 n.5 (1971).

25. Commission Comments are published by LexisNexis and Thomson Reuters in their print editions of the annotated codes, and printed in selected codes prepared by other publishers. Comments are also available on Westlaw and LexisNexis.

26. See Gov't Code §§ 8291, 9795, 11094-11099; see also Reynolds v. Superior Court, 12 Cal. 3d 834, 847 n.18, 528 P.2d 45, 53 n.18, 117 Cal. Rptr.

noted in the legislative journals, and the recommendation is referred to the appropriate policy committee.[27]

The bill introduced to effectuate a Commission recommendation is assigned to legislative committees charged with study of the matter in depth.[28] A copy of the recommendation is provided to legislative committee members and staff before the bill is heard and throughout the legislative process. The legislative committees rely on the recommendation in analyzing the bill and making recommendations to the Legislature concerning it.[29]

If an amendment is made to the bill that renders one of the Commission's original Comments inconsistent, the Commission generally will adopt a revised Comment and provide it to the committee. The Commission also provides this material to the Governor's office once the bill has passed the Legislature and is before the Governor for action. These materials are a matter of public record.

Until the mid-1980s, a legislative committee, on approving a bill implementing a Commission recommendation, would adopt the Commission's recommendation as indicative of the committee's

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437, 445 n.18 (1974) (Commission "submitted to the Governor and the Legislature an elaborate and thoroughly researched study").

27. See, e.g., Senate J. Aug. 18, 2003, at 2031 (noting receipt of 2002-2003 recommendations and their transmittal to the Committee on Judiciary).

28. See, e.g., Office of Chief Clerk, California State Assembly, California's Legislature 126-27 (2000) (discussing purpose and function of legislative committee system).

29. The Commission does not concur with the suggestion of the court in *Conservatorship of Wendland*, 26 Cal. 4th 519, 542, 28 P.3d 151, 166, 110 Cal. Rptr. 2d 412, 430 (2001), that a Commission Comment might be entitled to less weight based on speculation that the Legislature may not have read and endorsed every statement in the Commission's report. That suggestion belies the operation of the committee system in the Legislature. See White, *Sources of Legislative Intent in California*, 3 Pac. L.J. 63, 85 (1972) ("The best evidence of legislative intent must surely be the records of the legislature itself and the reports which the committees relied on in recommending passage of the legislation.").

intent in approving the bill.[30] If a Comment required revision, the revised Comment would be adopted as a legislative committee Comment. The committee's report would be printed in the journal of the relevant house.[31]

The Legislature has discontinued the former practice due to increased committee workloads and an effort to decrease the volume of material reprinted in the legislative journals. Under current practice, a legislative committee relies on Commission materials in its analysis of a bill, but does not separately adopt the materials. Instead, the Commission makes a report detailing the legislative history of the bill, including any revised Comments. Bill reports are published as appendices to the Commission's annual reports.[32]

Use of Commission Materials To Determine Legislative Intent

Commission materials that have been placed before and considered by the Legislature are legislative history, are declarative of legislative intent,[33] and are entitled to great weight in construing

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30. See, e.g., Baldwin v. State, 6 Cal. 3d 424, 433, 491 P.2d 1121, 1126, 99 Cal. Rptr. 145, 150 (1972). For a description of legislative committee reports adopted in connection with the bill that became the Evidence Code, see *Arellano v. Moreno*, 33 Cal. App. 3d 877, 884, 109 Cal. Rptr. 421, 426 (1973).

31. For an example of such a report, see *Report of Senate Committee on Judiciary on Assembly Bill 3472*, Senate J. June 14, 1984, *reprinted in* 18 Cal. L. Revision Comm'n Reports 1, 115 (1986).

32. Commission reports have in the past been published as well in the legislative journals. See, e.g., *In re* Marriage of Neal, 153 Cal. App. 3d 117, 124, 200 Cal. Rptr. 341, 345 (1984) (noting that Chairman of Senate Judiciary Committee, when reporting on AB 26 on Senate floor, moved that revised Commission report be printed in Senate Journal as evidence of legislative intent).

33. See, e.g., Fair v. Bakhtiari, 40 Cal. 4th 189, 195, 147 P.3d 653, 657, 51 Cal. Rptr. 3d 871, 875 (2006) ("The Commission's official comments are deemed to express the Legislature's intent."); People v. Williams, 16 Cal. 3d 663, 667-68, 547 P.2d 1000, 128 Cal. Rptr. 888 (1976) ("The official comments of the California Law Revision Commission on the various sections of the Evidence Code are declarative of the intent not only of the draft[ers] of the code but also of the legislators who subsequently enacted it.").

statutes.[34] The materials are a key interpretive aid for practitioners as well as courts,[35] and courts may judicially notice and rely on them.[36] Courts at all levels of the state[37] and federal[38] judicial systems depend on Commission materials to construe statutes

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34. See, e.g., Dep't of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd., 40 Cal. 4th 1, 12-13 n.9, 145 P.3d 462, 469 n.9, 50 Cal. Rptr. 3d 585, 593 n.9 (2006) (Commission's official comments are persuasive evidence of Legislature's intent); Hale v. S. Cal. IPA Med. Group, Inc., 86 Cal. App. 4th 919, 927, 103 Cal. Rptr. 2d 773, 778 (2001):

> In an effort to discern legislative intent, an appellate court is entitled to take judicial notice of the various legislative materials, including committee reports, underlying the enactment of a statute. (*Kern v. County of Imperial* (1990) 226 Cal. App. 3d 391, 400, fn. 8 [276 Cal. Rptr. 524]; *Coopers & Lybrand v. Superior Court* (1989) 212 Cal. App. 3d 524, 535, fn. 7 [260 Cal. Rptr. 713].) In particular, reports and interpretive opinions of the Law Revision Commission are entitled to great weight. (*Schmidt v. Southern Cal. Rapid Transit Dist.* (1993) 14 Cal. App. 4th 23, 30, fn. 10 [17 Cal. Rptr. 2d 340].)

35. *Cf.* 7 B. Witkin, Summary of California Law *Constitutional Law* § 123, at 230 (10th ed. 2005) (Commission reports as aid to construction); Gaylord, *An Approach to Statutory Construction*, 5 Sw. U. L. Rev. 349, 384 (1973).

36. See, e.g., Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc., 133 Cal. App. 4th 26, 34 Cal. Rptr. 3d 520 (2005) (providing overview of materials that may be judicially noticed in determining legislative intent); *Hale*, 86 Cal. App. 4th at 927; Barkley v. City of Blue Lake, 18 Cal. App. 4th 1745, 1751 n.3, 23 Cal. Rptr. 2d 315, 318-19 n.3 (1993).

37. See, e.g., Sullivan v. Delta Air Lines, Inc., 15 Cal. 4th 288, 298, 935 P.2d 781, 63 Cal. Rptr. 2d 74 (1997) (California Supreme Court); Admin. Mgmt. Services, Inc. v. Fid. Deposit Co. of Md., 129 Cal. App. 3d 484, 488, 181 Cal. Rptr. 141 (1982) (court of appeal); Rossetto v. Barross, 90 Cal. App. 4th Supp. 1, 110 Cal. Rptr. 2d 255 (2001) (appellate division of superior court).

38. See, e.g., California v. Green, 399 U.S. 149, 154 n.3 (1970) (United States Supreme Court); S. Cal. Bank v. Zimmerman (*In re* Hilde), 120 F.3d 950, 953 (9th Cir. 1997) (federal court of appeals); Williams v. Townsend, 283 F. Supp. 580, 582 (C.D. Cal. 1968) (federal district court); Ford Consumer Fin. Co. v. McDonell (*In re* McDonell), 204 B.R. 976, 978-79 (B.A.P. 9th Cir. 1996) (bankruptcy appellate panel); *In re* Garrido, 43 B.R. 289, 292-93 (Bankr. S.D. Cal. 1984) (bankruptcy court).

enacted on Commission recommendation.[39] Appellate courts have cited Commission materials in more than a thousand published opinions.[40]

Commission materials have been used as direct support for a court's interpretation of a statute,[41] as one of several indicia of legislative intent,[42] to explain the public policy behind a statute,[43] and on occasion to demonstrate (by their silence) the Legislature's intention not to change the law.[44] The Legislature's failure to adopt

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39. See, e.g., Jevne v. Superior Court, 35 Cal. 4th 935, 947, 111 P.3d 954, 962, 28 Cal. Rptr. 3d 685, 694-95 (2005) (Commission report entitled to substantial weight in construing statute); Collection Bureau of San Jose v. Rumsey, 24 Cal. 4th 301, 308 & n.6, 6 P.3d 713, 718 & n.6, 99 Cal. Rptr. 2d 792, 797 & n.6 (2000) (Comments to reenacted statute reiterate the clear understanding and intent of original enactment); Brian W. v. Superior Court, 20 Cal. 3d 618, 623, 574 P.2d 788, 791, 143 Cal. Rptr. 717, 720 (1978) (Comments persuasive evidence of Legislature's intent); Volkswagen Pac., Inc. v. City of Los Angeles, 7 Cal. 3d 48, 61-63, 496 P.2d 1237, 1247-48, 101 Cal. Rptr. 869, 879-80 (1972) (Comments evidence clear legislative intent of law); Van Arsdale v. Hollinger, 68 Cal. 2d 245, 249-50, 437 P.2d 508, 511, 66 Cal. Rptr. 20, 23 (1968) (Comments entitled to substantial weight), overruled on other grounds by Privette v. Superior Court, 5 Cal. 4th 689, 854 P.2d 721, 21 Cal. Rptr. 2d 72 (1993); County of Los Angeles v. Superior Court, 62 Cal. 2d 839, 843-44, 402 P.2d 868, 870-71, 44 Cal. Rptr. 796, 798-99 (1965) (statutes reflect policy recommended by Commission).

40. It should be noted that the Law Revision Commission should not be cited as the "Law Revision Committee" or as the "Law Review Commission." See, e.g., Venerable v. City of Sacramento, 185 F. Supp. 2d 1128, 1132 (E.D. Cal. 2002) (Law Revision "Committee"); Ryan v. Garcia, 27 Cal. App. 4th 1006, 1010 n.2, 33 Cal. Rptr. 2d 158, 160 n.2 (1994) (Law "Review" Commission).

41. See, e.g., People v. Ainsworth, 45 Cal. 3d 984, 1015, 755 P.2d 1017, 1036, 248 Cal. Rptr. 568, 586 (1988).

42. See, e.g., Heieck & Moran v. City of Modesto, 64 Cal. 2d 229, 233 n.3, 411 P.2d 105, 108 n.3, 49 Cal. Rptr. 377, 380 n.3 (1966).

43. See, e.g., Southern Cal. Gas Co. v. Public Utils. Comm'n, 50 Cal. 3d 31, 38 n.8, 784 P.2d 1373, 1376 n.8, 265 Cal. Rptr. 801, 804 n.8 (1990).

44. See, e.g., State *ex rel*. State Pub. Works Bd. v. Stevenson, 5 Cal. App. 3d 60, 64-65, 84 Cal. Rptr. 742, 745-46 (1970) (finding that Legislature had no intention of changing existing law where "not a word" in Commission's reports indicated intent to abolish or emasculate well-settled rule).

a Commission recommendation may be used as evidence of legislative intent to reject the proposed rule.[45]

Commission materials are entitled to great weight, but they are not conclusive.[46] While the Commission endeavors in Comments to explain any changes in the law made by a section, the Commission does not claim that every consistent or inconsistent case is noted in the Comments,[47] nor can it anticipate judicial conclusions as to the significance of existing case authorities.[48] Hence, failure of the Comment to note every change the recommendation would make in prior law, or to refer to a consistent or inconsistent judicial decision, is not intended to, and should not, influence the construction of a clearly stated statutory provision.[49]

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45. See, e.g., McWilliams v. City of Long Beach, 56 Cal. 4th 613, 623-24, 300 P.3d 886, 155 Cal. Rptr. 3d 817 (2013); Nestle v. City of Santa Monica, 6 Cal. 3d 920, 935-36, 496 P.2d 480, 490, 101 Cal. Rptr. 568, 578 (1972).

46. See, e.g., Redevelopment Agency v. Metropolitan Theatres Corp., 215 Cal. App. 3d 808, 812, 263 Cal. Rptr. 637, 639 (1989) (Comment does not override clear and unambiguous statute). Commission materials are but one indicium of legislative intent. See, e.g., Estate of Joseph, 17 Cal. 4th 203, 216, 949 P.2d 472, 480, 70 Cal. Rptr. 2d 619, 627 (1998). The accuracy of a Comment may also be questioned. See, e.g., Buzgheia v. Leasco Sierra Grove, 30 Cal. App. 4th 766, 774, 36 Cal. Rptr. 2d 144, 149 (1994); *In re* Thomas, 102 B.R. 199, 202 (Bankr. E.D. Cal. 1989).

47. *Cf.* People v. Coleman, 8 Cal. App. 3d 722, 731, 87 Cal. Rptr. 554, 559 (1970) (Comments make clear intent to reflect existing law even if not all supporting cases are cited).

48. See, e.g., Arellano v. Moreno, 33 Cal. App. 3d 877, 885, 109 Cal. Rptr. 421, 426-27 (1973) (noting that decisional law cited in Comment was distinguished by the California Supreme Court in a case decided after enactment of the Commission recommendation).

49. The Commission does not concur in the *Kaplan* approach to statutory construction. See Kaplan v. Superior Court, 6 Cal. 3d 150, 158-59, 491 P.2d 1, 5-6, 98 Cal. Rptr. 649, 653-54 (1971). For a reaction to the problem created by the *Kaplan* approach, see *Recommendation Relating to Erroneously Ordered Disclosure of Privileged Information,* 11 Cal. L. Revision Comm'n Reports 1163 (1973); 1974 Cal. Stat. ch. 227.

Some types of Commission materials are not properly relied on as evidence of legislative intent. On occasion, courts have cited preliminary Commission materials such as tentative recommendations, correspondence, and staff memoranda and drafts in support of their construction of a statute.[50] While these materials may be indicative of the Commission's intent in proposing the legislation, only the Legislature's intent in adopting the legislation is entitled to weight in construing the statute.[51] Unless preliminary Commission materials were before the Legislature during its consideration of the legislation, those materials are not legislative history and are not relevant in determining the Legislature's intention in adopting the legislation.[52]

A Commission study prepared after enactment of a statute that analyzes the statute is not part of the legislative history of the statute.[53] However, documents prepared by or for the Commission

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50. See, e.g., Rojas v. Superior Court, 33 Cal. 4th 407, 93 P.3d 260, 15 Cal. Rptr. 3d 643 (2005) (tentative recommendation, correspondence, and staff memorandum and draft); Yamaha Corp. v. State Bd. of Equalization, 19 Cal. 4th 1, 12-13, 960 P.2d 1031, 1037, 78 Cal. Rptr. 2d 1, 7 (1998) (tentative recommendation). However, in some cases, proposed legislation will be based on a tentative, rather than final, Commission recommendation. See, e.g., Estate of Archer, 193 Cal. App. 3d 238, 243, 239 Cal. Rptr. 137, 140 (1987). In that event, reliance on the tentative recommendation is proper.

See also Ilkhchooyi v. Best, 37 Cal. App. 4th 395, 406, 45 Cal. Rptr. 2d 766, 772-73 (1995) (letter responding to tentative recommendation); D. Henke, California Legal Research Handbook § 3.51 (1971) (background studies).

51. *Cf.* Rittenhouse v. Superior Court, 235 Cal. App. 3d 1584, 1589, 1 Cal. Rptr. 2d 595, 598 (1991) (linking Commission's intent and Legislature's intent); Guthman v. Moss, 150 Cal. App. 3d 501, 508, 198 Cal. Rptr. 54, 58 (1984) (determination of Commission's intent used to infer Legislature's intent).

52. The Commission concurs with the opinion of the court in *Juran v. Epstein*, 23 Cal. App. 4th 882, 894 n.5, 28 Cal. Rptr. 2d 588, 594 n.5 (1994), that staff memoranda to the Commission should generally not be considered as legislative history.

53. See, e.g., Duarte v. Chino Community Hosp., 72 Cal. App. 4th 849, 856 n.3, 85 Cal. Rptr. 2d 521, 525 n.3 (1999).

may be used by the courts for their analytical value, apart from their role in statutory construction.[54]

Publications

Commission publications are distributed to the Governor, the Secretary of the Senate, the Chief Clerk of the Assembly, and the Legislative Counsel.[55] Commission materials are also distributed to interest groups, lawyers, law professors, courts, district attorneys, law libraries, and other individuals requesting materials.

The Commission's reports, recommendations, and studies are published in hardcover volumes that serve as a permanent record of the Commission's work and, it is believed, are a valuable contribution to the legal literature of California. These volumes are available at many county law libraries and at some other libraries. About half of the hardcover volumes are out of print, but others are available for purchase.[56] Publications that are out of print are available as electronic files.[57]

Electronic Publication and Internet Access

Since 1995, the Commission has provided a variety of information on the Internet, including online material and downloadable files.[58] Interested persons with Internet access can find the current agenda,

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54. See. e.g., Sierra Club v. San Joaquin Local Agency Formation Comm'n, 21 Cal. 4th 489, 502-03, 981 P.2d 543, 551-52, 87 Cal. Rptr. 2d 702, 712 (1999) (unenacted Commission recommendation useful as "opinion of a learned panel"); Hall v. Hall, 222 Cal. App. 3d 578, 585, 271 Cal. Rptr. 773, 777 (1990) (Commission staff report most detailed analysis of statute available); W.E.J. v. Superior Court, 100 Cal. App. 3d 303, 309-10, 160 Cal. Rptr. 862, 866 (1979) (law review article prepared for Commission provides insight into development of law); Schonfeld v. City of Vallejo, 50 Cal. App. 3d 401, 407 n.4, 123 Cal. Rptr. 669, 673 n.4 (1975) (court indebted to many studies of Commission for analytical materials).

55. See Gov't Code § 8291. For limitations on Section 8291, see Gov't Code §§ 9795, 11094-11099.

56. See *Commission Publications*, Appendix 6 *infra*.

57. See "Electronic Publication and Internet Access" *infra*.

58. The URL for the Commission's website is <http://www.clrc.ca.gov>.

meeting minutes, background studies, tentative and final recommendations, staff memoranda, and general background information.

Since 2002, all Commission publications and staff memoranda are available as electronic files. Recent publications and memoranda may be downloaded from the Commission's website. Files that are not on the website are available on request.[59]

Electronic Mail

Email commenting on Commission proposals or suggesting issues for study is given the same consideration as letter correspondence. Email to the Commission may be sent to *commission@clrc.ca.gov*.

The Commission distributes the majority of its meeting agendas, staff memoranda, and other written materials electronically, by means of its website and email distribution lists. The Commission encourages use of email as an inexpensive and expedient means of communication with the Commission.

MCLE Credit

The Commission is approved by the State Bar of California as a minimum continuing legal education provider. Participants and attendees at Commission meetings may be eligible to receive MCLE credit. To receive credit for participation or attendance at a meeting, a person must register at the meeting. Meeting materials are available free of charge on the Internet[60] or may be purchased in advance from the Commission.

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59. See *Commission Publications*, Appendix 6 *infra*.

60. See "Electronic Publication and Internet Access" *supra*.

Personnel of Commission[61]

As of December 1, 2017, the following persons were members of the Law Revision Commission:

Legislative Members[62]

Assembly Member Ed Chau
Senator Richard Roth

Members Appointed by Governor[63]	***Term Expires***
Tom Hallinan, Ceres *Chairperson*	October 1, 2019
Jane McAllister, Hilmar *Vice-Chairperson*	October 1, 2019
Susan Duncan Lee, San Francisco	October 1, 2019
Victor King, La Crescenta	October 1, 2019
Crystal Miller-O'Brien, Los Angeles	October 1, 2021
Vacant	October 1, 2021
Vacant	October 1, 2021

Legislative Counsel[64]

Diane F. Boyer-Vine, Sacramento

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61. See also *Biographies of 2017 Commissioners*, Appendix 5 *infra*.

62. The Senate and Assembly members of the Commission serve at the pleasure of their respective appointing powers, the Senate Committee on Rules and the Speaker of the Assembly. Gov't Code § 8281.

63. Seven Commission members are appointed by the Governor with the advice and consent of the Senate. Gov't Code § 8281. These Commissioners serve staggered four-year terms. *Id*. The provision in Government Code Section 8281 to the effect that Commission members appointed by the Governor hold office until the appointment and qualification of their successors has been superseded by the rule in Government Code Section 1774 declaring a vacancy if there is no reappointment 60 days following expiration of the term of office. See also Gov't Code § 1774.7 (Section 1774 overrides contrary special rules unless specifically excepted).

64. The Legislative Counsel serves on the Commission by virtue of office. Gov't Code § 8281.

On October 1, 2017, Commissioners Damian Capozzola and Taras Kihiczak ended their service as Commissioners.

The following persons are on the Commission's staff:

Legal

BRIAN HEBERT
Executive Director

BARBARA S. GAAL
Chief Deputy Counsel

KRISTIN BURFORD
Staff Counsel

STEVE COHEN
Staff Counsel

Administrative-Secretarial

DEBORA LARRABEE
Associate Governmental Program Analyst

VICTORIA V. MATIAS
Secretary

In addition, Karin Bailey, Damian Caravez, Greg Gonzalez, and Elisa Shieh, all from the University of California, Davis, School of Law, worked for the Commission in 2017.

Commission Budget

The Commission's operations for the 2017-18 fiscal year have been funded through a reimbursement from the California Office of Legislative Counsel, in the amount of $958,000.

That reimbursement is supplemented by monies budgeted for income generated from the sale of documents to the public, to recover the cost of the documents.

The Commission also receives substantial donations of necessary library materials from the legal publishing community, especially California Continuing Education of the Bar, LexisNexis, and Thomson Reuters. In addition, the Commission receives benchbooks from the California Center for Judicial Education and Research (CJER). The Commission also receives a copy of the McGeorge Law Review, annually. The Commission receives

additional library materials from other legal publishers and from other law reform agencies on an exchange basis, and has full access to the law libraries at the University of California, Davis, School of Law and at Stanford Law School. The Commission is grateful for these contributions.

Other Activities

The Commission is directed by statute to cooperate with bar associations and other learned, professional, or scientific associations, institutions, or foundations in any manner suitable for the fulfillment of the purposes of the Commission.[65]

National Conference of Commissioners on Uniform State Laws

The Commission is directed by statute to receive and consider proposed changes in the law recommended by the National Conference of Commissioners on Uniform State Laws.[66] Legislative Counsel and Commission member Diane F. Boyer-Vine is a member of the California Commission on Uniform State Laws and the National Conference. The Commission's Executive Director, Brian Hebert, is an associate member of the National Conference.

Other Commissioner and Staff Activities

On March 29, 2017, Executive Director Brian Hebert participated in a panel discussion conducted by the Public Law Section of the Sacramento County Bar Association, on Emerging Issues in the California Public Records Act (Gov't Code §§ 6250-6276.48), with a focus on the Law Revision Commission's ongoing study of a nonsubstantive revision of that act and related provisions.

On September 19, 2017, Executive Director Brian Hebert participated in a panel discussion at the University of California, Davis, School of Law, on law student opportunities in the legislative process, with a focus on the work of the Law Revision Commission.

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65. Gov't Code § 8296.

66. Gov't Code § 8289.

Legislative History of Recommendations in the 2017 Legislative Session

In 2017, bills to effectuate three Commission recommendations were introduced. All three proposals were enacted.

Recognition of Tribal and Foreign Court Money Judgments

Assembly Bill 905 (2017 Cal. Stat. ch. 168) was introduced in 2017 by Assembly Member Brian Maienschein. The bill effectuated the Commission's recommendation on *Recognition of Tribal and Foreign Court Money Judgments*, 44 Cal. L. Revision Comm'n Reports 611 (2016).

The measure was enacted, with amendments. See *Report of the California Law Revision Commission on Chapter 168 of the Statutes of 2017 (Assembly Bill 905)*, 45 Cal. L. Revision Comm'n Reports ___ (2017) (Appendix 4, *infra)*.

Government Interruption of Communication Service

Assembly Bill 1034 (2017 Cal. Stat. ch. 322) was introduced in 2017 by Assembly Member Ed Chau. The bill effectuated the Commission's recommendation on *Government Interruption of Communication Service*, 44 Cal. L. Revision Comm'n Reports 681 (2016).

The measure was enacted, with amendments.

Mechanics Liens in Common Interest Developments

Assembly Bill 534 (2017 Cal. Stat. ch. 44) was introduced in 2017 by Assembly Member James Gallagher. The bill effectuated the Commission's recommendation on *Mechanics Liens and Common Area*, 44 Cal. L. Revision Comm'n Reports 739 (2016).

The measure was enacted, with amendments.

Report on Statutes Repealed by Implication or Held Unconstitutional

Government Code Section 8290 provides:

> The commission shall recommend the express repeal of all statutes repealed by implication, or held unconstitutional by the Supreme Court of the state or the Supreme Court of the United States.

Pursuant to this directive, the Commission has reviewed the decisions of the United States Supreme Court and the California Supreme Court published since the Commission's last Annual Report was prepared[67] and has the following to report:

- One decision holding a state statute repealed by implication has been found.
- No decision of the United States Supreme Court holding a state statute unconstitutional has been found.
- No decision of the California Supreme Court holding a state statute unconstitutional has been found.

In *Briggs v. Brown*, 1 Cal. 5th 151, 400 P.3d 29, 221 Cal. Rptr. 3d 465 (2017), the California Supreme Court held that Proposition 66, the Death Penalty Reform and Savings Act of 2016, a citizen initiative, repealed by implication provisions of Penal Code Section 1506 that require a prosecution appeal in a capital habeas corpus proceeding to be taken to the California Supreme Court. The court held that the enactment by the initiative of Penal Code Section 1509.1(a), which authorizes either party to appeal the decision of a superior court on a capital habeas corpus petition "to the court of appeal," demonstrated a clear intent by the electorate to supersede the contrary provisions of Section 1506.

Recommendations

The Commission respectfully recommends that the Legislature authorize the Commission to continue its study of the topics previously authorized.[68]

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67. This study has been carried through opinions published on or before November 1, 2017.

68. See discussion under "Calendar of Topics for Study" *supra*; *Calendar of Topics Authorized for Study*, Appendix 2 *infra*.

Pursuant to the mandate imposed by Government Code Section 8290, the Commission recommends the repeal of the provisions referred to under "Report on Statutes Repealed by Implication or Held Unconstitutional," *supra*, to the extent they have been held unconstitutional, and have not been amended, reformed, or repealed.

APPENDIX 1

STATUTE GOVERNING THE CALIFORNIA LAW REVISION COMMISSION

(Government Code Sections 8280-8298*)

§ 8280. Creation

8280. There is created in the State Government the California Law Revision Commission.

§ 8281. Membership

8281. The commission consists of one Member of the Senate appointed by the Committee on Rules, one Member of the Assembly appointed by the Speaker, and seven additional members appointed by the Governor with the advice and consent of the Senate. The Legislative Counsel shall be an ex officio member of the commission.

The Members of the Legislature appointed to the commission shall serve at the pleasure of the appointing power and shall participate in the activities of the commission to the extent that the participation is not incompatible with their respective positions as Members of the Legislature. For the purposes of this article, those Members of the Legislature shall constitute a joint interim investigating committee on the subject of this article and as a joint interim investigating committee shall have the powers and duties imposed upon those committees by the Joint Rules of the Senate and Assembly.

The members appointed by the Governor shall be appointed for a term of four years and shall hold office until the appointment and qualification of their successors. The terms of the members first appointed shall not commence earlier than October 1, 1953, and

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*Added by 1984 Cal. Stat. ch. 1335, § 2; see also 1985 Cal. Stat. ch. 106, § 45 (amending Section 8295); 1989 Cal. Stat. ch. 152, § 1 (adding Section 8298), 2004 Cal. Stat. ch. 193, § 33 (amending Section 8293). Formerly Gov't Code §§ 10300-10340, added by 1953 Cal. Stat. ch. 1445, § 2; amended by 1960 Cal. Stat. ch. 61, § 1 (1st Ex. Sess.); 1965 Cal. Stat. ch. 371, § 110; 1978 Cal. Stat. ch. 228, § 1; 1981 Cal. Stat. ch. 1106, § 2.

shall expire as follows: four on October 1, 1955, and three on October 1, 1957. When a vacancy occurs in any office filled by appointment by the Governor, he or she shall appoint a person to the office, who shall hold office for the balance of the unexpired term of his or her predecessor.

Note. The provision in the third paragraph to the effect that Commission members appointed by the Governor hold office until appointment and qualification of their successors is superseded by the rule in Government Code Section 1774 declaring a vacancy if there is no reappointment 60 days following expiration of the term of office. See also Gov't Code § 1774.7 (Section 1774 overrides contrary special rules unless specifically excepted).

§ 8282. Compensation and expenses

8282. (a) The members of the commission shall serve without compensation, except that each member appointed by the Governor shall receive fifty dollars ($50) for each day's attendance at a meeting of the commission.

(b) In addition, each member shall be allowed actual expenses incurred in the discharge of his or her duties, including travel expenses.

Note. Government Code Section 11564.5 provides a per diem compensation of $100, notwithstanding any other provision of law.

§ 8283. Chairperson

8283. The commission shall select one of its members chairperson.

§ 8284. Executive secretary

8284. The commission may appoint an executive secretary and fix his or her compensation, in accordance with law.

§ 8285. Employees

8285. The commission may employ and fix the compensation, in accordance with law, of such professional, clerical and other assistants as may be necessary.

§ 8286. Assistance of state

8286. The material of the State Library shall be made available to the commission. All state agencies, and other official state organizations, and all persons connected therewith shall give the commission full information, and reasonable assistance in any matters of research requiring recourse to them, or to data within their knowledge or control.

§ 8287. Assistance of bar

8287. The Board of Governors of the State Bar shall assist the commission in any manner the commission may request within the scope of its powers or duties.

§ 8288. Political activities of commissioners and staff

8288. No employee of the commission and no member appointed by the Governor shall, with respect to any proposed legislation concerning matters assigned to the commission for study pursuant to Section 8293, advocate the passage or defeat of the legislation by the Legislature or the approval or veto of the legislation by the Governor or appear before any committee of the Legislature as to such matters unless requested to do so by the committee or its chairperson. In no event shall an employee or member of the commission appointed by the Governor advocate the passage or defeat of any legislation or the approval or veto of any legislation by the Governor, in his or her official capacity as an employee or member.

§ 8289. Duties of commission

8289. The commission shall, within the limitations imposed by Section 8293:

(a) Examine the common law and statutes of the state and judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms.

(b) Receive and consider proposed changes in the law recommended by the American Law Institute, the National Conference of Commissioners on Uniform State Laws, any bar association or other learned bodies.

(c) Receive and consider suggestions from judges, justices, public officials, lawyers, and the public generally as to defects and anachronisms in the law.

(d) Recommend, from time to time, such changes in the law as it deems necessary to modify or eliminate antiquated and inequitable rules of law, and to bring the law of this state into harmony with modern conditions.

§ 8290. Unconstitutional and impliedly repealed statutes

8290. The commission shall recommend the express repeal of all statutes repealed by implication, or held unconstitutional by the Supreme Court of the state or the Supreme Court of the United States.

§ 8291. Submission and distribution of reports

8291. The commission shall submit its reports, and its recommendations as to revision of the laws, to the Governor and the Legislature, and shall distribute them to the Governor, the Members of the Legislature, and the heads of all state departments.

Note. Section 8291 is limited by later-enacted rules governing distribution of state reports set out in Government Code Sections 9795 and 11094-11099.

§ 8292. Contents of reports

8292. The commission may, within the limitations imposed by Section 8293, include in its report the legislative measures proposed by it to effect the adoption or enactment of the proposed revision. The reports may be accompanied by exhibits of various changes, modifications, improvements, and suggested enactments prepared or proposed by the commission with a full and accurate index thereto.

§ 8293. Calendar of topics

8293. 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.

§ 8294. Printing of reports

8294. The reports, exhibits, and proposed legislative measures shall be printed by the State Printing Office under the supervision of the commission. The exhibits shall be so printed as to show in the readiest manner the changes and repeals proposed by the commission.

§ 8295. Cooperation with legislative committees

8295. The commission shall confer and cooperate with any legislative committee on revision of the law and may contract with any committee for the rendition of service, by either for the other, in the work of revision.

§ 8296. Cooperation with bar and other associations

8296. The commission may cooperate with any bar association or other learned, professional, or scientific association, institution or foundation in any manner suitable for the fulfillment of the purposes of this article.

§ 8297. Research contracts

8297. The commission may, with the approval of the Director of General Services, enter into, amend and terminate contracts with colleges, universities, schools of law or other research institutions, or with qualified individuals for the purposes of research.

§ 8298. Recommendations concerning minor revisions

8298. The commission may study and recommend revisions to correct technical or minor substantive defects in the statutes of the state without a prior concurrent resolution of the Legislature referring the matter to it for study.

APPENDIX 2

CALENDAR OF TOPICS AUTHORIZED FOR STUDY

The Commission's calendar of topics authorized for study includes the subjects listed below.[1] Each of these topics has been authorized for Commission study by the Legislature. For the current authorizing resolution, see 2016 Cal. Stat. res. ch. 150.

1. Creditors' remedies. Whether the law should be revised that relates to creditors' remedies, including, but not limited to, attachment, garnishment, execution, repossession of property (including the claim and delivery statute, self-help repossession of property, and the Commercial Code provisions on repossession of property), confession of judgment procedures, default judgment procedures, enforcement of judgments, the right of redemption, procedures under private power of sale in a trust deed or mortgage, possessory and nonpossessory liens, insolvency, and related matters.[2]

2. Probate Code. Whether the California Probate Code should be revised, including, but not limited to, the issue of whether California should adopt, in whole or in part, the Uniform Probate Code, and related matters.[3]

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1. The calendar of topics lists only those topics selected by the Commission for study and authorized by the Legislature. The Commission also studies topics specifically directed to it by concurrent resolution of the Legislature or by statute. See, e.g., 2013 Cal. Stat. res. ch. 115 [SCR 54] (state and local agency access to customer information from communication service providers); 2014 Cal. Stat. ch. 243 [SB 406] (recognition of tribal and foreign court money judgments). The Commission may also study and recommend revisions to correct technical or minor substantive defects in state statutes without a prior concurrent resolution. Gov't Code § 8298.

2. See also 1983 Cal. Stat. res. ch. 40; 1974 Cal. Stat. res. ch. 45; 1972 Cal. Stat. res. ch. 27; 1957 Cal. Stat. res. ch. 202; 1 Cal. L. Revision Comm'n Reports, Annual Report for 1957, at 15-16 (1957). Revised in 2001 Cal. Stat. res. ch. 78; 30 Cal. L. Revision Comm'n Reports 661 (2000).

3. See also 1980 Cal. Stat. res. ch. 37. Revised in 2001 Cal. Stat. res. ch. 78; 30 Cal. L. Revision Comm'n Reports 661 (2000).

3. Real and personal property. Whether the law should be revised that relates to real and personal property, including, but not limited to, a marketable title act, covenants, servitudes, conditions, and restrictions on land use or relating to land, powers of termination, escheat of property and the disposition of unclaimed or abandoned property, eminent domain, quiet title actions, abandonment or vacation of public streets and highways, partition, rights and duties attendant on assignment, subletting, termination, or abandonment of a lease, and related matters.[4]

4. Family law. Whether the law should be revised that relates to family law, including, but not limited to, community property, the adjudication of child and family civil proceedings, child custody, adoption, guardianship, freedom from parental custody and control, and related matters, including other subjects covered by the Family Code.[5]

5. Discovery in civil cases. Whether the law relating to discovery in civil cases should be revised.[6]

6. Rights and disabilities of minors and incompetent persons. Whether the law relating to the rights and disabilities of minors and incompetent persons should be revised.[7]

7. Evidence. Whether the Evidence Code should be revised.[8]

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4. See 1983 Cal. Stat. res. ch. 40, consolidating various previously authorized aspects of real and personal property law into one comprehensive topic. Expanded in 1988 Cal Stat. res. ch. 81. Revised in 2001 Cal. Stat. res. ch. 78; 30 Cal. L. Revision Comm'n Reports 661 (2000).

5. See 1997 Cal. Stat. res. ch. 102, consolidating Family Code authority, child custody, adoption, and guardianship authority, and family law proceedings authority. See also 1995 Cal. Stat. res. ch. 87; 1989 Cal. Stat. res. ch. 70; 1983 Cal. Stat. res. ch. 40; 1978 Cal. Stat. res. ch. 65; 1972 Cal. Stat. res. ch. 27; 1956 Cal. Stat. res. ch. 42.

6. See also 1975 Cal. Stat. res. ch. 15; 12 Cal. L. Revision Comm'n Reports 526-28 (1974).

7. See also 1979 Cal. Stat. res. ch. 19; 14 Cal. L. Revision Comm'n Reports 217-18 (1978).

8. See also 1965 Cal. Stat. res. ch. 130.

8. Alternative Dispute Resolution. Whether the law relating to arbitration, mediation, and other alternative dispute resolution techniques should be revised.[9]

9. Administrative law. Whether there should be changes to administrative law.[10]

10. Attorney's fees. Whether the law relating to the payment and the shifting of attorney's fees between litigants should be revised.[11]

11. Uniform Unincorporated Nonprofit Association Act. Whether the Uniform Unincorporated Nonprofit Association Act, or parts of that uniform act, and related provisions should be adopted in California.[12]

12. Trial court unification. Recommendations to be reported pertaining to statutory changes that may be necessitated by court unification.[13]

13. Contract law. Whether the law of contracts should be revised, including the law relating to the effect of electronic communications on the law governing contract formation, the statute of frauds, the parol evidence rule, and related matters.[14]

14. Common interest developments. Whether the law governing common interest housing developments should be revised to clarify the law, eliminate unnecessary or obsolete provisions, consolidate existing statutes in one place in the codes, establish a clear, consistent, and unified policy with regard to formation and management of these developments and transaction of real property interests located within

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9. See also 1968 Cal. Stat. res. ch. 110; 8 Cal. L. Revision Comm'n Reports 1325-26 (1967). Revised in 2001 Cal. Stat. res. ch. 78; 30 Cal. L. Revision Comm'n Reports 661-62 (2000).

10. See also 1987 Cal. Stat. res. ch. 47.

11. See also 1995 Cal. Stat. res. ch. 87; 1988 Cal. Stat. res. ch. 20.

12. See also 1993 Cal. Stat. res. ch. 31; 22 Cal. L. Revision Comm'n Reports 846 (1992).

13. See also 1995 Cal. Stat. res. ch. 87; 1993 Cal. Stat. res. ch. 96.

14. See also 1996 Cal. Stat. res. ch. 38; 25 Cal. L. Revision Comm'n Reports 628-29 (1995).

them, and to determine to what extent they should be subject to regulation.[15]

15. Legal malpractice statutes of limitation. Whether the statutes of limitation for legal malpractice actions should be revised to recognize equitable tolling or other adjustment for the circumstances of simultaneous litigation, and related matters.[16]

16. Coordination of public records statutes. Whether the law governing disclosure of public records and the law governing protection of privacy in public records should be revised to better coordinate them, including consolidation and clarification of the scope of required disclosure and creation of a single set of disclosure procedures, to provide appropriate enforcement mechanisms, and to ensure that the law governing disclosure of public records adequately treats electronic information, and related matters.[17]

17. Criminal sentencing. Whether the law governing criminal sentences for enhancements relating to weapons or injuries should be revised to simplify and clarify the law and eliminate unnecessary or obsolete provisions.[18]

18. Subdivision Map Act and Mitigation Fee Act. Whether the Subdivision Map Act (Division 2 (commencing with Section 66410) of Title 7 of the Government Code) and the Mitigation Fee Act (Chapter 5 (commencing with Section 66000), Chapter 6 (commencing with Section 66010), Chapter 7 (commencing with Section 66012), Chapter 8 (commencing with Section 66016), and Chapter 9 (commencing with Section 66020) of Division 1 of Title 7 of the Government Code) should

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15. See also 1999 Cal. Stat. res. ch. 81; 28 Cal. L. Revision Comm'n Reports 693-94 (1998).

16. See also 1999 Cal. Stat. res. ch. 81; 28 Cal. L. Revision Comm'n Reports 696 (1998).

17. See also 1999 Cal. Stat. res. ch. 81; 28 Cal. L. Revision Comm'n Reports 695-96 (1998).

18. See also 1999 Cal. Stat. res. ch. 81; 28 Cal. L. Revision Comm'n Reports 695 (1998). Revised in 2002 Cal. Stat. res. ch. 166.

be revised to improve their organization, resolve inconsistencies, and clarify and rationalize provisions, and related matters.[19]

19. Uniform Statute and Rule Construction Act. Whether the Uniform Statute and Rule Construction Act (1995) should be adopted in California in whole or in part, and related matters.[20]

20. Place of trial in a civil case. Whether the law governing the place of trial in a civil case should be revised.[21]

21. Charter schools and the Government Claims Act. Analysis of the legal and policy implications of treating a charter school as a public entity for the purposes of Division 3.6 (commencing with Section 810) of Title 1 of the Government Code.[22]

22. Fish and Game Code. Whether the Fish and Game Code and related statutory law should be revised to improve its organization, clarify its meaning, resolve inconsistencies, eliminate unnecessary or obsolete provisions, standardize terminology, clarify program authority and funding sources, and make other minor improvements, without making any significant substantive change to the effect of the law.[23]

23. Mediation Confidentiality. (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:

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19. See also 2001 Cal. Stat. res. ch. 78; 30 Cal. L. Revision Comm'n Reports 662 (2000).

20. See also 2003 Cal. Stat. res. ch. 92; 33 Cal. L. Revision Comm'n Reports 599 (2003).

21. See also 2007 Cal. Stat. res. ch. 100; 38 Cal. L. Revision Comm'n Reports 30 (2008).

22. See also 2009 Cal. Stat. res. ch. 98; 39 Cal. L. Revision Comm'n Reports 28 (2009).

23. See also 2012 Cal. Stat. res. ch. 108; 42 Cal. L. Revision Comm'n Reports 361 (2012).

(1) 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.

(2) The availability and propriety of contractual waivers.

(3) 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.[24]

24. California Public Records Act. Study, report on, and prepare recommended legislation as soon as possible, considering the commission's preexisting duties and workload demands, concerning the revision of the California Public Records Act and related provisions. This legislation shall accomplish all of the following objectives:

(1) Reduce the length and complexity of current sections.

(2) Avoid unnecessary cross-references.

(3) Neither expand nor contract the scope of existing exemptions to the general rule that records are open to the public pursuant to the current provisions of the Public Records Act.

(4) To the extent compatible with (3), use terms with common definitions.

(5) Organize the existing provisions in such a way that similar provisions are located in close proximity to one another.

(6) Eliminate duplicative provisions.

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24. See also 2012 Cal. Stat. res. ch. 108; 42 Cal. L. Revision Comm'n Reports 361 (2012).

(7) Clearly express legislative intent without any change in the substantive provisions.[25]

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25. See also 2016 Cal. Stat. res. ch. 150; 44 Cal. L. Revision Comm'n Reports 782 (2016).

APPENDIX 3

LEGISLATIVE ACTION ON COMMISSION RECOMMENDATIONS

(Cumulative)

Note. The "Action by Legislature" column may include references to relevant legislative history in the Commission's Reports, following the italicized "*See*." These references are to pages in Commission bound volumes (e.g., "35:73" refers to bound volume 35, page 73).

Recommendation	Action by Legislature
1. *Partial Revision of Education Code*, 1 Cal. L. Revision Comm'n Reports, Annual Report for 1954, at 12 (1957)	Enacted. 1955 Cal. Stat. chs. 799, 877
2. *Summary Distribution of Small Estates Under Probate Code Sections 640 to 646*, 1 Cal. L. Revision Comm'n Reports, Annual Report for 1954, at 50 (1957)	Enacted. 1955 Cal. Stat. ch. 1183
3. *Fish and Game Code*, 1 Cal. L. Revision Comm'n Reports, Annual Report for 1956, at 13-14 (1957)	Enacted. 1957 Cal. Stat. ch. 456
4. *Maximum Period of Confinement in a County Jail*, 1 Cal. L. Revision Comm'n Reports, at A-1 (1957)	Enacted. 1957 Cal. Stat. ch. 139
5. *Notice of Application for Attorney's Fees and Costs in Domestic Relations Actions*, 1 Cal. L. Revision Comm'n Reports, at B-1 (1957)	Enacted. 1957 Cal. Stat. ch. 540
6. *Taking Instructions to Jury Room*, 1 Cal. L. Revision Comm'n Reports, at C-1 (1957)	Not enacted; but see Code Civ. Proc. § 612.5, enacting substance of this recommendation.
7. *The Dead Man Statute*, 1 Cal. L. Revision Comm'n Reports, at D-1 (1957)	Not enacted; but recommendation accomplished in enactment of Evidence Code. See Evid. Code § 1261 Comment
8. *Rights of Surviving Spouse in Property Acquired by Decedent While Domiciled Elsewhere*, 1 Cal. L. Revision Comm'n Reports, at E-1 (1957)	Enacted. 1957 Cal. Stat. ch. 490

Recommendation	Action by Legislature
9. *The Marital "For and Against" Testimonial Privilege*, 1 Cal. L. Revision Comm'n Reports, at F-1 (1957)	Not enacted; but recommendation accomplished in enactment of Evidence Code. See Evid. Code § 970 Comment
10. *Suspension of the Absolute Power of Alienation*, 1 Cal. L. Revision Comm'n Reports, at G-1 (1957); 2 Cal. L. Revision Comm'n Reports, Annual Report for 1959, at 14 (1959)	Enacted. 1959 Cal. Stat. ch. 470
11. *Elimination of Obsolete Provisions in Penal Code Sections 1377 and 1378*, 1 Cal. L. Revision Comm'n Reports, at H-1 (1957)	Enacted. 1957 Cal. Stat. ch. 102
12. *Judicial Notice of the Law of Foreign Countries*, 1 Cal. L. Revision Comm'n Reports, at I-1 (1957)	Enacted. 1957 Cal. Stat. ch. 249
13. *Choice of Law Governing Survival of Actions*, 1 Cal. L. Revision Comm'n Reports, at J-1 (1957)	No legislation recommended.
14. *Effective Date of Order Ruling on a Motion for New Trial*, 1 Cal. L. Revision Comm'n Reports, at K-1 (1957); 2 Cal. L. Revision Comm'n Reports, Annual Report for 1959, at 16 (1959)	Enacted. 1959 Cal. Stat. ch. 468
15. *Retention of Venue for Convenience of Witnesses*, 1 Cal. L. Revision Comm'n Reports, at L-1 (1957)	Not enacted.
16. *Bringing New Parties Into Civil Actions*, 1 Cal. L. Revision Comm'n Reports, at M-1 (1957)	Enacted. 1957 Cal. Stat. ch. 1498
17. *Grand Juries*, 2 Cal. L. Revision Comm'n Reports, Annual Report for 1959, at 20 (1959)	Enacted. 1959 Cal. Stat. ch. 501
18. *Procedure for Appointing Guardians*, 2 Cal. L. Revision Comm'n Reports, Annual Report for 1959, at 21 (1959)	Enacted. 1959 Cal. Stat. ch. 500
19. *Appointment of Administrator in Quiet Title Action*, 2 Cal. L. Revision Comm'n Reports, Annual Report for 1959, at 29 (1959)	No legislation recommended.

Recommendation	Action by Legislature
20. *Presentation of Claims Against Public Entities*, 2 Cal. L. Revision Comm'n Reports, at A-1 (1959)	Enacted. 1959 Cal. Stat. chs. 1715, 1724, 1725, 1726, 1727, 1728; Cal. Const., art. XI, § 10 (1960)
21. *Right of Nonresident Aliens to Inherit*, 2 Cal. L. Revision Comm'n Reports, at B-1 (1959); 11 Cal. L. Revision Comm'n Reports 421 (1973)	Enacted. 1974 Cal. Stat. ch. 425
22. *Mortgages to Secure Future Advances*, 2 Cal. L. Revision Comm'n Reports, at C-1 (1959)	Enacted. 1959 Cal. Stat. ch. 528
23. *Doctrine of Worthier Title*, 2 Cal. L. Revision Comm'n Reports, at D-1 (1959)	Enacted. 1959 Cal. Stat. ch. 122
24. *Overlapping Provisions of Penal and Vehicle Codes Relating to Taking of Vehicles and Drunk Driving*, 2 Cal. L. Revision Comm'n Reports, at E-1 (1959)	Not enacted; but see 1972 Cal. Stat. ch. 92, enacting substance of a portion of recommendation relating to drunk driving.
25. *Time Within Which Motion for New Trial May Be Made*, 2 Cal. L. Revision Comm'n Reports, at F-1 (1959)	Enacted. 1959 Cal. Stat. ch. 469
26. *Notice to Shareholders of Sale of Corporate Assets*, 2 Cal. L. Revision Comm'n Reports, at G-1 (1959)	Not enacted; but see Corp. Code §§ 1001, 1002, enacting substance of recommendation.
27. *Evidence in Eminent Domain Proceedings*, 3 Cal. L. Revision Comm'n Reports, at A-1 (1961)	Not enacted; but see Evid. Code § 810 *et seq.*, enacting substance of recommendation.
28. *Taking Possession and Passage of Title in Eminent Domain Proceedings*, 3 Cal. L. Revision Comm'n Reports, at B-1 (1961)	Enacted. 1961 Cal. Stat. chs. 1612, 1613
29. *Reimbursement for Moving Expenses When Property Is Acquired for Public Use*, 3 Cal. L. Revision Comm'n Reports, at C-1 (1961)	Not enacted; but see Gov't Code § 7260 *et seq.*, enacting substance of recommendation.
30. *Rescission of Contracts*, 3 Cal. L. Revision Comm'n Reports, at D-1 (1961)	Enacted. 1961 Cal. Stat. ch. 589

Recommendation	Action by Legislature
31. *Right to Counsel and Separation of Delinquent From Nondelinquent Minor in Juvenile Court Proceedings*, 3 Cal. L. Revision Comm'n Reports, at E-1 (1961)	Enacted. 1961 Cal. Stat. ch. 1616
32. *Survival of Actions*, 3 Cal. L. Revision Comm'n Reports, at F-1 (1961)	Enacted. 1961 Cal. Stat. ch. 657
33. *Arbitration*, 3 Cal. L. Revision Comm'n Reports, at G-1 (1961)	Enacted. 1961 Cal. Stat. ch. 461
34. *Presentation of Claims Against Public Officers and Employees*, 3 Cal. L. Revision Comm'n Reports, at H-1 (1961)	Not enacted 1961; but see recommendation to 1963 session (item 39 *infra*), which was enacted.
35. *Inter Vivos Marital Property Rights in Property Acquired While Domiciled Elsewhere*, 3 Cal. L. Revision Comm'n Reports, at I-1 (1961)	Enacted. 1961 Cal. Stat. ch. 636
36. *Notice of Alibi in Criminal Actions*, 3 Cal. L. Revision Comm'n Reports, at J-1 (1961)	Not enacted.
37. *Discovery in Eminent Domain Proceedings*, 4 Cal. L. Revision Comm'n Reports 701 (1963); 8 Cal. L. Revision Comm'n Reports 19 (1967)	Enacted. 1967 Cal. Stat. ch. 1104
38. *Tort Liability of Public Entities and Public Employees*, 4 Cal. L. Revision Comm'n Reports 801 (1963)	Enacted. 1963 Cal. Stat. ch. 1681 *See 4:211, 219*
39. *Claims, Actions and Judgments Against Public Entities and Public Employees*, 4 Cal. L. Revision Comm'n Reports 1001 (1963)	Enacted. 1963 Cal. Stat. ch. 1715 *See 4:211, 222*
40. *Insurance Coverage for Public Entities and Public Employees*, 4 Cal. L. Revision Comm'n Reports 1201 (1963)	Enacted. 1963 Cal. Stat. ch. 1682 *See 4:212, 223*
41. *Defense of Public Employees*, 4 Cal. L. Revision Comm'n Reports 1301 (1963)	Enacted. 1963 Cal. Stat. ch. 1683 *See 4:212, 224*
42. *Liability of Public Entities for Ownership and Operation of Motor Vehicles*, 4 Cal. L. Revision Comm'n Reports 1401 (1963); 7 Cal. L. Revision Comm'n Reports 401 (1965)	Enacted. 1965 Cal. Stat. ch. 1527

Recommendation	Action by Legislature
43. *Workmen's Compensation Benefits for Persons Assisting Law Enforcement or Fire Control Officer*, 4 Cal. L. Revision Comm'n Reports 1501 (1963)	Enacted. 1963 Cal. Stat. ch. 1684 *See 4:212, 224*
44. *Sovereign Immunity — Amendments and Repeals of Inconsistent Statutes*, 4 Cal. L. Revision Comm'n Reports 1601 (1963)	Enacted. 1963 Cal. Stat. chs. 1685, 1686, 2029 *See 4:213*
45. *Evidence Code*, 7 Cal. L. Revision Comm'n Reports 1 (1965)	Enacted. 1965 Cal. Stat. ch. 299 *See 7:912, 923*
46. *Claims and Actions Against Public Entities and Public Employees*, 7 Cal. L. Revision Comm'n Reports 401 (1965)	Enacted. 1965 Cal. Stat. ch. 653 *See 7:914, 928*
47. *Evidence Code Revisions*, 8 Cal. L. Revision Comm'n Reports 101 (1967)	Enacted in part. 1967 Cal. Stat. ch. 650 Balance enacted. 1970 Cal. Stat. ch. 69 *See 8:1315*
48. *Evidence — Agricultural Code Revisions*, 8 Cal. L. Revision Comm'n Reports 201 (1967)	Enacted. 1967 Cal. Stat. ch. 262
49. *Evidence — Commercial Code Revisions*, 8 Cal. L. Revision Comm'n Reports 301 (1967)	Enacted. 1967 Cal. Stat. ch. 703
50. *Whether Damage for Personal Injury to a Married Person Should Be Separate or Community Property*, 8 Cal. L. Revision Comm'n Reports 401 (1967); 8 Cal. L. Revision Comm'n Reports 1385 (1967)	Enacted. 1968 Cal. Stat. chs. 457, 458 *See 8:1318; 9:18*
51. *Vehicle Code Section 17150 and Related Sections*, 8 Cal. L. Revision Comm'n Reports 501 (1967)	Enacted. 1967 Cal. Stat. ch. 702 *See 8:1317*
52. *Additur*, 8 Cal. L. Revision Comm'n Reports 601 (1967)	Enacted. 1967 Cal. Stat. ch. 72 *See 8:1317*
53. *Abandonment or Termination of a Lease*, 8 Cal. L. Revision Comm'n Reports 701 (1967); 9 Cal. L. Revision Comm'n Reports 401 (1969); 9 Cal. L. Revision Comm'n Reports 153 (1969)	Enacted. 1970 Cal. Stat. ch. 89 *See 8:1319; 10:1018*

Recommendation	Action by Legislature
54. *Good Faith Improver of Land Owned by Another*, 8 Cal. L. Revision Comm'n Reports 801 (1967); 8 Cal. L. Revision Comm'n Reports 1373 (1967)	Enacted. 1968 Cal. Stat. ch. 150 *See 8:2319; 9:19*
55. *Suit By or Against an Unincorporated Association*, 8 Cal. L. Revision Comm'n Reports 901 (1967)	Enacted. 1967 Cal. Stat. ch. 1324 *See 8:1317*
56. *Escheat*, 8 Cal. L. Revision Comm'n Reports 1001 (1967)	Enacted. 1968 Cal. Stat. chs. 247, 356 *See 9:16*
57. *Recovery of Condemnee's Expenses on Abandonment of an Eminent Domain Proceeding*, 8 Cal. L. Revision Comm'n Reports 1361 (1967)	Enacted. 1968 Cal. Stat. ch. 133 *See 9:19*
58. *Service of Process on Unincorporated Associations*, 8 Cal. L. Revision Comm'n Reports 1403 (1967)	Enacted. 1968 Cal. Stat. ch. 132 *See 9:18*
59. *Sovereign Immunity — Statute of Limitations*, 9 Cal. L. Revision Comm'n Reports 49 (1969); 9 Cal. L. Revision Comm'n Reports 175 (1969)	Enacted. 1970 Cal. Stat. ch. 104 *See 9:98*
60. *Additur and Remittitur*, 9 Cal. L. Revision Comm'n Reports 63 (1969)	Enacted. 1969 Cal. Stat. ch. 115 *See 9:99*
61. *Fictitious Business Names*, 9 Cal. L. Revision Comm'n Reports 71 (1969)	Enacted. 1969 Cal. Stat. ch. 114 *See 9:98*
62. *Quasi-Community Property*, 9 Cal. L. Revision Comm'n Reports 113 (1969)	Enacted. 1970 Cal. Stat. ch. 312 *See 10:1019*
63. *Arbitration of Just Compensation*, 9 Cal. L. Revision Comm'n Reports 123 (1969)	Enacted. 1970 Cal. Stat. ch. 417 *See 10:1018*
64. *Revisions of Evidence Code*, 9 Cal. L. Revision Comm'n Reports 137 (1969)	Enacted in part. 1970 Cal. Stat. ch. 69 See also 1970 Cal. Stat. chs. 1396, 1397; 1972 Cal. Stat. ch. 888 *See 10:1018*
65. *Mutuality of Remedies in Suits for Specific Performance*, 9 Cal. L. Revision Comm'n Reports 201 (1969)	Enacted. 1969 Cal. Stat. ch. 156 *See 9:99*
66. *Powers of Appointment*, 9 Cal. L. Revision Comm'n Reports 301 (1969)	Enacted. 1969 Cal. Stat. chs. 113, 155 *See 9:98*

Recommendation	Action by Legislature
67. *Evidence Code — Revisions of Privileges Article*, 9 Cal. L. Revision Comm'n Reports 501 (1969)	Vetoed; but see 1970 Cal. Stat. chs. 1396, 1397 *See 9:98*
68. *Fictitious Business Names*, 9 Cal. L. Revision Comm'n Reports 601 (1969)	Enacted. 1970 Cal. Stat. ch. 618 *See 10:1019*
69. *Representation as to the Credit of Third Persons and the Statute of Frauds*, 9 Cal. L. Revision Comm'n Reports 701 (1969)	Enacted. 1970 Cal. Stat. ch. 720 *See 10:1021*
70. *Revisions of Governmental Liability Act*, 9 Cal. L. Revision Comm'n Reports 801 (1969)	Enacted in part. 1970 Cal. Stat. chs. 662, 1099 *See 10:1020*
71. *"Vesting" of Interests Under Rule Against Perpetuities*, 9 Cal. L. Revision Comm'n Reports 901 (1969)	Enacted. 1970 Cal. Stat. ch. 45 *See 10:1021*
72. *Counterclaims and Cross-Complaints, Joinder of Causes of Action, and Related Provisions*, 10 Cal. L. Revision Comm'n Reports 501 (1971)	Enacted. 1971 Cal. Stat. chs. 244, 950; see also 1973 Cal. Stat. ch. 828 *See 10:1125*
73. *Wage Garnishment and Related Matters*, 10 Cal. L. Revision Comm'n Reports 701 (1971); 11 Cal. L. Revision Comm'n Reports 101 (1973); 12 Cal. L. Revision Comm'n Reports 901 (1974); 13 Cal. L. Revision Comm'n Reports 601 (1976); 13 Cal. L. Revision Comm'n Reports 1703 (1976); 14 Cal. L. Revision Comm'n Reports 261 (1978)	Enacted in part. 1978 Cal. Stat. ch. 1133; see also 1979 Cal. Stat. ch. 66 *See 11:1024; 11:1123; 12:530; 13:2012; 14:13, 223; 15:1024*
74. *Proof of Foreign Official Records*, 10 Cal. L. Revision Comm'n Reports 1022 (1971)	Enacted. 1970 Cal. Stat. ch. 41
75. *Inverse Condemnation — Insurance Coverage*, 10 Cal. L. Revision Comm'n Reports 1051 (1971)	Enacted. 1971 Cal. Stat. ch. 140 *See 10:1126*
76. *Discharge From Employment Because of Wage Garnishment*, 10 Cal. L. Revision Comm'n Reports 1147 (1971)	Enacted. 1971 Cal. Stat. ch. 1607 *See 10:1126*
77. *Civil Arrest*, 11 Cal. L. Revision Comm'n Reports 1 (1973)	Enacted. 1973 Cal. Stat. ch. 20 *See 11:1123*

Recommendation	Action by Legislature
78. *Claim and Delivery Statute*, 11 Cal. L. Revision Comm'n Reports 301 (1973)	Enacted. 1973 Cal. Stat. ch. 526 *See 11:1124*
79. *Unclaimed Property*, 11 Cal. L. Revision Comm'n Reports 401 (1973); 12 Cal. L. Revision Comm'n Reports 609 (1974)	Proposed resolution enacted. 1973 Cal. Stat. res. ch. 76 Legislation enacted. 1975 Cal. Stat. ch. 25 *See 11:1124; 12:530; 13:2012*
80. *Enforcement of Sister State Money Judgments*, 11 Cal. L. Revision Comm'n Reports 451 (1973)	Enacted. 1974 Cal. Stat. ch. 211 *See 12:534*
81. *Prejudgment Attachment*, 11 Cal. L. Revision Comm'n Reports 701 (1973)	Enacted. 1974 Cal. Stat. ch. 1516 See also 1975 Cal. Stat. ch. 200 *See 12:530*
82. *Landlord-Tenant Relations*, 11 Cal. L. Revision Comm'n Reports 951 (1973)	Enacted. 1974 Cal. Stat. chs. 331, 332 *See 12:536*
83. *Pleading* (technical change), 11 Cal. L. Revision Comm'n Reports 1024 (1973)	Enacted. 1972 Cal. Stat. ch. 73
84. *Evidence — Judicial Notice* (technical change), 11 Cal. L. Revision Comm'n Reports 1025 (1973)	Enacted. 1972 Cal. Stat. ch. 764
85. *Evidence — "Criminal Conduct" Exception*, 11 Cal. L. Revision Comm'n Reports 1147 (1973)	Not enacted 1974; see recommendation to 1975 session (item 90 *infra*), which was enacted. *See 12:535*
86. *Erroneously Compelled Disclosure of Privileged Information*, 11 Cal. L. Revision Comm'n Reports 1163 (1973)	Enacted. 1974 Cal. Stat. ch. 227 *See 12:535*
87. *Liquidated Damages*, 11 Cal. L. Revision Comm'n Reports 1201 (1973); 13 Cal. L. Revision Comm'n Reports 1735 (1976); 13 Cal. L. Revision Comm'n Reports 2139 (1976)	Enacted. 1977 Cal. Stat. ch. 198 *See 12:535; 13:1616; 14:13*
88. *Payment of Judgments Against Local Public Entities*, 12 Cal. L. Revision Comm'n Reports 575 (1974)	Enacted. 1975 Cal. Stat. ch. 285 *See 13:2011*
89. *View by Trier of Fact in a Civil Case*, 12 Cal. L. Revision Comm'n Reports 587 (1974)	Enacted. 1975 Cal. Stat. ch. 301 *See 13:2011*

Recommendation	Action by Legislature
90. *Good Cause Exception to the Physician-Patient Privilege*, 12 Cal. L. Revision Comm'n Reports 601 (1974)	Enacted. 1975 Cal. Stat. ch. 318 *See 13:2012*
91. *Improvement Acts*, 12 Cal. L. Revision Comm'n Reports 1001 (1974)	Enacted. 1974 Cal. Stat. ch. 426 *See 12:534*
92. *Condemnation Law and Procedure: Conforming Changes in Special District Statutes*, 12 Cal. L. Revision Comm'n Reports 1101 (1974); 12 Cal. L. Revision Comm'n Reports 2004 (1974)	Enacted. 1975 Cal. Stat. chs. 581, 582, 584, 585, 586, 587, 1176, 1276
93. *The Eminent Domain Law*, 12 Cal. L. Revision Comm'n Reports 1601 (1974)	Enacted. 1975 Cal. Stat. chs. 1239, 1240, 1275 *See 13:2010*
94. *Oral Modification of Written Contracts*, 13 Cal. L. Revision Comm'n Reports 301 (1976); 13 Cal. L. Revision Comm'n Reports 2129 (1976)	Enacted. 1975 Cal. Stat. ch. 7; 1976 Cal. Stat. ch. 109 *See 13:2011; 13:1616*
95. *Partition of Real and Personal Property*, 13 Cal. L. Revision Comm'n Reports 401 (1976)	Enacted. 1976 Cal. Stat. ch. 73 *See 13:2013, 1610*
96. *Revision of the Attachment Law*, 13 Cal. L. Revision Comm'n Reports 801 (1976)	Enacted. 1976 Cal. Stat. ch. 437 *See 13:1612*
97. *Undertakings for Costs*, 13 Cal. L. Revision Comm'n Reports 901 (1976)	Not enacted 1976; but see recommendation to 1979 session (item 118 *infra*), which was enacted. *See 13:1614*
98. *Service of Process on Unincorporated Associations*, 13 Cal. L. Revision Comm'n Reports 1657 (1976)	Enacted. 1976 Cal. Stat. ch. 888 *See 13:1616*
99. *Sister State Money Judgments*, 13 Cal. L. Revision Comm'n Reports 1669 (1976)	Enacted. 1977 Cal. Stat. ch. 232 *See 14:12*
100. *Damages in Action for Breach of Lease*, 13 Cal. L. Revision Comm'n Reports 1679 (1976)	Enacted. 1977 Cal. Stat. ch. 49 *See 14:13*
101. *Admissibility of Copies of Business Records in Evidence*, 13 Cal. L. Revision Comm'n Reports 2051 (1976)	Not enacted. *See 13:2012*

Recommendation	Action by Legislature
102. *Turnover Orders Under the Claim and Delivery Law*, 13 Cal. L. Revision Comm'n Reports 2079 (1976)	Enacted. 1976 Cal. Stat. ch. 145 *See 13:1614*
103. *Relocation Assistance by Private Condemnors*, 13 Cal. L. Revision Comm'n Reports 2085 (1976)	Enacted. 1976 Cal. Stat. ch. 143 *See 13:1614*
104. *Condemnation for Byroads and Utility Easements*, 13 Cal. L. Revision Comm'n Reports 2091 (1976)	Enacted in part (utility easements). 1976 Cal. Stat. ch. 994 *See 13:1615*
105. *Transfer of Out-of-State Trusts to California*, 13 Cal. L. Revision Comm'n Reports 2101 (1976)	Enacted. 1976 Cal. Stat. ch. 144 *See 13:1615*
106. *Admissibility of Duplicates in Evidence*, 13 Cal. L. Revision Comm'n Reports 2115 (1976)	Enacted in bill not sponsored by Commission. See 1985 Cal. Stat. ch. 100 *For original history, see 13:1615*
107. *Nonprofit Corporation Law*, 13 Cal. L. Revision Comm'n Reports 2201 (1976)	Not enacted.; legislation on this subject, not sponsored by Commission, was enacted in 1978. *For original history, see 14:11*
108. *Use of Keepers Pursuant to Writs of Execution*, 14 Cal. L. Revision Comm'n Reports 49 (1978)	Enacted. 1977 Cal. Stat. ch. 155 *See 14:12*
109. *Attachment Law: Effect of Bankruptcy Proceedings; Effect of General Assignments for the Benefit of Creditors*, 14 Cal. L. Revision Comm'n Reports 61 (1978)	Enacted. 1977 Cal. Stat. ch. 499 *See 14:12*
110. *Review of Resolution of Necessity by Writ of Mandate*, 14 Cal. L. Revision Comm'n Reports 83 (1978)	Enacted. 1978 Cal. Stat. ch. 286 *See 14:224*
111. *Use of Court Commissioners Under the Attachment Law*, 14 Cal. L. Revision Comm'n Reports 93 (1978)	Enacted. 1978 Cal. Stat. ch. 151 *See 14:224*
112. *Evidence of Market Value of Property*, 14 Cal. L. Revision Comm'n Reports 105 (1978)	Enacted in part. 1978 Cal. Stat. ch. 294 Substance of remainder enacted in 1980. See item 123 *infra* *See 14:225*

Recommendation	Action by Legislature
113. *Psychotherapist-Patient Privilege*, 14 Cal. L. Revision Comm'n Reports 127 (1978); 15 Cal. L. Revision Comm'n Reports 1307 (1980)	Enacted in part. 1985 Cal. Stat. chs. 545 (licensed educational psychologist), 1077 (repeal of Evid. Code § 1028) *See 14:225*
114. *Parol Evidence Rule*, 14 Cal. L. Revision Comm'n Reports 143 (1978)	Enacted. 1978 Cal. Stat. ch. 150 *See 14:224*
115. *Attachment Law — Unlawful Detainer Proceedings; Bond for Levy on Joint Deposit Account or Safe Deposit Box; Definition of "Chose in Action,"* 14 Cal. L. Revision Comm'n Reports 241 (1978)	Enacted. 1978 Cal. Stat. ch. 273 *See 14:224*
116. *Powers of Appointment* (technical changes), 14 Cal. L. Revision Comm'n Reports 257 (1978)	Enacted. 1978 Cal. Stat. ch. 266
117. *Ad Valorem Property Taxes in Eminent Domain Proceedings*, 14 Cal. L. Revision Comm'n Reports 291 (1978)	Enacted. 1979 Cal. Stat. ch. 31 *See 15:1025*
118. *Security for Costs*, 14 Cal. L. Revision Comm'n Reports 319 (1978)	Enacted. 1980 Cal. Stat. ch. 114 *See 15:1025*
119. *Guardianship-Conservatorship Law*, 14 Cal. L. Revision Comm'n Reports 501 (1978); 15 Cal. L. Revision Comm'n Reports 451 (1980)	Enacted. 1979 Cal. Stat. chs. 165, 726, 730 *See 15:1024, 1427*
120. *Interest Rate on Judgments*, 15 Cal. L. Revision Comm'n Reports 7 (1980)	Enacted. 1982 Cal. Stat. ch. 150 *See 15:1427; 16:2025*
121. *Married Women as Sole Traders*, 15 Cal. L. Revision Comm'n Reports 21 (1980)	Enacted. 1980 Cal. Stat. ch. 123 *See 15:1426*
122. *State Tax Liens*, 15 Cal. L. Revision Comm'n Reports 29 (1980)	Enacted. 1980 Cal. Stat. ch. 600 *See 15:1427*
123. *Application of Evidence Code Property Valuation Rules in Noncondemnation Cases*, 15 Cal. L. Revision Comm'n Reports 301 (1980)	Enacted. 1980 Cal. Stat. ch. 381 *See 15:1429*
124. *Uniform Durable Power of Attorney Act*, 15 Cal. L. Revision Comm'n Reports 351 (1980)	Enacted. 1981 Cal. Stat. ch. 511 *See 16:25*
125. *Probate Homestead*, 15 Cal. L. Revision Comm'n Reports 401 (1980)	Enacted. 1980 Cal. Stat. ch. 119 *See 15:1428*

Recommendation	Action by Legislature
126. *Effect of New Bankruptcy Law on the Attachment Law*, 15 Cal. L. Revision Comm'n Reports 1043 (1980)	Enacted. 1979 Cal. Stat. ch. 177 *See 15:1024*
127. *Confessions of Judgment*, 15 Cal. L. Revision Comm'n Reports 1053 (1980)	Enacted. 1979 Cal. Stat. ch. 568 *See 15:1024*
128. *Special Assessment Liens on Property Taken for Public Use*, 15 Cal. L. Revision Comm'n Reports 1101 (1980)	Enacted. 1980 Cal. Stat. ch. 122 *See 15:1428*
129. *Assignments for the Benefit of Creditors*, 15 Cal. L. Revision Comm'n Reports 1117 (1980)	Enacted. 1980 Cal. Stat. ch. 135 *See 15:1427*
130. *Vacation of Public Streets, Highways, and Service Easements*, 15 Cal. L. Revision Comm'n Reports 1137 (1980)	Enacted. 1980 Cal. Stat. ch. 1050 *See 15:1429*
131. *Quiet Title Actions*, 15 Cal. L. Revision Comm'n Reports 1187 (1980)	Enacted. 1980 Cal. Stat. ch. 44 *See 15:1428*
132. *Agreements for Entry of Paternity and Support Judgments*, 15 Cal. L. Revision Comm'n Reports 1237 (1980)	Enacted. 1980 Cal. Stat. ch. 682 *See 15:1426*
133. *Enforcement of Claims and Judgments Against Public Entities*, 15 Cal. L. Revision Comm'n Reports 1257 (1980)	Enacted. 1980 Cal. Stat. ch. 215 *See 15:1426*
134. *Uniform Veterans Guardianship Act*, 15 Cal. L. Revision Comm'n Reports 1289 (1980)	Enacted. 1980 Cal. Stat. ch. 89 *See 15:1428*
135. *Enforcement of Obligations After Death*, 15 Cal. L. Revision Comm'n Reports 1327 (1980)	Enacted. 1980 Cal. Stat. ch. 124 *See 15:1426*
136. *Guardianship-Conservatorship* (technical change), 15 Cal. L. Revision Comm'n Reports 1427 (1980)	Enacted. 1980 Cal. Stat. ch. 246
137. *Revision of Guardianship-Conservatorship Law*, 15 Cal. L. Revision Comm'n Reports 1463 (1980)	Enacted. 1981 Cal. Stat. ch. 9 *See 16:24*

Recommendation	Action by Legislature
138. *Non-Probate Transfers*, 15 Cal. L. Revision Comm'n Reports 1605 (1980); 16 Cal. L. Revision Comm'n Reports 129 (1982)	Enacted in part (pay-on-death accounts). 1982 Cal. Stat. ch. 269; (credit unions and industrial loan companies) 1983 Cal. Stat. ch. 92 Substance of balance enacted. 1989 Cal. Stat. ch. 397 (banks and savings and loan associations) (item 229 *infra*) *See 16:2026; 17:823*
139. *Revision of the Powers of Appointment Statute*, 15 Cal. L. Revision Comm'n Reports 1667 (1980)	Enacted. 1981 Cal. Stat. ch. 63 *See 16:25*
140. *The Enforcement of Judgments Law*, 15 Cal. L. Revision Comm'n Reports 2001 (1980)	Enacted. 1982 Cal. Stat. chs. 497, 1364 *See 16:2024*
141. *State Tax Liens* (technical change), 16 Cal. L. Revision Comm'n Reports 24 (1982)	Enacted. 1981 Cal. Stat. ch. 217
142. *Assessment Liens on Property Taken for Public Use* (technical change), 16 Cal. L. Revision Comm'n Reports 25 (1982)	Enacted. 1981 Cal. Stat. ch. 139
143. *Federal Pensions as Community Property*, 16 Cal. L. Revision Comm'n Reports 47 (1982)	Proposed resolution adopted. 1982 Cal. Stat. res. ch. 44 *See 16:2027*
144. *Missing Persons*, 16 Cal. L. Revision Comm'n Reports 105 (1982)	Enacted. 1983 Cal. Stat. ch. 201 *See 17:822*
145. *Escheat* (technical change), 16 Cal. L. Revision Comm'n Reports 124 (1982)	Enacted. 1982 Cal. Stat. ch. 182
146. *Emancipated Minors*, 16 Cal. L. Revision Comm'n Reports 183 (1982)	Enacted. 1983 Cal. Stat. ch. 6 *See 17:823*
147. *Notice in Limited Conservatorship Proceedings*, 16 Cal. L. Revision Comm'n Reports 199 (1982)	Enacted. 1983 Cal. Stat. ch. 72 *See 17:823*
148. *Disclaimer of Testamentary and Other Interests*, 16 Cal. L. Revision Comm'n Reports 207 (1982)	Enacted. 1983 Cal. Stat. ch. 17 *See 17:823*
149. *Holographic and Nuncupative Wills*, 16 Cal. L. Revision Comm'n Reports 301 (1982)	Enacted. 1982 Cal. Stat. ch. 187 *See 16:2026*

Recommendation	Action by Legislature
150. *Marketable Title of Real Property*, 16 Cal. L. Revision Comm'n Reports 401 (1982)	Enacted. 1982 Cal. Stat. ch. 1268 *See 16:2026*
151. *Statutory Bonds and Undertakings*, 16 Cal. L. Revision Comm'n Reports 501 (1982)	Enacted. 1982 Cal. Stat. chs. 517, 998 *See 16:2025*
152. *Attachment*, 16 Cal. L. Revision Comm'n Reports 701 (1982)	Enacted. 1982 Cal. Stat. ch. 1198 *See 16:2025*
153. *Division of Joint Tenancy and Tenancy in Common Property at Dissolution of Marriage*, 16 Cal. L. Revision Comm'n Reports 2165 (1982), 17 Cal. L. Revision Comm'n Reports 863 (1984)	Enacted. 1983 Cal. Stat. ch. 342 *See 17:823*
154. *Creditors' Remedies*, 16 Cal. L. Revision Comm'n Reports 2175 (1982)	Enacted. 1983 Cal. Stat. ch. 155 *See 17:824*
155. *Conforming Changes to the Bond and Undertaking Law*, 16 Cal. L. Revision Comm'n Reports 2239 (1982)	Enacted. 1983 Cal. Stat. ch. 18 *See 17:825*
156. *Notice of Rejection of Late Claim Against Public Entity*, 16 Cal. L. Revision Comm'n Reports 2251 (1982)	Enacted. 1983 Cal. Stat. ch. 107 *See 17:824*
157. *Wills and Intestate Succession*, 16 Cal. L. Revision Comm'n Reports 2301 (1982)	Enacted. 1983 Cal. Stat. ch. 842 *See 17:822*
158. *Liability of Marital Property for Debts*, 17 Cal. L. Revision Comm'n Reports 1 (1984)	Enacted. 1984 Cal. Stat. ch. 1671 *See 18:20*
159. *Durable Power of Attorney for Health Care Decisions*, 17 Cal. L. Revision Comm'n Reports 101 (1984)	Enacted. 1983 Cal. Stat. ch. 1204 *See 17:822*
160. *Marital Property Presumptions and Transmutations*, 17 Cal. L. Revision Comm'n Reports 205 (1984)	Enacted in part (transmutations). 1984 Cal. Stat. ch. 1733 *See 18:21*
161. *Reimbursement of Educational Expenses*, 17 Cal. L. Revision Comm'n Reports 229 (1984)	Enacted. 1984 Cal. Stat. ch. 1661 *See 18:22*
162. *Special Appearance in Family Law Proceedings*, 17 Cal. L. Revision Comm'n Reports 243 (1984)	Enacted. 1984 Cal. Stat. ch. 156 *See 18:21*

Recommendation	Action by Legislature
163. *Liability of Stepparent for Child Support*, 17 Cal. L. Revision Comm'n Reports 251 (1984)	Enacted. 1984 Cal. Stat. ch. 249 *See 18:21*
164. *Awarding Temporary Use of Family Home*, 17 Cal. L. Revision Comm'n Reports 261 (1984)	Enacted. 1984 Cal. Stat. ch. 463 *See 18:21*
165. *Disposition of Community Property*, 17 Cal. L. Revision Comm'n Reports 269 (1984)	Not enacted. *See 18:22*
166. *Statutes of Limitation for Felonies*, 17 Cal. L. Revision Comm'n Reports 301 (1984)	Enacted. 1984 Cal. Stat. ch. 1270 *See 18:23; 20:2305*
167. *Independent Administration of Decedent's Estate*, 17 Cal. L. Revision Comm'n Reports 405 (1984)	Enacted. 1984 Cal. Stat. ch. 451 *See 18:19*
168. *Distribution of Estates Without Administration*, 17 Cal. L. Revision Comm'n Reports 421 (1984)	Enacted. 1984 Cal. Stat. ch. 451 *See 18:19*
169. *Simultaneous Deaths*, 17 Cal. L. Revision Comm'n Reports 443 (1984)	Enacted in part. See 1989 Cal. Stat. ch. 544 (intestate succession) (item 227 *infra*); 1990 Cal. Stat. ch. 710 (statutory will) (item 240 *infra*) *See 18:20*
170. *Notice of Will*, 17 Cal. L. Revision Comm'n Reports 461 (1984)	Not enacted. *See 18:20*
171. *Garnishment of Amounts Payable to Trust Beneficiary*, 17 Cal. L. Revision Comm'n Reports 471 (1984)	Enacted. 1984 Cal. Stat. ch. 493 *See 18:19*
172. *Bonds for Personal Representatives*, 17 Cal. L. Revision Comm'n Reports 483 (1984)	Enacted. 1984 Cal. Stat. ch. 451 *See 18:19*
173. *Recording Affidavits of Death*, 17 Cal. L. Revision Comm'n Reports 493 (1984)	Enacted. 1984 Cal. Stat. ch. 527 *See 18:20*
174. *Execution of Witnessed Will*, 17 Cal. L. Revision Comm'n Reports 509 (1984)	Not enacted. *See 18:20*
175. *Revision of Wills and Intestate Succession Law*, 17 Cal. L. Revision Comm'n Reports 537 (1984)	Enacted. 1984 Cal. Stat. ch. 892 *See 18:19*

Recommendation	Action by Legislature
176. *Uniform Transfers to Minors Act*, 17 Cal. L. Revision Comm'n Reports 601 (1984)	Enacted. 1984 Cal. Stat. ch. 243 *See 18:19*
177. *Statutory Forms for Durable Powers of Attorney*, 17 Cal. L. Revision Comm'n Reports 701 (1984)	Enacted. 1984 Cal. Stat. chs. 312 (health care), 602 (general power of attorney) *See 18:18*
178. *Vacation of Streets* (technical change), 17 Cal. L. Revision Comm'n Reports 825 (1984)	Enacted. 1983 Cal. Stat. ch. 52
179. *Effect of Death of Support Obligor*, 17 Cal. L. Revision Comm'n Reports 897 (1984)	Enacted in part. 1984 Cal. Stat. ch. 19. Balance enacted. 1985 Cal. Stat. ch. 362 (item 186 *infra*) *See 18:21*
180. *Dismissal for Lack of Prosecution*, 17 Cal. L. Revision Comm'n Reports 905 (1984)	Enacted. 1984 Cal. Stat. ch. 1705 *See 18:23*
181. *Severance of Joint Tenancy*, 17 Cal. L. Revision Comm'n Reports 941 (1984)	Enacted. 1984 Cal. Stat. ch. 519 *See 18:23*
182. *Quiet Title and Partition Judgments*, 17 Cal. L. Revision Comm'n Reports 947 (1984)	Enacted. 1984 Cal. Stat. ch. 20 *See 18:22*
183. *Dormant Mineral Rights*, 17 Cal. L. Revision Comm'n Reports 957 (1984)	Enacted. 1984 Cal. Stat. ch. 240 *See 18:22*
184. *Creditors' Remedies*, 17 Cal. L. Revision Comm'n Reports 975 (1984)	Enacted. 1984 Cal. Stat. ch. 538 *See 18:23*
185. *Rights Among Cotenants*, 17 Cal. L. Revision Comm'n Reports 1023 (1984)	Enacted. 1984 Cal. Stat. ch. 241 *See 18:23*
186. *Provision for Support if Support Obligor Dies*, 18 Cal. L. Revision Comm'n Reports 119 (1986)	Enacted. 1985 Cal. Stat. ch. 362 *See 18:217*
187. *Transfer of State Registered Property Without Probate*, 18 Cal. L. Revision Comm'n Reports 129 (1986)	Enacted. 1985 Cal. Stat. ch. 982 *See 18:216*
188. *Dividing Jointly Owned Property Upon Marriage Dissolution*, 18 Cal. L. Revision Comm'n Reports 147 (1986)	Enacted. 1985 Cal. Stat. ch. 362 *See 18:217*

Recommendation	Action by Legislature
189. *Probate Law* (clarifying revisions), 18 Cal. L. Revision Comm'n Reports 216 (1986)	Enacted. 1985 Cal. Stat. ch. 359
190. *Creditors' Remedies* (technical change), 18 Cal. L. Revision Comm'n Reports 217 (1986)	Enacted. 1985 Cal. Stat. ch. 41
191. *Uniform Transfers to Minors Act* (technical change), 18 Cal. L. Revision Comm'n Reports 218 (1986)	Enacted. 1985 Cal. Stat. ch. 90
192. *Protection of Mediation Communications*, 18 Cal. L. Revision Comm'n Reports 241 (1986)	Enacted. 1985 Cal. Stat. ch. 731 *See 18:218*
193. *Recording Severance of Joint Tenancy*, 18 Cal. L. Revision Comm'n Reports 249 (1986)	Enacted. 1985 Cal. Stat. ch. 157 *See 18:217*
194. *Abandoned Easements*, 18 Cal. L. Revision Comm'n Reports 257 (1986)	Enacted. 1985 Cal. Stat. ch. 157 *See 18:217*
195. *Distribution Under a Will or Trust*, 18 Cal. L. Revision Comm'n Reports 269 (1986)	Enacted. 1985 Cal. Stat. ch. 982 *See 18:216*
196. *Effect of Adoption or Out of Wedlock Birth on Rights at Death*, 18 Cal. L. Revision Comm'n Reports 289 (1986)	Enacted. 1985 Cal. Stat. ch. 982 *See 18:216*
197. *Durable Powers of Attorney*, 18 Cal. L. Revision Comm'n Reports 305 (1986)	Enacted. 1985 Cal. Stat. ch. 403 *See 18:216*
198. *Litigation Expenses in Family Law Proceedings*, 18 Cal. L. Revision Comm'n Reports 351 (1986)	Enacted. 1985 Cal. Stat. ch. 362 *See 18:217*
199. *Civil Code Sections 4800.1 and 4800.2*, 18 Cal. L. Revision Comm'n Reports 383 (1986)	One of two recommended measures enacted (*Application of Civil Code §§ 4800.1 and 4800.2*). 1986 Cal. Stat. ch. 49 *See 18:1717*
200. *The Trust Law*, 18 Cal. L. Revision Comm'n Reports 501 (1986)	Enacted. 1986 Cal. Stat. ch. 820 *See 18:1718*
201. *Disposition of Estate Without Administration*, 18 Cal. L. Revision Comm'n Reports 1005 (1986)	Enacted. 1986 Cal. Stat. ch. 783 *See 18:1717*
202. *Small Estate Set-Aside*, 18 Cal. L. Revision Comm'n Reports 1101 (1986)	Enacted. 1986 Cal. Stat. ch. 783 *See 18:1717*

Recommendation	Action by Legislature
203. *Proration of Estate Taxes*, 18 Cal. L. Revision Comm'n Reports 1127 (1986)	Enacted. 1986 Cal. Stat. ch. 783 *See 18:1717*
204. *Notice in Guardianship and Conservatorship*, 18 Cal. L. Revision Comm'n Reports 1793 (1986)	Enacted. 1987 Cal. Stat. ch. 923 *See 19:516*
205. *Preliminary Provisions and Definitions*, 18 Cal. L. Revision Comm'n Reports 1807 (1986)	Enacted. 1987 Cal. Stat. ch. 923 *See 19:516*
206. *Technical Revisions in the Trust Law*, 18 Cal. L. Revision Comm'n Reports 1823 (1986)	Enacted. 1987 Cal. Stat. ch. 128 *See 19:517*
207. *Supervised Administration*, 19 Cal. L. Revision Comm'n Reports 5 (1988)	Enacted. 1987 Cal. Stat. ch. 923 *See 19:516*
208. *Independent Administration*, 19 Cal. L. Revision Comm'n Reports 205 (1988)	Enacted. 1987 Cal. Stat. ch. 923 *See 19:517*
209. *Creditor Claims Against Decedent's Estate*, 19 Cal. L. Revision Comm'n Reports 299 (1988)	Enacted. 1987 Cal. Stat. ch. 923 *See 19:517*
210. *Notice in Probate Proceedings*, 19 Cal. L. Revision Comm'n Reports 357 (1988)	Enacted. 1987 Cal. Stat. ch. 923 *See 19:517*
211. *Marital Deduction Gifts*, 19 Cal. L. Revision Comm'n Reports 615 (1988)	Enacted. 1987 Cal. Stat. ch. 923 *See 19:517*
212. *Estates of Missing Persons*, 19 Cal. L. Revision Comm'n Reports 637 (1988)	Enacted. 1987 Cal. Stat. ch. 923 *See 19:517*
213. *Public Guardians and Administrators*, 19 Cal. L. Revision Comm'n Reports 707 (1988)	Enacted. 1988 Cal. Stat. ch. 1199 *See 19:1167*
214. *Inventory and Appraisal*, 19 Cal. L. Revision Comm'n Reports 741 (1988)	Enacted. 1988 Cal. Stat. ch. 1199 *See 19:1167*
215. *Opening Estate Administration*, 19 Cal. L. Revision Comm'n Reports 787 (1988)	Enacted. 1988 Cal. Stat. ch. 1199 *See 19:1167*
216. *Abatement*, 19 Cal. L. Revision Comm'n Reports 865 (1988)	Enacted. 1988 Cal. Stat. ch. 1199 *See 19:1167*
217. *Accounts*, 19 Cal. L. Revision Comm'n Reports 877 (1988)	Enacted. 1988 Cal. Stat. ch. 1199 *See 19:1167*

Recommendation	Action by Legislature
218. *Litigation Involving Decedents*, 19 Cal. L. Revision Comm'n Reports 899 (1988)	Enacted. 1988 Cal. Stat. ch. 1199 *See 19:1167*
219. *Rules of Procedure in Probate*, 19 Cal. L. Revision Comm'n Reports 917 (1988)	Enacted. 1988 Cal. Stat. ch. 1199 *See 19:1167*
220. *Distribution and Discharge*, 19 Cal. L. Revision Comm'n Reports 953 (1988)	Enacted. 1988 Cal. Stat. ch. 1199 *See 19:1167*
221. *Nondomiciliary Decedents*, 19 Cal. L. Revision Comm'n Reports 993 (1988)	Enacted. 1988 Cal. Stat. ch. 1199 *See 19:1167*
222. *Interest and Income During Administration*, 19 Cal. L. Revision Comm'n Reports 1019 (1988)	Enacted. 1988 Cal. Stat. ch. 1199 *See 19:1167*
223. *Authority of the Law Revision Commission*, 19 Cal. L. Revision Comm'n Reports 1162 (1988)	Enacted. 1989 Cal. Stat. ch. 152
224. *1988 Probate Cleanup Bill*, see 19 Cal. L. Revision Comm'n Reports 1167, 1191–1200 (1988)	Enacted. 1988 Cal. Stat. ch. 113
225. *Creditors' Remedies*, 19 Cal. L. Revision Comm'n Reports 1251 (1988)	Enacted. 1989 Cal. Stat. ch. 1416 *See 20:201*
226. *No Contest Clauses*, 20 Cal. L. Revision Comm'n Reports 7 (1990)	Enacted. 1989 Cal. Stat. ch. 544 *See 20:201*
227. *120-Hour Survival Requirement*, 20 Cal. L. Revision Comm'n Reports 21 (1990)	Enacted. 1989 Cal. Stat. ch. 544 *See 20:201*
228. *Compensation of Attorneys and Personal Representatives*, 20 Cal. L. Revision Comm'n Reports 31 (1990)	Enacted except for portion relating to compensation of attorneys. 1990 Cal. Stat. ch. 79 *See 20:2218*
229. *Multiple-Party Accounts*, 20 Cal. L. Revision Comm'n Reports 95 (1990)	Enacted. 1989 Cal. Stat. ch. 397 *See 20:202*
230. *Notice to Creditors*, 20 Cal. L. Revision Comm'n Reports 165 (1990); 20 Cal. L. Revision Comm'n Reports 507 (1990)	Enacted in part. 1989 Cal. Stat. ch. 544 Balance enacted. 1990 Cal. Stat. ch. 140 *See 20:201*
231. *1989 Probate Cleanup Bill*, see 20 Cal. L. Revision Comm'n Reports 201, 227 (1990)	Enacted. 1989 Cal. Stat. ch. 21

Recommendation	Action by Legislature
232. *Bonds of Guardians and Conservators*, 20 Cal. L. Revision Comm'n Reports 235 (1990)	Enacted. 1989 Cal. Stat. ch. 544
233. *Brokers' Commissions on Probate Sales*, 20 Cal. L. Revision Comm'n Reports 237-42 (1990)	Enacted. 1989 Cal. Stat. ch. 544
234. *Commercial Real Property Leases*, 20 Cal. L. Revision Comm'n Reports 251 (1990)	Enacted. 1989 Cal. Stat. ch. 982 *See 20:202*
235. *Trustees' Fees*, 20 Cal. L. Revision Comm'n Reports 279 (1990)	Enacted. 1990 Cal. Stat. ch. 79 *See 20:2218*
236. *Springing Powers of Attorney*, 20 Cal. L. Revision Comm'n Reports 405 (1990)	Enacted. 1990 Cal. Stat. ch. 986 *See 20:2220*
237. *Uniform Statutory Form Powers of Attorney Act*, 20 Cal. L. Revision Comm'n Reports 415 (1990)	Enacted. 1990 Cal. Stat. ch. 986 *See 20:2220*
238. *Disposition of Small Estate by Public Administrator*, 20 Cal. L. Revision Comm'n Reports 529 (1990)	Enacted. 1990 Cal. Stat. ch. 324 *See 20:2220*
239. *Court-Authorized Medical Treatment*, 20 Cal. L. Revision Comm'n Reports 537 (1990)	Enacted. 1990 Cal. Stat. ch. 710 *See 20:2219*
240. *Survival Requirement for Beneficiary of Statutory Will*, 20 Cal. L. Revision Comm'n Reports 549 (1990)	Enacted. 1990 Cal. Stat. ch. 710 *See 20:2219*
241. *Execution or Modification of Lease Without Court Order*, 20 Cal. L. Revision Comm'n Reports 557 (1990)	Enacted. 1990 Cal. Stat. ch. 710 *See 20:2219*
242. *Limitation Period for Action Against Surety in Guardianship or Conservatorship Proceeding*, 20 Cal. L. Revision Comm'n Reports 565 (1990)	Enacted. 1990 Cal. Stat. ch. 710 *See 20:2219*
243. *Repeal of Probate Code Section 6402.5 (In-Law Inheritance)*, 20 Cal. L. Revision Comm'n Reports 571 (1990)	Not enacted. *See 20:2220*
244. *Access to Decedent's Safe Deposit Box*, 20 Cal. L. Revision Comm'n Reports 597 (1990); 20 Cal. L. Revision Comm'n Reports 2859 (1990)	Enacted. 1991 Cal. Stat. ch. 1055 *See 20:2219; 21:20*

Recommendation	Action by Legislature
245. *Priority of Conservator or Guardian for Appointment as Administrator*, 20 Cal. L. Revision Comm'n Reports 607 (1990)	Enacted. 1990 Cal. Stat. ch. 710 *See 20:2219*
246. *New Probate Code*, 20 Cal. L. Revision Comm'n Reports 1001 (1990)	Enacted. 1990 Cal. Stat. ch. 79 *See 20:2218*
247. *Notice in Probate Where Address Unknown*, 20 Cal. L. Revision Comm'n Reports 2245 (1990)	Enacted. 1990 Cal. Stat. ch. 710 *See 20:2219*
248. *Jurisdiction of Superior Court in Trust Matters*, 20 Cal. L. Revision Comm'n Reports 2253 (1990)	Enacted. 1990 Cal. Stat. ch. 710 *See 20:2219*
249. *Uniform Management of Institutional Funds Act*, 20 Cal. L. Revision Comm'n Reports 2265 (1990)	Enacted. 1990 Cal. Stat. ch. 1307 *See 20:2220*
250. *Remedies for Breach of Assignment or Sublease Covenant*, 20 Cal. L. Revision Comm'n Reports 2405 (1990)	Enacted. 1991 Cal. Stat. ch. 67 *See 21:22*
251. *Use Restrictions*, 20 Cal. L. Revision Comm'n Reports 2421 (1990)	Enacted. 1991 Cal. Stat. ch. 67 *See 21:22*
252. *Uniform Statutory Rule Against Perpetuities*, 20 Cal. L. Revision Comm'n Reports 2501 (1990)	Enacted. 1991 Cal. Stat. ch. 156 *See 21:21*
253. *Elimination of Seven-Year Limit for Durable Power of Attorney for Health Care*, 20 Cal. L. Revision Comm'n Reports 2605 (1990)	Enacted. 1991 Cal. Stat. ch. 896 *See 21:22*
254. *Recognition of Agent's Authority Under Statutory Form Power of Attorney*, 20 Cal. L. Revision Comm'n Reports 2629 (1990); 22 Cal. L. Revision Comm'n Reports 965 (1992)	Enacted. 1992 Cal. Stat. ch. 178 *See 22:852*
255. *Debts That Are Contingent, Disputed, or Not Due*, 20 Cal. L. Revision Comm'n Reports 2707 (1990)	Enacted. 1991 Cal. Stat. ch. 1055 *See 21:20*
256. *Remedies of Creditor Where Personal Representative Fails to Give Notice*, 20 Cal. L. Revision Comm'n Reports 2719 (1990)	Enacted. 1991 Cal. Stat. ch. 1055 *See 21:20*

Recommendation	Action by Legislature
257. *Repeal of Civil Code Section 704 (Passage of Ownership of U.S. Bonds on Death)*, 20 Cal. L. Revision Comm'n Reports 2729 (1990)	Enacted. 1991 Cal. Stat. ch. 1055 *See 21:20*
258. *Disposition of Small Estate Without Probate*, 20 Cal. L. Revision Comm'n Reports 2737 (1990)	Enacted. 1991 Cal. Stat. ch. 1055 *See 21:20*
259. *Right of Surviving Spouse to Dispose of Community Property*, 20 Cal. L. Revision Comm'n Reports 2769 (1990)	Enacted. 1991 Cal. Stat. ch. 1055 *See 21:20*
260. *Litigation Involving Decedents*, 20 Cal. L. Revision Comm'n Reports 2785 (1990); 22 Cal. L. Revision Comm'n Reports 895 (1992)	Enacted. 1992 Cal. Stat. ch. 178 *See 22:852*
261. *Compensation in Guardianship and Conservatorship Proceedings*, 20 Cal. L. Revision Comm'n Reports 2837 (1990); 21 Cal. L. Revision Comm'n Reports 227 (1991)	Enacted. 1992 Cal. Stat. ch. 572 *See 22:853*
262. *Recognition of Trustees' Powers*, 20 Cal. L. Revision Comm'n Reports 2849 (1990)	Enacted. 1992 Cal. Stat. ch. 178 *See 22:852*
263. *Gifts in View of Impending Death*, 20 Cal. L. Revision Comm'n Reports 2869 (1990)	Enacted. 1991 Cal. Stat. ch. 1055 *See 21:20*
264. *TOD Beneficiary Designation for Vehicles and Certain Other State Registered Property*, 20 Cal. L. Revision Comm'n Reports 2883 (1990)	Enacted. 1991 Cal. Stat. ch. 1055 *See 21:20*
265. *1991 General Probate Bill* (miscellaneous provisions), see 20 Cal. L. Revision Comm'n Reports 2907 (1990)	Enacted. 1991 Cal. Stat. ch. 1055 *See 21:20*
266. *1991 Probate Urgency Clean-up Bill*, see 20 Cal. L. Revision Comm'n Reports 2909 (1990)	Enacted. 1991 Cal. Stat. ch. 82 *See 21:21*
267. *Application of Marketable Title Statute to Executory Interests*, 21 Cal. L. Revision Comm'n Reports 53 (1991)	Enacted. 1991 Cal. Stat. ch. 156 *See 21:21*

Recommendation	Action by Legislature
268. *Relocation of Powers of Appointment Statute*, 21 Cal. L. Revision Comm'n Reports 91 (1991)	Enacted. 1992 Cal. Stat. ch. 30 *See 22:853*
269. *Miscellaneous Creditors' Remedies*, 21 Cal. L. Revision Comm'n Reports 135 (1991)	Enacted. 1992 Cal. Stat. ch. 283 *See 22:853*
270. *Nonprobate Transfers of Community Property*, 21 Cal. L. Revision Comm'n Reports 163 (1991)	Enacted. 1992 Cal. Stat. ch. 51 *See 22:852*
271. *Notice of Trustees' Fees*, 21 Cal. L. Revision Comm'n Reports 191 (1991)	Enacted. 1992 Cal. Stat. ch. 178 *See 22:852*
272. *Nonprobate Transfer to Trustee Named in Will*, 21 Cal. L. Revision Comm'n Reports 201 (1991)	Enacted. 1992 Cal. Stat. ch. 178 *See 22:852*
273. *Preliminary Distribution Without Court Supervision*, 21 Cal. L. Revision Comm'n Reports 209 (1991)	Enacted. 1992 Cal. Stat. ch. 178 *See 22:852*
274. *Transfer of Conservatorship Property to Trust*, 21 Cal. L. Revision Comm'n Reports 227 (1991)	Enacted. 1992 Cal. Stat. ch. 572 *See 22:853*
275. *Family Code*, 22 Cal. L. Revision Comm'n Reports 1 (1992)	Enacted. 1992 Cal. Stat. chs. 162, 163 *See 22:851*
276. *Standing To Sue for Wrongful Death*, 22 Cal. L. Revision Comm'n Reports 955 (1992)	Enacted. 1992 Cal. Stat. ch. 178 *See 22:852*
277. *1992 General Probate Bill* (miscellaneous provisions), see 22 Cal. L. Revision Comm'n Reports 977 (1990)	Enacted. 1992 Cal. Stat. ch. 178 *See 22:852*
278. *Special Needs Trust for Disabled Minor or Incompetent Person*, 22 Cal. L. Revision Comm'n Reports 989 (1992)	Enacted. 1992 Cal. Stat. ch. 355 *See 22:853*
279. *1994 Family Code*, 23 Cal. L. Revision Comm'n Reports 1, 5 (1993)	Enacted. 1993 Cal. Stat. ch. 219 *See 23:922*
280. *Family Code: Child Custody*, 23 Cal. L. Revision Comm'n Reports 1, 15 (1993)	Enacted. 1993 Cal. Stat. ch. 219 *See 23:922*

Recommendation	Action by Legislature
281. *Family Code: Reorganization of Domestic Violence Provisions*, 23 Cal. L. Revision Comm'n Reports 1, 23 (1993)	Enacted. 1993 Cal. Stat. ch. 219 *See 23:922*
282. *Deposit of Estate Planning Documents with Attorney*, 23 Cal. L. Revision Comm'n Reports 965 (1993)	Enacted. 1993 Cal. Stat. ch. 519 *See 23:923*
283. *Parent and Child Relationship for Intestate Succession*, 23 Cal. L. Revision Comm'n Reports 991 (1993)	Enacted. 1993 Cal. Stat. ch. 529 *See 23:923*
284. *Effect of Joint Tenancy Title on Marital Property*, 23 Cal. L. Revision Comm'n Reports 1013 (1993)	Not enacted. *See 24:568*
285. *Trial Court Unification: Constitutional Revision (SCA 3)*, 24 Cal. L. Revision Comm'n Reports 1 (1994); *Trial Court Unification: Transitional Provisions for SCA 3*, 24 Cal. L. Revision Comm'n Reports 627 (1994)	Not enacted; Commission recommendations adopted in SCA 3 (1993-94), but SCA 3 not approved by Assembly. Commission recommendations largely enacted in SCA 4 (1996 Cal. Stat. res. ch. 36). *See 24:568; 28:707*
286. *Comprehensive Power of Attorney Law*, 24 Cal. L. Revision Comm'n Reports 111 (1994); *1995 Comprehensive Power of Attorney Law*, 24 Cal. L. Revision Comm'n Reports 323 (1994)	Enacted. 1994 Cal. Stat. ch. 307 *See 24:567*
287. *Orders To Show Cause and Temporary Restraining Orders*, 24 Cal. L. Revision Comm'n Reports 603 (1994)	Enacted. 1994 Cal. Stat. ch. 587 *See 24:567*
288. *Family Code Technical Amendments*. See 24 Cal. L. Revision Comm'n Reports 621 (1994); 26 Cal. L. Revision Comm'n Reports 175 (1996)	Enacted. 1994 Cal. Stat. ch. 1269; 1996 Cal. Stat. ch. 1061 *See 24:567; 26:132*
289. *Debtor-Creditor Relations*, 25 Cal. L. Revision Comm'n Reports 1 (1995)	Enacted in part. 1995 Cal. Stat. ch. 196 *See 25:636, 707*
290. *Administrative Adjudication by State Agencies*, 25 Cal. L. Revision Comm'n Reports 55 (1995)	Enacted. 1995 Cal. Stat. ch. 938 *See 25:636, 711*

Recommendation	Action by Legislature
291. *Uniform Prudent Investor Act*, 25 Cal. L. Revision Comm'n Reports 543 (1995). See also 25 Cal. L. Revision Comm'n Reports 673 (1995)	Enacted. 1995 Cal. Stat. ch. 63 *See 25:636, 673*
292. *Power of Attorney Law Technical Amendments*. See 25 Cal. L. Revision Comm'n Reports 709 (1995)	Enacted. 1995 Cal. Stat. ch. 300 *See 25:637*
293. *Statute of Limitations in Trust Matters: Probate Code Section 16460*, 26 Cal. L. Revision Comm'n Reports 1 (1996)	Enacted. 1996 Cal. Stat. ch. 862 *See 26:132*
294. *Inheritance From or Through Child Born Out of Wedlock*, 26 Cal. L. Revision Comm'n Reports 13 (1996)	Enacted. 1996 Cal. Stat. ch. 862 *See 26:132*
295. *Collecting Small Estate Without Administration*, 26 Cal. L. Revision Comm'n Reports 21 (1996)	Enacted. 1996 Cal. Stat. ch. 563 *See 26:132*
296. *Repeal of Civil Code Section 1464: The First Rule in Spencer's Case*, 26 Cal. L. Revision Comm'n Reports 29 (1996)	Enacted. 1998 Cal. Stat. ch. 14 *See 28:706*
297. *Homestead Exemption*, 26 Cal. L. Revision Comm'n Reports 37 (1996)	Not enacted. *See 26:133*
298. *Tolling Statute of Limitations When Defendant Is Out of State*, 26 Cal. L. Revision Comm'n Reports 83 (1996)	Enacted in part (technical amendments). 1997 Cal. Stat. ch. 1012, §§ 13, 14 *See 27:555, 623*
299. *Administrative Adjudication Technical Amendments*, 26 Cal. L. Revision Comm'n Reports 171 (1996)	Enacted. 1996 Cal. Stat. ch. 390 *See 26:132*
300. *Unfair Competition Litigation*, 26 Cal. L. Revision Comm'n Reports 191 (1996)	Not enacted. *See 27:555*
301. *Administrative Adjudication by Quasi-Public Entities*, 26 Cal. L. Revision Comm'n Reports 277 (1996)	Enacted. 1997 Cal. Stat. ch. 220 *See 27:554, 593*
302. *Marketable Title: Enforceability of Land Use Restrictions*, 26 Cal. L. Revision Comm'n Reports 289 (1996)	Enacted in part. 1998 Cal. Stat. ch. 14 *See 28:706*
303. *Attachment by Undersecured Creditors*, 26 Cal. L. Revision Comm'n Reports 307 (1996)	Enacted. 1997 Cal. Stat. ch. 222 *See 27:554*

Recommendation	Action by Legislature
304. *Ethical Standards for Administrative Law Judges*, 26 Cal. L. Revision Comm'n Reports 335 (1996)	Enacted. 1998 Cal. Stat. ch. 95 *See 28:706*
305. *Best Evidence Rule*, 26 Cal. L. Revision Comm'n Reports 369 (1996)	Enacted. 1998 Cal. Stat. ch. 100 *See 28:706*
306. *Mediation Confidentiality*, 26 Cal. L. Revision Comm'n Reports 407 (1996)	Enacted. 1997 Cal. Stat. ch. 772 *See 27:554, 595*
307. *Judicial Review of Agency Action*, 27 Cal. L. Revision Comm'n Reports 1 (1997)	Not enacted. *See 28:708*
308. *Inheritance by Foster Child or Stepchild*, 27 Cal. L. Revision Comm'n Reports 625 (1997)	Not enacted. *See 28:721*
309. *Business Judgment Rule*, 28 Cal. L. Revision Comm'n Reports 1 (1998)	Not enacted. *See 28:708*
310. *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm'n Reports 51 (1998)	Enacted. 1998 Cal. Stat. ch. 931 *See 28:707*
311. *Response to Demand for Production of Documents in Discovery*, 28 Cal. L. Revision Comm'n Reports 561 (1998)	Enacted. 1998 Cal. Stat. ch. 932 *See 28:708*
312. *Uniform TOD Security Registration Act*, 28 Cal. L. Revision Comm'n Reports 577 (1998)	Enacted. 1998 Cal. Stat. ch. 242 *See 28:707*
313. *Effect of Dissolution of Marriage on Nonprobate Transfers*, 28 Cal. L. Revision Comm'n Reports 599 (1998)	Enacted. 2001 Cal. Stat. ch. 417 *See 31:26*
314. *Administrative Rulemaking: Consent Regulations and Other Noncontroversial Regulations*, 28 Cal. L. Revision Comm'n Reports 625 (1998)	Vetoed. *See 29:605*
315. *Administrative Rulemaking: Advisory Interpretations*, 28 Cal. L. Revision Comm'n Reports 657 (1998)	Vetoed. *See 29:605*
316. *Health Care Decisions for Adults Without Decisionmaking Capacity*, 29 Cal. L. Revision Comm'n Reports 1 (1999)	Enacted. 1999 Cal. Stat. ch. 658 *See 29:604*

Recommendation	Action by Legislature
317. *Uniform Principal and Income Act*, 29 Cal. L. Revision Comm'n Reports 245 (1999)	Enacted. 1999 Cal. Stat. ch. 145 *See 29:604*
318. *Admissibility, Discoverability, and Confidentiality of Settlement Negotiations*, 29 Cal. L. Revision Comm'n Reports 345 (1999)	Not enacted. *See 30:676*
319. *Air Resources Technical Revisions*, 29 Cal. L. Revision Comm'n Reports 409 (1999)	Enacted. 2000 Cal. Stat. ch. 890 *See 30:676*
320. *Administrative Rulemaking*, 29 Cal. L. Revision Comm'n Reports 459 (1999)	Enacted. 2000 Cal. Stat. ch. 1060 *See 30:676*
321. *Trial Court Unification Follow-Up*, 29 Cal. L. Revision Comm'n Reports 657 (1999)	Enacted. 1999 Cal. Stat. ch. 344 *See 29:604*
322. *Enforcement of Judgments Under the Family Code: Technical Revisions*, 29 Cal. L. Revision Comm'n Reports 695 (1999)	Enacted. 2000 Cal. Stat. ch. 808 *See 30:675*
323. *Eminent Domain Valuation Evidence: Clarification of Evidence Code Section 822*, 29 Cal. L. Revision Comm'n Reports 733 (1999)	Enacted. 2000 Cal. Stat. ch. 948 *See 30:676*
324. *Alternate Distributee for Unclaimed Distribution*, 29 Cal. L. Revision Comm'n Reports 743 (1999)	Enacted. 2000 Cal. Stat. ch. 17 *See 30:675*
325. *Jurisdictional Classification of Good Faith Improver Claims*, 30 Cal. L. Revision Comm'n Reports 281 (2000)	Enacted. 2000 Cal. Stat. ch. 688 *See 30:675*
326. *Authority to Appoint Receivers*, 30 Cal. L. Revision Comm'n Reports 291 (2000)	Enacted. 2001 Cal. Stat. ch. 44 *See 31:25*
327. *Stay of Mechanic's Lien Enforcement Pending Arbitration*, 30 Cal. L. Revision Comm'n Reports 307 (2000); 31 Cal. L. Revision Comm'n Reports 333 (2002)	2000 Recommendation enacted. 2003 Cal. Stat. ch. 113 *See 33:641*
328. *Trout Affidavit*, 30 Cal. L. Revision Comm'n Reports 319 (2000)	Enacted. 2000 Cal. Stat. ch. 167 *See 30:675*
329. *Expired Pilot Projects*, 30 Cal. L. Revision Comm'n Reports 327 (2000)	Enacted. 2001 Cal. Stat. ch. 115 *See 31:25*

Recommendation	Action by Legislature
330. *Law Library Board of Trustees*, 30 Cal. L. Revision Comm'n Reports 429 (2000)	Enacted. 2001 Cal. Stat. ch. 52 *See 31:25*
331. *Unnecessary Procedural Differences Between Limited and Unlimited Civil Cases*, 30 Cal. L. Revision Comm'n Reports 443 (2000)	Enacted. 2001 Cal. Stat. ch. 812 *See 31:27*
332. *Civil Procedure: Technical Corrections*, 30 Cal. L. Revision Comm'n Reports 479 (2000)	Enacted. 2001 Cal. Stat. ch. 44 *See 31:25*
333. *Improving Access to Rulemaking Information Under the Administrative Procedure Act*, 30 Cal. L. Revision Comm'n Reports 517 (2000)	Enacted. 2000 Cal. Stat. ch. 1060 *See 30:676*
334. *Administrative Rulemaking Cleanup*, 30 Cal. L. Revision Comm'n Reports 533 (2000)	Enacted. 2001 Cal. Stat. ch. 59 *See 31:25*
335. *Rulemaking Under Penal Code Section 5058*, 30 Cal. L. Revision Comm'n Reports 545 (2000)	Enacted. 2001 Cal. Stat. ch. 141 *See 31:26*
336. *Early Disclosure of Valuation Data and Resolution of Issues in Eminent Domain*, 30 Cal. L. Revision Comm'n Reports 567 (2000)	Enacted. 2001 Cal. Stat. ch. 428 *See 31:26*
337. *Estate Planning During Marital Dissolution*, 30 Cal. L. Revision Comm'n Reports 603 (2000)	Enacted. 2001 Cal. Stat. ch. 417 *See 31:26*
338. *Health Care Decisions Law: Miscellaneous Revisions*, 30 Cal. L. Revision Comm'n Reports 621 (2000)	Enacted. 2001 Cal. Stat. ch. 230 *See 31:26*
339. *Evidence of Prejudgment Deposit Appraisal in Eminent Domain*, 31 Cal. L. Revision Comm'n Reports 109 (2001)	Enacted. 2002 Cal. Stat. ch. 293 *See 32:601*
340. *Debtor-Creditor Law: Technical Revisions*, 31 Cal. L. Revision Comm'n Reports 123 (2001)	Enacted. 2002 Cal. Stat. ch. 68 *See 32:600*
341. *Municipal Bankruptcy*, 31 Cal. L. Revision Comm'n Reports 143 (2001)	Enacted. 2002 Cal. Stat. ch. 94 *See 32:600*

Recommendation	Action by Legislature
342. *Rules of Construction for Trusts and Other Instruments*, 31 Cal. L. Revision Comm'n Reports 167 (2001)	Enacted. 2002 Cal. Stat. ch. 138 *See 32:601*
343. *Cases in Which Court Reporter Is Required*, 31 Cal. L. Revision Comm'n Reports 223 (2001)	Enacted. 2002 Cal. Stat. ch. 71 *See 32:600*
344. *Electronic Communications and Evidentiary Privileges*, 31 Cal. L. Revision Comm'n Reports 245 (2001)	Enacted. 2002 Cal. Stat. ch. 72 *See 32:600*
345. *Administrative Rulemaking Refinements*, 31 Cal. L. Revision Comm'n Reports 259 (2001)	Enacted. 2002 Cal. Stat. ch. 389 *See 32:601*
346. *The Double Liability Problem in Home Improvement Contracts*, 31 Cal. L. Revision Comm'n Reports 281 (2001)	Not enacted. *See 32:602*.
347. *Statutes Made Obsolete by Trial Court Restructuring: Part 1*, 32 Cal. L. Revision Comm'n Reports 1 (2002)	Enacted. 2002 Cal. Stat. ch. 784 (statutory revision); 2002 Cal. Stat. res. ch. 88 (proposed constitutional amendment) *See 32:601*
348. *Common Interest Developments: Organization of Davis-Stirling Common Interest Development Act,* 33 Cal. L. Revision Comm'n Reports 1 (2003).	Enacted. 2003 Cal. Stat. ch. 557 *See 33:645*
349. *Common Interest Developments: Association Rulemaking and Decisionmaking,* 33 Cal. L. Revision Comm'n Reports 81 (2003).	Enacted in part. 2003 Cal. Stat. ch. 557 *See 33:645*
350. *Exemptions from Enforcement of Money Judgments: Second Decennial Review,* 33 Cal. L. Revision Comm'n Reports 113 (2003).	Enacted. 2003 Cal. Stat. ch. 379
351. *Probate Code Technical Corrections,* 33 Cal. L. Revision Comm'n Reports 145 (2003).	Enacted. 2003 Cal. Stat. ch. 32
352. *Statutes Made Obsolete by Trial Court Restructuring: Part 2,* 33 Cal. L. Revision Comm'n Reports 169 (2003).	Enacted. 2003 Cal. Stat. ch. 149 *See 33:643*
353. *Obsolete Reporting Requirements,* 33 Cal. L. Revision Comm'n Reports 267 (2003)	Enacted. 2004 Cal. Stat. ch. 193

Recommendation	Action by Legislature
354. *Authority of Court Commissioner,* 33 Cal. L. Revision Comm'n Reports 673 (2003)	Enacted. 2004 Cal. Stat. ch. 49
355. *Alternative Dispute Resolution in Common Interest Developments*, 33 Cal. L. Revision Comm'n Reports 689 (2003)	Enacted. 2004 Cal. Stat. ch. 754 *See 34:81*
356. *Unincorporated Associations*, 33 Cal. L. Revision Comm'n Reports 729 (2003)	Enacted. 2004 Cal. Stat. ch. 178 *See 34:71*
357. *Civil Discovery: Nonsubstantive Reform*, 33 Cal. L. Revision Comm'n Reports 789 (2003)	Enacted. 2004 Cal. Stat. ch. 182 *See 34:75*
358. *Common Interest Development Law: Architectural Review and Decisionmaking*, 34 Cal. L. Revision Comm'n Reports 107 (2004)	Enacted. 2004 Cal. Stat. ch. 346 *See 34:77*
359. *Preemption of CID Architectural Restrictions*, 34 Cal. L. Revision Comm'n Reports 117 (2004)	Enacted. 2005 Cal. Stat. ch. 37 *See 35:30*
360. *Obsolete Cross-References to Former Code of Civil Procedure Section 383*, 34 Cal. L. Revision Comm'n Reports 127 (2004)	Enacted. 2005 Cal. Stat. ch. 37 *See 35:30*
361. *Civil Discovery: Statutory Clarification and Minor Substantive Improvements*, 34 Cal. L. Revision Comm'n Reports 137 (2004)	Enacted. 2005 Cal. Stat. ch. 294 *See 35:77*
362. *Civil Discovery: Correction of Obsolete Cross-References*, 34 Cal. L. Revision Comm'n Reports 161 (2004)	Enacted. 2005 Cal. Stat. ch. 294 *See 35:77*
363. *Ownership of Amounts Withdrawn from Joint Account*, 34 Cal. L. Revision Comm'n Reports 199 (2004)	Enacted. 2012 Cal. Stat. ch. 235 *See 42:361*
364. *Emergency Rulemaking Under the Administrative Procedure Act*, 34 Cal. L. Revision Comm'n Reports 221 (2004)	Enacted. 2006 Cal. Stat. ch. 713 *See 36:31*
365. *Unincorporated Association Governance*, 34 Cal. L. Revision Comm'n Reports 231 (2004)	Enacted. 2005 Cal. Stat. ch. 116 *See 35:73*

Recommendation	Action by Legislature
366. *Nonprofit Association Tort Liability*, 34 Cal. L. Revision Comm'n Reports 257 (2004)	Enacted. 2005 Cal. Stat. ch. 116 *See 35:73*
367. *Waiver of Privilege by Disclosure*, 34 Cal. L. Revision Comm'n Reports 265 (2004)	Not enacted. *See 36:31 n. 62*
368. *Financial Privacy*, 34 Cal. L. Revision Comm'n Reports 401 (2004)	Not enacted. *See 36:31 n. 62*
369. *Common Interest Development Ombudsperson*, 35 Cal. L. Revision Comm'n Reports 123 (2005)	Vetoed. *See 36:31 n. 62*
370. *Enforcement of Judgments Under the Family Code*, 35 Cal. L. Revision Comm'n Reports 161 (2005)	Enacted. 2006 Cal. Stat. ch. 86 *See 36:31*
371. *Oral Argument in Civil Procedure*, 35 Cal. L. Revision Comm'n Reports 181 (2005)	No legislation recommended.
372. *Technical and Minor Substantive Statutory Corrections*, 35 Cal. L. Revision Comm'n Reports 219 (2006)	Enacted. 2007 Cal. Stat. ch. 263 *See 37:28, 37:71*
373. *Time Limits for Discovery in an Unlawful Detainer Case*, 36 Cal. L. Revision Comm'n Reports 271 (2006).	Enacted. 2007 Cal. Stat. ch. 113 *See 37:28*
374. *Statutes Made Obsolete by Trial Court Restructuring: Part 3*, 36 Cal. L. Revision Comm'n Reports 341 (2006).	Enacted. 2007 Cal. Stat. ch. 43 *See 37:29*
375. *Revocable Transfer on Death (TOD) Deed, 36 Cal. L. Revision Comm'n Reports 103 (2006).*	Not enacted. *See 38:28, n. 66*
376. *Deposition in Out-of-State Litigation*, 37 Cal. L. Revision Comm'n Reports 99 (2007).	Enacted. 2008 Cal. Stat. ch. 231 *See 38:29, 38:77*
377. *Trial Court Restructuring: Appellate Jurisdiction of Bail Forfeiture*, 37 Cal. L. Revision Comm'n Reports 149 (2007).	Not enacted. But see 2012 Cal. Stat. ch. 470 (item 395 *infra*) *See 38:28 n. 66*
378. *Statutes Made Obsolete by Trial Court Restructuring: Part 4*, 37 Cal. L. Revision Comm'n Reports 171 (2007).	Enacted. 2008 Cal. Stat. ch. 56 *See 38:29*

Recommendation	Action by Legislature
379. *Trial Court Restructuring: Transfer of Case Based on Lack of Jurisdiction, 37 Cal. L. Revision Comm'n Reports 195 (2007).*	Enacted. 2008 Cal. Stat. ch. 56 *See 38:29*
380. *Technical and Minor Substantive Statutory Corrections: References to Recording Technology*, 37 Cal. L. Revision Comm'n Reports 211 (2007).	Enacted. 2009 Cal. Stat. ch. 88 *See 39:27, 39:71*
381. *Revision of No Contest Clause Statute*, 37 Cal. L. Revision Comm'n Reports 359 (2007).	Enacted. 2008 Cal. Stat. ch. 174 *See 38:29, 38:75*
382. *Miscellaneous Hearsay Exceptions: Present Sense Impression*, 37 Cal. L. Revision Comm'n Reports 407 (2007).	No legislation introduced.
383. *Miscellaneous Hearsay Exceptions: Forfeiture by Wrongdoing*, 37 Cal. L. Revision Comm'n Reports 443 (2007).	No legislation introduced; but see 2010 Cal. Stat. ch. 537, enacting a similar amendment of Evid. C. § 240.
384. *Mechanics Lien Law*, 37 Cal. L. Revision Comm'n Reports 527 (2007).	Enacted. 2010 Cal. Stat. ch. 697 *See 39:27, 40:28, 40:49*
385. *Donative Transfer Restrictions*, 38 Cal. L. Revision Comm'n Reports 107 (2007).	Enacted. 2009 Cal. Stat. ch. 348, 2010 Cal. Stat. ch. 620 *See 39:27, 40:28, 40:45*
386. *Attorney-Client Privilege After Client's Death*, 38 Cal. L. Revision Comm'n Reports 163 (2008).	Enacted. 2009 Cal. Stat. ch. 8 *See 39:27*
387. *Revision of No Contest Clause Statute: Conforming Revisions*, 38 Cal. L. Revision Comm'n Reports 203 (2008).	Enacted. 2009 Cal. Stat. ch. 348 *See 39:27*
388. *Nonsubstantive Reorganization of Deadly Weapon Statutes*, 38 Cal. L. Revision Comm'n Reports 217 (2009).	Enacted. 2010 Cal. Stat. ch. 178, 2010 Cal. Stat. ch. 711 *See 40:27, 40:43, 40:107*
389. *Marketable Record Title: Notice of Option,* 39 Cal. L. Revision Comm'n Reports 99 (2009).	Enacted. 2011 Cal. Stat. ch. 46 *See 41:28*
390. *Statutes Made Obsolete by Trial Court Restructuring: Part 5,* 39 Cal. L. Revision Comm'n Reports 109 (2009).	Enacted. 2010 Cal. Stat. ch. 212 *See 40:28, 42:360*

Recommendation	Action by Legislature
391. *Trial Court Restructuring: Rights and Responsibilities of the County as Compared to the Superior Court (Part 1),* 39 Cal. L. Revision Comm'n Reports 157 (2009).	Enacted. 2012 Cal. Stat. ch. 470 *See 42:360*
392. *Obsolete Cross-References to Former Code of Civil Procedure Section 116.780(d),* 39 Cal. L. Revision Comm'n Reports 223 (2009).	Enacted. 2011 Cal. Stat. ch. 308 *See 41:28*
393. *Statutory Clarification and Simplification of CID Law*, 40 Cal. L. Revision Comm'n Reports 235 (2010).	Enacted. 2012 Cal. Stat. ch. 180 *See 42:360*
394. *Mechanics Lien Law: Clean-Up Legislation*, 41 Cal. L. Revision Comm'n Reports 103 (2011).	Enacted. 2011 Cal. Stat. ch. 44 *See 41:28*
395. *Nonsubstantive Reorganization of Deadly Weapon Statutes: Clean-Up Legislation*, 41 Cal. L. Revision Comm'n Reports 135 (2011).	Enacted. 2011 Cal. Stat. ch. 285; see also 2012 Cal. Stat. ch. 162, §§ 12-14, 203, 207; 2013 Cal. Stat. ch. 76, §§ 145.5, 145.7, 147.3, 147.5, 153.5; 2013 Cal. Stat. ch. 291, § 2 *See 41:28, 43:279*
396. *Trial Court Restructuring: Appellate Jurisdiction of Bail Forfeiture*, 41 Cal. L. Revision Comm'n Reports 265 (2011).	Enacted. 2012 Cal. Stat. ch. 470 *See 42:360*
397. *Statutory Cross-References to "Tort Claims Act,"* 41 Cal. L. Revision Comm'n Reports 285 (2011).	Enacted. 2012 Cal. Stat. ch. 759 *See 42:360-61*
398. *Trial Court Restructuring: Writ Jurisdiction in a Small Claims Case*, 41 Cal. L. Revision Comm'n Reports 315 (2011).	Enacted. 2012 Cal. Stat. ch. 470 *See 42:360*
399. *Commercial and Industrial Common Interest Developments*, 42 Cal. L. Revision Comm'n Reports 1 (2012).	Enacted. 2013 Cal. Stat. ch. 605 *See 43:279-80*
400. *Charter Schools and the Government Claims Act*, 42 Cal. L. Revision Comm'n Reports 225 (2012).	No legislation recommended.

Recommendation	Action by Legislature
401. *Third Decennial Review of Exemptions from Enforcement of Money Judgments*, 42 Cal. L. Revision Comm'n Reports 297 (2012).	Enacted. 2013 Cal. Stat. ch. 15 *See 43:279*
402. *Statutory Clarification and Simplification of CID Law: Clean-Up Legislation*, 42 Cal. L. Revision Comm'n Reports 311 (2012).	Enacted. 2013 Cal. Stat. ch. 183 *See 43:279*
403. *Commercial and Industrial Subdivisions*, 43 Cal. L. Revision Comm'n Reports 1 (2013).	Enacted. 2013 Cal. Stat. ch. 605 *See 43:279-80*
404. *Statutory Clarification and Simplification of CID Law: Further Clean-Up Legislation*, 43 Cal. L. Revision Comm'n Reports 23 (2013).	Enacted. 2013 Cal. Stat. ch. 183 *See 43:279*
405. *Technical and Minor Substantive Statutory Corrections*, 43 Cal. L. Revision Comm'n Reports 35 (2013).	Enacted. 2014 Cal. Stat. ch. 913 *See 44:27*
406. *Deadly Weapons: Minor Clean-Up Issues*, 43 Cal. L. Revision Comm'n Reports 63 (2013).	Enacted. 2014 Cal. Stat. ch. 103 *See 44:27*
407. *Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act*, 43 Cal. L. Revision Comm'n Reports 93 (2013).	Enacted. 2014 Cal. Stat. ch. 553 *See 44:27, 44:77*
408. *Fish and Game Law: Technical Revisions and Minor Substantive Improvements (Part 1)*, 44 Cal. L. Revision Comm'n Reports 115 (2015).	Enacted. 2015 Cal. Stat. ch. 154 *See 44:522; 44:571*
409. *State and Local Agency Access to Electronic Communications: Constitutional and Statutory Requirements*, 44 Cal. L. Revision Comm'n Reports 229 (2015).	No legislation recommended.
410. *Fish and Game Law: Technical Revisions and Minor Substantive Improvements (Part 2)*, 44 Cal. L. Revision Comm'n Reports 349 (2015).	Enacted. 2016 Cal. Stat. ch. 546 *See 44:782*
411. *Trial Court Unification: Publication of Legal Notice*, 44 Cal. L. Revision Comm'n Reports 385 (2015).	Enacted. 2016 Cal. Stat. ch. 703 *See 44:782*

Recommendation	Action by Legislature
412. *Deadly Weapons: Minor Clean-Up Issues (Part 2)*, 44 Cal. L. Revision Comm'n Reports 471 (2015).	Legislation pending.
413. *Recognition of Tribal and Foreign Court Money Judgments*, 44 Cal. L. Revision Comm'n Reports 611 (2016).	Enacted. 2017 Cal. Stat. ch. 168 *See 45:310*
414. *Government Interruption of Communication Service*, 44 Cal. L. Revision Comm'n Reports 681 (2016).	Enacted. 2017 Cal. Stat. ch. 322 *See 45:310*
415. *Mechanics Liens in Common Interest Developments,* 44 Cal. L. Revision Comm'n Reports 739 (2016).	Enacted. 2017 Cal. Stat. ch. 144 *See 45:310*
416. *Revocable Transfer on Death Deed: Recordation,* 45 Cal. L. Revision Comm'n Reports 1 (2017).	Legislation pending.
417. *Homestead Exemption: Dwelling,* 45 Cal. L. Revision Comm'n Reports 11 (2017).	No legislation introduced.
418. *Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct,* 45 Cal. L. Revision Comm'n Reports 19 (2017).	No legislation introduced.

APPENDIX 4

REPORT OF THE CALIFORNIA LAW REVISION COMMISSION ON CHAPTER 168 OF THE STATUTES OF 2017 (ASSEMBLY BILL 905)

Recognition of Tribal and Foreign Court Money Judgments

Chapter 168 of the Statutes of 2017 was introduced as Assembly Bill 905, authored by Assembly Member Brian Maienschein. The measure implements the Commission's recommendation on *Recognition of Tribal and Foreign Court Money Judgments,* 44 Cal. L. Revision Comm'n Reports 611 (2016).

To reflect amendments made to Assembly Bill 905 in the legislative process, the Commission revised its Comments to Code of Civil Procedure Section 1716 and the heading of Chapter 3 (commencing with Section 1730) of Title 11 of Part 3 of the Code of Civil Procedure, and added a Comment to Code of Civil Procedure Section 1737.[1] Those revised Comments superseded the comparable Comments approved by the Commission when it approved its recommendation on *Recognition of Tribal and Foreign Court Money Judgments*.[2]

Ordinarily, the revised and added Comments would be published in an appendix to a Commission *Annual Report*. In this instance however, the revised and added Comments were erroneously incorporated into the published version of the recommendation itself.

Therefore, to preserve the historical record, the Comments originally approved by the Commission in conjunction with its recommendation on *Recognition of Tribal and Foreign Court Money Judgments* are reproduced below. The revised Comments that supersede the Comments set out below, as well as the added

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1. See CLRC Staff Memorandum 2017-22, pp. 3-5 and attachment; Minutes of June 8, 2017, Commission Meeting.

2. For the originally approved Comments, see CLRC Staff Memorandum 2016-44; Minutes of September 22, 2016, Commission Meeting.

Comment to Code of Civil Procedure Section 1737, can be found in the Commission's published recommendation at 44 Cal. L. Revision Comm'n Reports 611 (2016), on pages 653, 669, and 672.

SUPERSEDED COMMENTS

Code Civ. Proc. § 1716 (amended). Standards for recognition [UFCMJRA § 4]

Comment. Section 1716 is similar to Section 4 of the Uniform Foreign-Country Money Judgments Recognition Act (2005) ("2005 Uniform Act").

Paragraphs (b)(1) and (c)(8) state exceptions to recognition of a foreign-country judgment related to the due process offered in the foreign proceeding. Under both paragraphs (b)(1) and (c)(8), the focus of the inquiry "is not whether the procedure in the rendering country is similar to U.S. procedure, but rather on the basic fairness of the foreign-country procedure." See Background from the 2005 Uniform Act *infra*. Unlike the Tribal Court Civil Money Judgment Act, this Act does not attempt to define "due process." *Compare* Code Civ. Proc. § 1732(c) *with* Code Civ. Proc. § 1714.

Paragraph (b)(2) provides that a foreign-country judgment shall not be recognized if the foreign court did not have personal jurisdiction over the defendant. Section 1717 makes clear that a foreign court lacks personal jurisdiction if either of the following applies:

(1) The foreign court lacks a basis for exercising personal jurisdiction that would be sufficient according to the standards governing personal jurisdiction in this state.

(2) The foreign court lacks personal jurisdiction under its own law.

Subdivision (c) lists grounds on which the court may decline to recognize a foreign-country judgment. With the exception of paragraphs (c)(3) and (c)(4), these grounds generally involve the fairness of the foreign proceeding. When the fairness-related grounds apply, the court has discretion to recognize the foreign-country judgment in the unusual case where countervailing considerations outweigh the seriousness of the defect underlying the applicable ground for nonrecognition. Such countervailing considerations could include, for instance, situations in which the opponent failed to raise an objection in the foreign court or the opponent's own misconduct was the primary cause of the harm suffered.

Paragraph (c)(1) provides that a court may decline to recognize a foreign-country judgment if the defendant did not receive notice of the foreign proceeding in sufficient time to enable the defendant to defend. Under this paragraph, a defect in either the timing or the content of the notice could be grounds for nonrecognition if that defect precluded the defendant from defending in the foreign court proceeding.

Paragraph (c)(2) provides that a court may decline to recognize a foreign-country judgment if fraud deprived the losing party of an adequate opportunity to present its case. The Uniform Law Commission's commentary on this provision indicates that the type of fraud that can serve as grounds for nonrecognition is limited to "extrinsic fraud — conduct of the prevailing party that deprived the losing party of an adequate opportunity to present its case." See Background from the 2005 Uniform Act *infra*. The reference to "extrinsic fraud" suggests that the test established by the exception is categorical, permitting nonrecognition in cases of extrinsic, but not intrinsic, fraud. However, the language of the exception establishes a functional test, whether the fraud deprived the party of an adequate opportunity to present its case. Recent judgment recognition case law evaluates fraud by assessing "whether the injured party had any opportunity to address the alleged misconduct during the original proceeding." See Restatement of the Law Fourth: The Foreign Relations Law of the United States: Jurisdiction § 404 Reporters' Note 3 (Tentative Draft No. 1, April 1, 2014). This case law suggests that a key consideration for a court deciding whether alleged fraud could be a ground for nonrecognition is whether there was "a reasonable opportunity for the person victimized by fraud to uncover the misconduct and bring it to the [rendering] court's attention." *Id*.

Paragraph (c)(4) provides that a court may decline to recognize a foreign-country judgment if it conflicts with another final and conclusive judgment. Some commentators suggest that, where the foreign court rendering the later judgment fairly considered the earlier judgment and declined to recognize it under standards similar to those set forth in this Uniform Act, a court should ordinarily recognize the later foreign-country judgment. However, in some situations, other law may require the recognition of one of the conflicting judgments (e.g., where one of the conflicting judgments is entitled to full faith and credit). See *id*. § 404 Comment f, Reporters' Note 6.

Former paragraph (c)(9) is not continued. Federal law includes specific standards governing the recognition of foreign-country defamation judgments. See subdivision (e) (referring to the federal SPEECH Act standards for recognition of defamation judgments).

Subdivision (e) is added to make clear that judgments that are not eligible for recognition under the federal SPEECH Act (codified at 28 U.S.C. §§ 4101-4105) shall not be recognized under this chapter.

The commentary for Section 4 of the 2005 Uniform Act is set out, in relevant part, below. The Law Revision Commission's recommendation (*Recognition of Tribal and Foreign Court Money Judgments*, 44 Cal. L. Revision Comm'n Reports 611 (2016)) does not reproduce all parts of the Uniform Law Commission's commentary. The omission of any part of the Uniform Law Commission commentary does not necessarily imply disapproval of the omitted commentary.

Background from the 2005 Uniform Act

Source: This section is based on Section 4 of the 1962 [Uniform Foreign Money Judgments Recognition] Act [hereafter, "1962 Act"].

1. This Section provides the standards for recognition of a foreign-country money judgment. Section [1719] sets out the effect of recognition of a foreign-country money judgment under this Act.

2. Recognition of a judgment means that the forum court accepts the determination of legal rights and obligations made by the rendering court in the foreign country. *See*, *e.g*. Restatement (Second) of Conflicts of Laws, Ch. 5, Topic 3, Introductory Note (recognition of foreign judgment occurs to the extent the forum court gives the judgment "the same effect with respect to the parties, the subject matter of the action and the issues involved that it has in the state where it was rendered.") Recognition of a foreign-country judgment must be distinguished from enforcement of that judgment. Enforcement of the foreign-country judgment involves the application of the legal procedures of the state to ensure that the judgment debtor obeys the foreign-country judgment. Recognition of a foreign-country money judgment often is associated with enforcement of the judgment, as the judgment creditor usually seeks recognition of the foreign-country judgment primarily for the purpose of invoking the enforcement procedures of the forum state to assist the judgment creditor's collection of the judgment from the judgment debtor. Because the forum court cannot enforce the foreign-country judgment until it has determined that the judgment will be given effect, recognition is a prerequisite to enforcement of the foreign-country judgment. Recognition, however, also has significance outside the enforcement context because a foreign-country judgment also must be recognized before it can be given preclusive effect under res judicata and collateral estoppel principles. The issue of whether a foreign-country judgment will be recognized is distinct from both the issue of whether the judgment will be enforced, and the issue of the extent to which it will be given preclusive effect.

3. [Subdivision (a) of Section 1716] places an affirmative duty on the forum court to recognize a foreign-country money judgment unless one of the grounds for nonrecognition stated in [subdivision (b), (c), or (e)] applies. [Subdivision] (b) states three mandatory grounds for denying recognition to a foreign-country money judgment. If the forum court finds that one of the grounds listed in [subdivision] (b) exists, then it must deny recognition to the foreign-country money judgment. [Subdivision] (c) states eight nonmandatory grounds for denying recognition. The forum court has discretion to decide whether or not to refuse recognition based on one of these grounds. [Subdivision] (d) places the burden of proof on the party resisting recognition of the foreign-country judgment to establish that one of the grounds for nonrecognition [stated in subdivision (b) or (c)] exists.

4. The mandatory grounds for nonrecognition stated in [subdivision (b) of Section 1716] are identical to the mandatory grounds stated in Section 4 of the 1962 Act. The discretionary grounds stated in [paragraphs] (c)(1) through (6) are based on subsection 4(b)(1) through (6) of the 1962 Act. The discretionary grounds stated in [paragraphs] (c)(7) and (8) are new [to the 2005 Uniform Act].

5. Under [paragraph (b)(1) of Section 1716], the forum court must deny recognition to the foreign-country money judgment if that judgment was "rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law." The standard for this ground for nonrecognition "has been stated authoritatively by the Supreme Court of the United States in *Hilton v. Guyot*, 159 U.S.113, 205 (1895). As indicated in that decision, a mere difference in the procedural system is not a sufficient basis for nonrecognition. A case of serious injustice must be involved." Cmt §4, Uniform Foreign Money-Judgment Recognition Act (1962). The focus of inquiry is not whether the procedure in the rendering country is similar to U.S. procedure, but rather on the basic fairness of the foreign-country procedure. Kam-Tech Systems, Ltd. v. Yardeni, 74 A.2d 644, 649 (N.J. App. 2001) (interpreting the comparable provision in the 1962 Act); *accord*, Society of Lloyd's v. Ashenden, 233 F.3d 473 (7th Cir. 2000) (procedures need not meet all the intricacies of the complex concept of due process that has emerged from U.S. case law, but rather must be fair in the broader international sense) (interpreting comparable provision in the 1962 Act). Procedural differences, such as absence of jury trial or different evidentiary rules are not sufficient to justify denying recognition under [paragraph] (b)(1), so long as the essential elements of impartial administration and basic procedural fairness have been

provided in the foreign proceeding. As the U.S. Supreme Court stated in *Hilton*:

> Where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect then a foreign-country judgment should be recognized. *Hilton*, 159 U.S. at 202.

6. [Omitted]

7. [Paragraph (c)(2) of Section 1716] limits the type of fraud that will serve as a ground for denying recognition to extrinsic fraud. This provision is consistent with the interpretation of the comparable provision in subsection 4(b)(2) of the 1962 Act by the courts, which have found that only extrinsic fraud — conduct of the prevailing party that deprived the losing party of an adequate opportunity to present its case — is sufficient under the 1962 Act. Examples of extrinsic fraud would be when the plaintiff deliberately had the initiating process served on the defendant at the wrong address, deliberately gave the defendant wrong information as to the time and place of the hearing, or obtained a default judgment against the defendant based on a forged confession of judgment. When this type of fraudulent action by the plaintiff deprives the defendant of an adequate opportunity to present its case, then it provides grounds for denying recognition of the foreign-country judgment. Extrinsic fraud should be distinguished from intrinsic fraud, such as false testimony of a witness or admission of a forged document into evidence during the foreign proceeding. Intrinsic fraud does not provide a basis for denying recognition under [paragraph] (c)(2), as the assertion that intrinsic fraud has occurred should be raised and dealt with in the rendering court.

8. The public policy exception in [paragraph (c)(3) of Section 1716] is based on the public policy exception in subsection 4(b)(3) of the 1962 Act, with one difference. The public policy exception in the 1962 Act states that the relevant inquiry is whether "the [cause of action] [claim for relief] on which the judgment is based" is repugnant to public policy. Based on this "cause of action" language, some courts interpreting the 1962 Act have refused to find that a public policy challenge based on

something other than repugnancy of the foreign cause of action comes within this exception. *E.g.*, Southwest Livestock & Trucking Co., Inc. v. Ramon, 169 F.3d 317 (5th Cir. 1999) (refusing to deny recognition to Mexican judgment on promissory note with interest rate of 48% because cause of action to collect on promissory note does not violate public policy); Guinness PLC v. Ward, 955 F.2d 875 (4th Cir. 1992) (challenge to recognition based on post-judgment settlement could not be asserted under public policy exception); The Society of Lloyd's v. Turner, 303 F.3d 325 (5th Cir. 2002) (rejecting argument legal standards applied to establish elements of breach of contract violated public policy because cause of action for breach of contract itself is not contrary to state public policy); *cf.* Bachchan v. India Abroad Publications, Inc., 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992) (judgment creditor argued British libel judgment should be recognized despite argument it violated First Amendment because New York recognizes a cause of action for libel). [Paragraph] (c)(3) rejects this narrow focus by providing that the forum court may deny recognition if either the cause of action or the judgment itself violates public policy. *Cf.* Restatement (Third) of the Foreign Relations Law of the United States, § 482(2)(d) (1986) (containing a similarly-worded public policy exception to recognition).

Although [paragraph] (c)(3) of this Act rejects the narrow focus on the cause of action under the 1962 Act, it retains the stringent test for finding a public policy violation applied by courts interpreting the 1962 Act. Under that test, a difference in law, even a marked one, is not sufficient to raise a public policy issue. Nor is it relevant that the foreign law allows a recovery that the forum state would not allow. Public policy is violated only if recognition or enforcement of the foreign-country judgment would tend clearly to injure the public health, the public morals, or the public confidence in the administration of law, or would undermine "that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel." Hunt v. BP Exploration Co. (Libya) Ltd., 492 F. Supp. 885, 901 (N.D. Tex. 1980).

The language "or of the United States" in [paragraph] (c)(3), which does not appear in the 1962 Act provision, makes it clear that the relevant public policy is that of both the State in which recognition is sought and that of the United States. This is the position taken by the vast majority of cases interpreting the 1962 public policy provision. *E.g.*, Bachchan v. India Abroad Publications, Inc., 585 N.Y.S.2d 661 (Sup.Ct. N.Y. 1992) (British libel judgment denied recognition because it violates First Amendment).

9. [Paragraph (c)(5) of Section 1716] allows the forum court to refuse recognition of a foreign-country judgment when the parties had a valid agreement, such as a valid forum selection clause or agreement to arbitrate, providing that the relevant dispute would be resolved in a forum other than the forum issuing the foreign-country judgment. Under this provision, the forum court must find both the existence of a valid agreement and that the agreement covered the subject matter involved in the foreign litigation resulting in the foreign-country judgment.

10. [Paragraph (c)(6) of Section 1716] authorizes the forum court to refuse recognition of a foreign-country judgment that was rendered in the foreign country solely on the basis of personal service when the forum court believes the original action should have been dismissed by the court in the foreign country on grounds of *forum non conveniens*.

11. [Paragraph (c)(7) of Section 1716] is new. Under this [paragraph], the forum court may deny recognition to a foreign-country judgment if there are circumstances that raise substantial doubt about the integrity of the rendering court with respect to that judgment. It requires a showing of corruption in the particular case that had an impact on the judgment that was rendered. This provision may be contrasted with [paragraph] (b)(1), which requires that the forum court refuse recognition to the foreign-country judgment if it was rendered under a judicial system that does not provide impartial tribunals. Like the comparable provision in subsection 4(a)(1) of the 1962 Act, [paragraph] (b)(1) focuses on the judicial system of the foreign country as a whole, rather than on whether the particular judicial proceeding leading to the foreign-country judgment was impartial and fair. *See, e.g.*, The Society of Lloyd's v. Turner, 303 F.3d 325, 330 (5th Cir. 2002) (interpreting the 1962 Act); CIBC Mellon Trust Co. v. Mora Hotel Corp,. N.V., 743 N.Y.S.2d 408, 415 (N.Y. App. 2002) (interpreting the 1962 Act); Society of Lloyd's v. Ashenden, 233 F.3d 473, 477 (7th Cir. 2000) (interpreting the 1962 Act). On the other hand, [paragraph] (c)(7) allows the court to deny recognition to the foreign-country judgment if it finds a lack of impartiality and fairness of the tribunal in the individual proceeding leading to the foreign-country judgment. Thus, the difference is that between showing, for example, that corruption and bribery is so prevalent throughout the judicial system of the foreign country as to make that entire judicial system one that does not provide impartial tribunals versus showing that bribery of the judge in the proceeding that resulted in the particular foreign-country judgment under consideration had a sufficient impact on the ultimate judgment as to call it into question.

12. [Paragraph (c)(8) of Section 1716] also is new. It allows the forum court to deny recognition to the foreign-country judgment if the court

finds that the specific proceeding in the foreign court was not compatible with the requirements of fundamental fairness. Like [paragraph] (c)(7), it can be contrasted with [paragraph] (b)(1), which requires the forum court to deny recognition to the foreign-country judgment if the forum court finds that the entire judicial system in the foreign country where the foreign-country judgment was rendered does not provide procedures compatible with the requirements of fundamental fairness. While the focus of [paragraph] (b)(1) is on the foreign country's judicial system as a whole, the focus of [paragraph] (c)(8) is on the particular proceeding that resulted in the specific foreign-country judgment under consideration. Thus, the difference is that between showing, for example, that there has been such a breakdown of law and order in the particular foreign country that judgments are rendered on the basis of political decisions rather than the rule of law throughout the judicial system versus a showing that for political reasons the particular party against whom the foreign-country judgment was entered was denied fundamental fairness in the particular proceedings leading to the foreign-country judgment.

[Paragraphs (c)(7) and (8) of Section 1716] both are discretionary grounds for denying recognition, while [paragraph] (b)(1) is mandatory. Obviously, if the entire judicial system in the foreign country fails to satisfy the requirements of impartiality and fundamental fairness, a judgment rendered in that foreign country would be so compromised that the forum court should refuse to recognize it as a matter of course. On the other hand, if the problem is evidence of a lack of integrity or fundamental fairness with regard to the particular proceeding leading to the foreign-country judgment, then there may or may not be other factors in the particular case that would cause the forum court to decide to recognize the foreign-country judgment. For example, a forum court might decide not to exercise its discretion to deny recognition despite evidence of corruption or procedural unfairness in a particular case because the party resisting recognition failed to raise the issue on appeal from the foreign-country judgment in the foreign country, and the evidence establishes that, if the party had done so, appeal would have been an adequate mechanism for correcting the transgressions of the lower court.

13. Under [subdivision (d) of Section 1716], the party opposing recognition of the foreign-country judgment has the burden of establishing that one of the grounds for nonrecognition set out in [subdivision] (b) or (c) applies. The 1962 Act was silent as to who had the burden of proof to establish a ground for nonrecognition and courts

applying the 1962 Act took different positions on the issue. *Compare* Bridgeway Corp. v. Citibank, 45 F.Supp. 2d 276, 285 (S.D.N.Y. 1999) (plaintiff has burden to show no mandatory basis under 4(a) for nonrecognition exists; defendant has burden regarding discretionary bases) *with* The Courage Co. LLC v. The ChemShare Corp., 93 S.W.3d 323, 331 (Tex. App. 2002) (party seeking to avoid recognition has burden to prove ground for nonrecognition). Because the grounds for nonrecognition in Section [1716] are in the nature of defenses to recognition, the burden of proof is most appropriately allocated to the party opposing recognition of the foreign-country judgment.

[Adapted from the Uniform Law Commission's Comment to the 2005 Uniform Act § 4.]

Heading of Chapter 3 (commencing with Section 1730) (added).

Comment. The heading of Chapter 3 (commencing with Section 1730) is added to locate the Tribal Court Civil Money Judgment Act within Title 11.

The standards of recognition for tribal court civil money judgments set forth in Section 1737 of this Act are derived from Section 4 of the Uniform Foreign-Country Money Judgments Recognition Act (2005) (hereafter, "2005 Uniform Act"). See also Section 1716.

Paragraph (b)(1) of Section 1737 provides that a tribal court money judgment shall not be recognized if the tribal court did not have personal jurisdiction over the respondent. Under this paragraph, a tribal court can lack personal jurisdiction if either of the following applies:

(1) The tribal court lacks a basis for exercising personal jurisdiction that would be sufficient according to the standards governing personal jurisdiction in this state.

(2) The tribal court lacks personal jurisdiction under its own law.

The need to evaluate personal jurisdiction under the tribal court's own law should be rare. In most cases, objections to personal jurisdiction will have been litigated or waived in the tribal court proceeding. "There is authority … for the proposition that a U.S. court generally will not look behind a foreign court's finding of personal jurisdiction under its own law." See Restatement of the Law Fourth: The Foreign Relations Law of the United States: Jurisdiction § 403 Reporters' Note 7 (Tentative Draft No. 1, April 1, 2014). Generally, the mere fact that a judgment was rendered by a tribal court suggests that personal jurisdiction was proper under tribal law. However, a California court may need to evaluate personal jurisdiction under tribal law when the issue of personal jurisdiction was neither litigated nor waived in the tribal court

proceeding (e.g., the defendant never appeared and a default judgment was entered).

Where a defect in the service of process would defeat personal jurisdiction under tribal law, a court may find that the tribal court lacked personal jurisdiction under tribal law on the basis of that service defect. However, where the service defect is not jurisdictional, the service defect could still lead to nonrecognition under other provisions. E.g., Section 1737(c)(1).

Subdivision (c) of Section 1737 lists grounds on which the court may decline to recognize a tribal court money judgment. With the exception of paragraphs (c)(3) and (c)(4) of Section 1737, these grounds generally involve the fairness of the tribal court proceeding. When the fairness-related grounds apply, the court has discretion to recognize the tribal court judgment in the unusual case where countervailing considerations outweigh the seriousness of the defect underlying the applicable ground for nonrecognition. Such countervailing considerations could include, for instance, situations in which the opponent failed to raise an objection in the tribal court or the opponent's own misconduct was the primary cause of the harm suffered.

Section 1737(c)(1) provides that a court may decline to recognize a tribal court money judgment if the defendant did not receive notice of the tribal court proceeding in sufficient time to enable the defendant to defend. Under this paragraph, a defect in either the timing or the content of the notice could be grounds for nonrecognition if that defect precluded the defendant from defending in the tribal court proceeding.

Section 1737(c)(2) provides that a court may decline to recognize a tribal court money judgment if fraud deprived the losing party of an adequate opportunity to present its case. The Uniform Law Commission's commentary on this provision indicates that the type of fraud that can serve as grounds for nonrecognition is limited to "extrinsic fraud — conduct of the prevailing party that deprived the losing party of an adequate opportunity to present its case." See Background from the 2005 Uniform Act *infra*. The reference to "extrinsic fraud" suggests that the test established by the exception is categorical, permitting nonrecognition in cases of extrinsic, but not intrinsic, fraud. However, the language of the exception establishes a functional test, whether the fraud deprived the party of an adequate opportunity to present its case. Recent judgment recognition case law evaluates fraud by assessing "whether the injured party had any opportunity to address the alleged misconduct during the original proceeding." See Restatement of the Law Fourth: The Foreign Relations Law of the United States: Jurisdiction §

404 Reporters' Note 3 (Tentative Draft No. 1, April 1, 2014). This case law suggests that a key consideration for a court deciding whether alleged fraud could be a ground for nonrecognition is whether there was "a reasonable opportunity for the person victimized by fraud to uncover the misconduct and bring it to the [rendering] court's attention." *Id.*

Section 1737(c)(4) provides that a court may decline to recognize a tribal court money judgment if it conflicts with another final and conclusive judgment. Some commentators suggest that, where the tribal court rendering the later judgment fairly considered the earlier judgment and declined to recognize it under standards similar to those set forth in this Act, a court should ordinarily recognize the later tribal court money judgment. However, in some situations, other law may require the recognition of one of the conflicting judgments (e.g., where one of the conflicting judgments is entitled to full faith and credit). See *id.* § 404 Comment f, Reporters' Note 6.

The commentary for Section 4 of the 2005 Uniform Act is set out, in relevant part, below. The Law Revision Commission's recommendation (*Recognition of Tribal and Foreign Court Money Judgments*, 44 Cal. L. Revision Comm'n Reports 611 (2016)) does not reproduce all parts of the Uniform Law Commission's commentary. The omission of any part of the Uniform Law Commission commentary does not necessarily imply disapproval of the omitted commentary.

Background from the 2005 Uniform Act

Source: [Section 1737] is based on Section 4 of the 1962 [Uniform Foreign Money Judgments Recognition] Act [hereafter, "1962 Act"].

1. [Section 1737] provides the standards for recognition of a [tribal court] money judgment. …

2. [Omitted]

3. … [Subdivision (b) of Section 1737] states three mandatory grounds for denying recognition to a [tribal court] money judgment. If the forum court finds that one of the grounds listed in [subdivision (b) of Section 1737] exists, then it must deny recognition to the [tribal court] money judgment. [Subdivision (c) of Section 1737] states [nine] nonmandatory grounds for denying recognition. The forum court has discretion to decide whether or not to refuse recognition based on one of these grounds. [Subdivision (d) of Section 1737] places the burden of proof on the party resisting recognition of the [tribal court] judgment to establish that one of the grounds for nonrecognition exists.

4. [Omitted]

5. Under [paragraph (b)(3) of Section 1737], the forum court must deny recognition to the [tribal court] money judgment if that judgment was "rendered under a judicial system that does not provide impartial

tribunals or procedures compatible with the requirements of due process of law." The standard for this ground for nonrecognition "has been stated authoritatively by the Supreme Court of the United States in *Hilton v. Guyot*, 159 U.S.113, 205 (1895). As indicated in that decision, a mere difference in the procedural system is not a sufficient basis for nonrecognition. A case of serious injustice must be involved." Cmt §4, Uniform Foreign Money-Judgment Recognition Act (1962). The focus of inquiry is not whether the procedure … is similar to U.S. procedure, but rather on the basic fairness of the [tribal court] procedure. Kam-Tech Systems, Ltd. v. Yardeni, 74 A.2d 644, 649 (N.J. App. 2001) (interpreting the comparable provision in the 1962 Act); *accord*, Society of Lloyd's v. Ashenden, 233 F.3d 473 (7th Cir. 2000) (procedures need not meet all the intricacies of the complex concept of due process that has emerged from U.S. case law, but rather must be fair in the broader international sense) (interpreting comparable provision in the 1962 Act). Procedural differences, such as absence of jury trial or different evidentiary rules are not sufficient to justify denying recognition under [paragraph (b)(3) of Section 1737], so long as the essential elements of impartial administration and basic procedural fairness have been provided in the [tribal court] proceeding. As the U.S. Supreme Court stated in *Hilton*:

> Where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect then a foreign-country judgment should be recognized. *Hilton*, 159 U.S. at 202.

6. [Omitted]

7. [Paragraph (c)(2) of Section 1737] limits the type of fraud that will serve as a ground for denying recognition to extrinsic fraud. This provision is consistent with the interpretation of the comparable provision in subsection 4(b)(2) of the 1962 Act by the courts, which have found that only extrinsic fraud — conduct of the prevailing party that deprived the losing party of an adequate opportunity to present its case

— is sufficient under the 1962 Act. Examples of extrinsic fraud would be when the plaintiff deliberately had the initiating process served on the defendant at the wrong address, deliberately gave the defendant wrong information as to the time and place of the hearing, or obtained a default judgment against the defendant based on a forged confession of judgment. When this type of fraudulent action by the plaintiff deprives the defendant of an adequate opportunity to present its case, then it provides grounds for denying recognition of the [tribal court] judgment. Extrinsic fraud should be distinguished from intrinsic fraud, such as false testimony of a witness or admission of a forged document into evidence during the [tribal court] proceeding. Intrinsic fraud does not provide a basis for denying recognition under [paragraph (c)(2) of Section 1737], as the assertion that intrinsic fraud has occurred should be raised and dealt with in the rendering court.

8. The public policy exception in [paragraph (c)(3) of Section 1737] is based on the public policy exception in subsection 4(b)(3) of the 1962 Act, with one difference. The public policy exception in the 1962 Act states that the relevant inquiry is whether "the [cause of action] [claim for relief] on which the judgment is based" is repugnant to public policy. Based on this "cause of action" language, some courts interpreting the 1962 Act have refused to find that a public policy challenge based on something other than repugnancy of the … cause of action comes within this exception. *E.g.*, Southwest Livestock & Trucking Co., Inc. v. Ramon, 169 F.3d 317 (5th Cir. 1999) (refusing to deny recognition to Mexican judgment on promissory note with interest rate of 48% because cause of action to collect on promissory note does not violate public policy); Guinness PLC v. Ward, 955 F.2d 875 (4th Cir. 1992) (challenge to recognition based on post-judgment settlement could not be asserted under public policy exception); The Society of Lloyd's v. Turner, 303 F.3d 325 (5th Cir. 2002) (rejecting argument legal standards applied to establish elements of breach of contract violated public policy because cause of action for breach of contract itself is not contrary to state public policy); *cf.* Bachchan v. India Abroad Publications, Inc., 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992) (judgment creditor argued British libel judgment should be recognized despite argument it violated First Amendment because New York recognizes a cause of action for libel). [Paragraph (c)(3) of Section 1737] rejects this narrow focus by providing that the forum court may deny recognition if either the cause of action or the judgment itself violates public policy. *Cf.* Restatement (Third) of the Foreign Relations Law of the United States, § 482(2)(d) (1986) (containing a similarly-worded public policy exception to recognition).

Although [paragraph (c)(3) of Section 1737] of this Act rejects the narrow focus on the cause of action under the 1962 Act, it retains the

stringent test for finding a public policy violation applied by courts interpreting the 1962 Act. Under that test, a difference in law, even a marked one, is not sufficient to raise a public policy issue. Nor is it relevant that the [tribe's] law allows a recovery that the forum state would not allow. Public policy is violated only if recognition or enforcement of the [tribal court] judgment would tend clearly to injure the public health, the public morals, or the public confidence in the administration of law, or would undermine "that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel." Hunt v. BP Exploration Co. (Libya) Ltd., 492 F. Supp. 885, 901 (N.D. Tex. 1980).

The language "or of the United States" in [paragraph (c)(3) of Section 1737], which does not appear in the 1962 Act provision, makes it clear that the relevant public policy is that of both the State in which recognition is sought and that of the United States. This is the position taken by the vast majority of cases interpreting the 1962 public policy provision. *E.g.*, Bachchan v. India Abroad Publications, Inc., 585 N.Y.S.2d 661 (Sup.Ct. N.Y. 1992) (British libel judgment denied recognition because it violates First Amendment).

9. [Paragraph (c)(5) of Section 1737] allows the forum court to refuse recognition of a [tribal court] judgment when the parties had a valid agreement, such as a valid forum selection clause or agreement to arbitrate, providing that the relevant dispute would be resolved in a forum other than the [tribal court] issuing the … judgment. Under this provision, the forum court must find both the existence of a valid agreement and that the agreement covered the subject matter involved in the … litigation resulting in the [tribal court] judgment.

10. [Paragraph (c)(6) of Section 1737] authorizes the forum court to refuse recognition of a [tribal court] judgment that was rendered … solely on the basis of personal service when the forum court believes the original action should have been dismissed by the [tribal] court … on grounds of *forum non conveniens*.

11. … Under [paragraph (c)(7) of Section 1737], the forum court may deny recognition to a [tribal court] judgment if there are circumstances that raise substantial doubt about the integrity of the rendering court with respect to that judgment. It requires a showing of corruption in the particular case that had an impact on the judgment that was rendered. This provision may be contrasted with [paragraph (b)(3) of Section 1737], which requires that the forum court refuse recognition to the [tribal court] judgment if it was rendered under a judicial system that does not provide impartial tribunals. Like the comparable provision in

subsection 4(a)(1) of the 1962 Act, [paragraph (b)(3) of Section 1737] focuses on the [tribe's] judicial system … as a whole, rather than on whether the particular judicial proceeding leading to the [tribal court] judgment was impartial and fair. *See, e.g.*, The Society of Lloyd's v. Turner, 303 F.3d 325, 330 (5th Cir. 2002) (interpreting the 1962 Act); CIBC Mellon Trust Co. v. Mora Hotel Corp,. N.V., 743 N.Y.S.2d 408, 415 (N.Y. App. 2002) (interpreting the 1962 Act); Society of Lloyd's v. Ashenden, 233 F.3d 473, 477 (7th Cir. 2000) (interpreting the 1962 Act). On the other hand, [paragraph (c)(7) of Section 1737] allows the court to deny recognition to the [tribal court] judgment if it finds a lack of impartiality and fairness of the tribunal in the individual proceeding leading to the [tribal court] judgment. Thus, the difference is that between showing, for example, that corruption and bribery is so prevalent throughout the [tribe's] judicial system … as to make that entire judicial system one that does not provide impartial tribunals versus showing that bribery of the judge in the proceeding that resulted in the particular [tribal court] judgment under consideration had a sufficient impact on the ultimate judgment as to call it into question.

12. [Paragraph (c)(8) of Section 1737] … allows the forum court to deny recognition to the [tribal court] judgment if the court finds that the specific proceeding in the [tribal] court was not compatible with the requirements of fundamental fairness. Like [paragraph (c)(7) of Section 1737], it can be contrasted with [paragraph (b)(3) of Section 1737], which requires the forum court to deny recognition to the [tribal court] judgment if the forum court finds that the entire judicial system … where the [tribal court] judgment was rendered does not provide procedures compatible with the requirements of fundamental fairness. While the focus of [paragraph (b)(3) of Section 1737] is on the [tribal] judicial system as a whole, the focus of [paragraph (c)(8) of Section 1737] is on the particular proceeding that resulted in the specific [tribal court] judgment under consideration. Thus, the difference is that between showing, for example, that there has been such a breakdown of law and order in the particular [tribe] that judgments are rendered on the basis of political decisions rather than the rule of law throughout the judicial system versus a showing that for political reasons the particular party against whom the [tribal court] judgment was entered was denied fundamental fairness in the particular proceedings leading to the [tribal court] judgment.

[Paragraphs (c)(7) and (8) of Section 1737] both are discretionary grounds for denying recognition, while [paragraph (b)(3) of Section 1737] is mandatory. Obviously, if the [tribe's] entire judicial system … fails to satisfy the requirements of impartiality and fundamental fairness, a judgment rendered in that [judicial system] would be so compromised

that the forum court should refuse to recognize it as a matter of course. On the other hand, if the problem is evidence of a lack of integrity or fundamental fairness with regard to the particular proceeding leading to the [tribal court] judgment, then there may or may not be other factors in the particular case that would cause the forum court to decide to recognize the [tribal court] judgment. For example, a forum court might decide not to exercise its discretion to deny recognition despite evidence of corruption or procedural unfairness in a particular case because the party resisting recognition failed to raise the issue on appeal from the [tribal court] judgment …, and the evidence establishes that, if the party had done so, appeal would have been an adequate mechanism for correcting the transgressions of the lower court.

13. [Omitted]

[Adapted from the Uniform Law Commission's Comment to the 2005 Uniform Act § 4.]

APPENDIX 5

BIOGRAPHIES OF 2017 COMMISSIONERS

Tom Hallinan, of Ceres, serves as the Chairperson of the Commission, and has been a partner with Churchwell White LLP since 2012. He was previously a partner with Bush, Ackley, Milich and Hallinan from 1994 to 2012, a law clerk at the United States Attorney's Office from 1991 to 1993, and a law clerk at the Judicial Council of California from 1990 to 1992. He has also served on the 38th District Agricultural Association, Stanislaus County Fair Board of Directors. Commissioner Hallinan received a Juris Doctor degree from Lincoln Law School.

Jane McAllister, of Hilmar, serves as the Vice-Chairperson of the Commission, and has been a partner with McAllister and McAllister, Inc. since 1996. She was previously an associate attorney with Damrell, Nelson, Schrimp, Pallios, Pacher and Silva from 1988 to 1996. Commissioner McAllister received a Juris Doctor degree from Humphreys College School of Law.

Diane Boyer-Vine, of Sacramento, has been Legislative Counsel for the State of California since 2002. She was previously a deputy and thereafter a chief deputy in the Legislative Counsel's office from 1988 to 2002, and before that an associate with the law firm of Martorana and Stockman. She also serves as a member of the California Commission on Uniform State Laws. Commissioner Boyer-Vine received a Juris Doctor degree from the University of California, Davis School of Law.

Assembly Member Ed Chau, of Monterey Park, has been a member of the Assembly since 2012. He previously was a general law practitioner in the Law Office of Edwin Chau, a small business owner for over 20 years, an engineer for IBM, and a programmer for Unisys Corporation. He has also previously served as a board member of the Montebello Unified School District, where he acted as Board President three times, and has served as Judge Pro Tem for the Los Angeles Superior Court. Commissioner Chau received a Juris Doctor degree from Southwestern University.

Victor King, of La Crescenta, has been university legal counsel for California State University, Los Angeles since 2002. He was previously a partner with the law firm of Lewis Brisbois Bisgaard and Smith LLP from 2001 to 2002, an associate with the law firm of Lewis Brisbois Bisgaard and Smith LLP from 1999 to 2001, an associate with the law firm of Bottum and Feliton from 1996 to 1999, and an associate with the law firm of Ochoa and Sillas from 1991 to 1995. He was also a trustee of the Glendale Community College District from 1997 to 2009. Commissioner King received a Juris Doctor degree from the University of Michigan Law School.

Susan Duncan Lee, of San Francisco, has been a deputy attorney general and thereafter a supervising deputy attorney general with the California Department of Justice since 1989. Commissioner Lee received a Juris Doctor degree from the University of California, Hastings College of the Law.

Crystal Miller-O'Brien, of Los Angeles, has been general counsel for Medical Management Consultants, Inc. since 2006. She was previously an associate with the law firm of Anderson McPharlin and Connors LLP from 2005 to 2006, an associate with the law firm of Robie and Matthai PC from 2003 to 2004, an associate with the law firm of Bullivant Houser Bailey PC from 2002 to 2003, and a judicial clerk to the Washington State Supreme Court from 2001 to 2002. She also served on the board of directors of the Conference of California Bar Associations from 2009 to 2012, and is a member of Corporate Counsel Women of Color, the Black Women Lawyers Association of Los Angeles, and the National Association of Women Business Owners. Commissioner Miller-O'Brien received a Juris Doctor degree and a Joint Certificate in Alternative Dispute Resolution from Willamette University College of Law.

Senator Richard Roth, of Riverside, has been a member of the Senate since 2012. He previously was a managing partner in the law firm of Roth Carney APC, engaged in the practice of labor and employment law with other Riverside-based firms for over 30 years, an attorney with the National Labor Relations Board, an

adjunct instructor at the University of California at Riverside's Anderson School of Management and in the University's extension division, a Legal Advisor to the Airlift/Tanker Association, and a Lawyer Representative to the Ninth Circuit Court of Appeals Judicial Conference. He has also served in the United States Air Force, and was a member of the JAG Corps, including service in the Pentagon as Mobilization Assistant to the Judge Advocate General of the U.S. Air Force, retiring with the rank of major general. He has also previously served as Chairman of the Board for the Greater Riverside Chambers of Commerce, president of the Monday Morning Group vice-chairperson of the Parkview Community Hospital Board, and trustee of the March Field Museum. He is a member of the Raincross Club, the Riverside Community Hospital Advisory Board, the Thomas W. Wathen Foundation Board (Flabob Airport), the Riverside County Bar Association Board of Directors, the Path of Life Ministries Advisory Board, the Air Force Judge Advocate General's School Foundation Board, and the La Sierra University Foundation Board, and a past member of the Riverside Public Library Foundation Board, and the Riverside Art Museum Board. Commissioner Roth received a Juris Doctor degree from Emory University.

APPENDIX 6

COMMISSION PUBLICATIONS

From 1955 until 2009, the California Law Revision Commission's annual reports, recommendations, and studies were published in separate pamphlets, which were later bound in a small edition of hard-cover volumes. Beginning with the Commission's 2009-2010 Annual Report, the printing of separate pamphlets was generally discontinued. As a general rule, only the hard-cover volumes are now published. (The Commission may occasionally publish a separate report for ease of reference.)

All Commission publications may be downloaded from the Commission's website at *www.clrc.ca.gov*.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Disposition of Estate Without Administration: Dollar Amounts

August 2018

California Law Revision Commission
c/o UC Davis School of Law
Davis, CA 95616
www.clrc.ca.gov

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

Cite this report as *Disposition of Estate Without Administration: Dollar Amounts*, 45 Cal. L. Revision Comm'n Reports 387 (2018).

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION
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August 17, 2018

To: The Honorable Edmund G. Brown, Jr.
Governor of California, and
The Legislature of California

The Probate Code provides several options for estates or portions of estates to be conveyed without requiring a full probate proceeding. Many of these provisions that allow disposition of an estate without administration include a dollar limit, authorizing use of the procedure only where the value of the relevant assets is less than the specified amount.

The Commission concluded that, unless the dollar amounts were adjusted to account for inflation, the availability of these procedures would decrease over time due to inflation. This, in turn, could effectively require more estates to be administered in probate.

The Commission believes that these disposition without administration procedures are a useful tool and their availability should be preserved. Therefore, the Commission recommends adjusting the dollar amounts to reflect the cost-of-living changes due to inflation since these amounts were last adjusted. The Commission also recommends that these amounts be adjusted and published administratively triennially (every three years) going forward.

This recommendation was prepared pursuant to Resolution Chapter 150 of the Statutes of 2016.

Respectfully submitted,

Thomas Hallinan
Chairperson

DISPOSITION OF ESTATE WITHOUT ADMINISTRATION: DOLLAR AMOUNTS

BACKGROUND

The Probate Code contains a number of provisions that permit an estate or a portion of an estate to be collected without administration (or with substantially simplified administration). Some of these procedures are limited to estates or assets below a specified dollar amount.

These procedures are helpful to heirs and beneficiaries of small estates, as the procedures make it possible to avoid the delays and costs associated with probate administration.[1] In addition, these procedures lessen the burden on courts and allow judicial resources to be directed to matters requiring greater judicial oversight.[2]

The Commission studied the dollar limits for these procedures to determine whether those dollar limits need to be adjusted.

SCOPE OF THE ISSUE

The Commission's study of this topic focused on procedures that permit collection of an estate or assets of a decedent without administration or with substantially simplified administration that are subject to a maximum dollar limit. In particular, the Commission focused on the following provisions of the Probate Code:

- *Small Estate Set-Aside* (Sections 6600-6615). These provisions allow the decedent's spouse and/or minor children to petition the court to set the decedent's estate aside for them. The procedure is only applicable when the value of the estate (subject to specified exclusions[3]) does not exceed $20,000.

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1. See Senate Committee on Judiciary Analysis of AB 1305 (June 6, 2011), p. 4.

2. *Id.*

3. See Prob. Code §§ 6602, 6609.

- *Affidavit Procedure for Collection or Transfer of Personal Property* (Sections 13100-13116). These provisions permit a decedent's successor[4] to collect certain property without administration, when the gross value of the decedent's real and personal property in this state does not exceed $150,000 (subject to Section 13050, described below).
- *Transfer of Real Property Without Administration* (Sections 13150-13158). Under these provisions, a court may order the transfer of real property to a decedent's successor[5] if the gross value of the decedent's real and personal property in this state does not exceed $150,000) (subject to Section 13050, described below).
- *Affidavit Procedure for Real Property of Small Value* (Sections 13200-13210). These provisions allow a decedent's successor[6] to record a court-certified affidavit, to transfer title to the decedent's real property to the successor. The provisions only apply if the gross value of all real property in the decedent's estate located in California does not exceed $50,000 (subject to Section 13050, described below).
- *Collection by Affidavit of Compensation Owed Deceased Spouse* (Sections 13600-13606). These provisions allow a decedent's surviving spouse to collect salary or other compensation owed by an employer for personal services of the deceased spouse, of $15,000 or less.

Probate Code Section 13050 provides a rule for calculating the value of the decedent's property, which is used to determine the availability of certain procedures described above. In that

4. See *id.* § 13006.

5. *Id.*

6. *Id.*

calculation, Section 13050(c)(2) excludes up to $15,000 of unpaid compensation owed to the decedent.

This recommendation addresses only the dollar amounts noted above.

This recommendation does not address and the Commission takes no position on the suitability of dollar amounts in other provisions of the Probate Code.

PROBLEM

These procedures for simplified administration and disposition of administration are subject to dollar limits, as indicated above. These dollar limits serve an important function by balancing the need for judicial oversight with the need for judicial economy and the avoidance of unnecessary administration.[7] The dollar limits represent a considered choice in which the Legislature struck a balance between these important, competing policy concerns.

Over time, changes in the cost of living could shift the policy balance struck by the Legislature. As the cost of living increases, the purchasing power of these dollar limits will be lower. Fewer estates and assets will qualify to use these procedures and would, instead, require administration in a full probate proceeding. As such, "[t]he Legislature has regularly reemphasized the importance of maintaining this balance by adjusting the applicable limits regularly over time."[8]

RECOMMENDATION

The Commission recommends that the dollar amounts contained in Chapter 6 (commencing with Section 6600) of Part 3 of Division 6 and Division 8 (commencing with 13000) of the

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7. Senate Committee on Judiciary Analysis of AB 1305 (June 6, 2011), pp. 4-5.

8. *Id* at 5.

Probate Code be adjusted to reflect the cost-of-living increases since these amounts were previously changed.[9]

In addition, the Commission recommends that an automatic cost-of-living adjustment mechanism be added to the Probate Code to provide for periodic administrative adjustment of the dollar amounts and publication of those adjusted amounts going forward.[10] This automatic adjustment mechanism (proposed Probate Code Section 890) is modeled after Code of Civil Procedure Section 703.150, which provides for automatic adjustment of the dollar amounts for exemptions from the enforcement of money judgments.

As with Code of Civil Procedure Section 703.150, proposed Probate Code Section 890 would assign the Judicial Council the task of adjusting the dollar amounts and publishing those adjusted amounts.

Proposed Probate Code Section 890 uses the same triennial cycle for adjusting the relevant dollar amounts as Code of Civil Procedure Section 703.150. Using the same triennial cycle (once every three years, as specified) would appear to minimize the administrative burden of performing these adjustments for the different statutory provisions.

RELATED TECHNICAL CHANGES

The Commission also recommends making the following related technical changes:

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9. The Commission considered which cost-of-living index to use for calculating the adjustment amounts: either the United States Bureau of Labor Statistics Consumer Price Index for All Urban Consumers (USBLS Index) or the California Consumer Price Index (CCPI). The Commission selected the USBLS Index because this index has been used recently for updating dollar values in the Probate Code. See CLRC Minutes (Dec. 2017), p. 15; CLRC Staff Memorandum 2017-58, pp. 5-7.

10. See proposed Prob. Code § 890.

- Amend Sections 13101, 13152, 13200, and 13601, which prescribe the contents of documents to be used to collect assets under different procedures at issue in this recommendation. These sections are amended to ensure that the adjusted dollar amounts are used in the forms, as appropriate, and the list of adjusted dollar amounts, prepared by Judicial Council, is attached to the relevant form.
- Repeal Section 13600(e), which provides a cost-of-living adjustment of the dollar limit for collection of unpaid compensation by a surviving spouse. That provision does not assign responsibility for making the adjustment. Nor does it provide a mechanism for publication of the adjusted amount. The relevant dollar amounts will now be subject to adjustment and publication under proposed Probate Code Section 890.
- Amend Sections 13601 and 13602 to conform to Section 13600(d), which specifies that a surviving spouse of a deceased firefighter or public safety officer is exempt from the dollar limit for collection of unpaid compensation.[11]

The Commission also proposes miscellaneous technical changes to conform to standard drafting practices, as indicated in the proposed legislation.

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11. See 2002 Cal. Stat. ch. 733, § 2.

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PROPOSED LEGISLATION

Prob. Code § 890 (added). Periodic adjustment of dollar amounts

SECTION 1. Part 21 (commencing with Section 890) is added to Division 2 of the Probate Code, to read:

PART 21. PERIODIC ADJUSTMENT OF DOLLAR AMOUNTS

§ 890. Periodic adjustment of dollar amounts

890. (a) On April 1, 2022, and at each three-year interval ending on April 1 thereafter, the dollar amounts specified in Chapter 6 (commencing with Section 6600) of Part 3 of Division 6 and in Division 8 (commencing with Section 13000) in effect immediately before that date shall be adjusted as provided in subdivision (b).

(b) The Judicial Council shall determine the amount of the adjustment based on the change in the United States city average of the "Consumer Price Index for All Urban Consumers," as published by the United States Bureau of Labor Statistics, from the December that is 40 months prior to the adjustment to the December immediately preceding the adjustment, with each adjusted amount rounded to the nearest twenty-five dollars ($25).

(c) Beginning April 1, 2022, the Judicial Council shall, after adjusting the amounts as directed in subdivision (b), publish a list of the current dollar amounts for the provisions identified in subdivision (a), together with the date of the next scheduled adjustment.

(d) Adjustments made under subdivision (a) do not apply when the decedent's death preceded the date of adjustment.

Comment. Section 890 is comparable to Code of Civil Procedure Section 703.150. It provides for periodic cost-of-living adjustments for dollar amounts contained in certain provisions of the Probate Code.

Prob. Code § 6602 (amended). Petition to set aside estate

SEC. 2. Section 6602 of the Probate Code is amended to read:

6602. A petition may be filed under this chapter requesting an order setting aside the decedent's estate to the decedent's surviving spouse and minor children, or one or more of them, as provided in this chapter, if the net value of the decedent's estate, over and above all liens and encumbrances at the date of death and over and above the value of any probate homestead interest set apart out of the decedent's estate under Section 6520, does not exceed ~~twenty thousand dollars ($20,000)~~ eighty-five thousand nine hundred dollars ($85,900), as adjusted periodically in accordance with Section 890.

Comment. Section 6602 is amended to adjust the dollar amount contained in this section. The adjusted amount reflects cost-of-living increases since the amount was last changed. See 1976 Cal. Stat. ch. 1028, § 2 (amending former Prob. Code § 640, which was the predecessor to this section); see also 1986 Cal. Stat. ch. 783 §§ 9, 23; *Recommendation Relating to Small Estate Set-Aside*, 18 Cal. L. Revision Comm'n Reports 1101 (1986). The dollar amount is subject to periodic cost-of-living adjustments going forward. See Section 890.

Prob. Code § 6609 (amended). Court order to set aside estate

SEC. 3. Section 6609 of the Probate Code is amended to read:

6609. (a) If the court determines that the net value of the decedent's estate, over and above all liens and encumbrances at the date of death of the decedent and over and above the value of any probate homestead interest set apart out of the decedent's estate under Section 6520, does not exceed ~~twenty thousand dollars ($20,000)~~ eighty-five thousand nine hundred dollars ($85,900), as adjusted periodically in accordance with Section 890, as of the date of the decedent's death, the court shall make an order under this section unless the court determines that making an order under this section would be inequitable under the circumstances of the particular case.

(b) In determining whether to make an order under this section, the court shall consider the needs of the surviving spouse and minor children, the liens and encumbrances on the property of the decedent's estate, the claims of creditors, the needs of the heirs or

devisees of the decedent, the intent of the decedent with respect to the property in the estate and the estate plan of the decedent as expressed in inter vivos and testamentary transfers or by other means, and any other relevant considerations. If the surviving spouse has remarried at the time the petition is heard, it shall be presumed that the needs of the surviving spouse do not justify the setting aside of the small estate, or any portion thereof, to the surviving spouse. This presumption is a presumption affecting the burden of proof.

(c) Subject to subdivision (d), if the court makes an order under this section, the court shall assign the whole of the decedent's estate, subject to all liens and encumbrances on property in the estate at the date of the decedent's death, to the surviving spouse and the minor children of the decedent, or any one or more of them.

(d) If there are any liabilities for expenses of the last illness, funeral charges, or expenses of administration that are unpaid at the time the court makes an order under this section, the court shall make ~~such orders as are necessary so that~~ the necessary orders for payment of those unpaid liabilities ~~are paid~~.

(e) Title to property in the decedent's estate vests absolutely in the surviving spouse, minor children, or any or all of them, as provided in the order, subject to all liens and encumbrances on property in the estate at the date of the decedent's death, and there shall be no further proceedings in the administration of the decedent's estate unless additional property in the decedent's estate is discovered.

Comment. Section 6609 is amended to adjust the dollar amount contained in this section. The adjusted amount reflects cost-of-living increases since the amount was last changed. See 1976 Cal. Stat. ch. 1028, § 3 (amending former Prob. Code § 645, which was the predecessor to this section); see also 1986 Cal. Stat. ch. 783 §§ 9, 23; *Recommendation Relating to Small Estate Set-Aside*, 18 Cal. L. Revision Comm'n Reports 1101 (1986). The dollar amount is subject to periodic cost-of-living adjustments going forward. See Section 890.

Subdivision (d) of Section 6609 is amended to make technical changes.

Prob. Code § 13050 (amended). Exclusions in determining property or estate of decedent or its value

SEC. 4. Section 13050 of the Probate Code is amended to read:

13050. (a) For the purposes of this part:

(1) Any property or interest or lien thereon ~~which~~ that, at the time of the decedent's death, was held by the decedent as a joint tenant, or in which the decedent had a life or other interest terminable upon the decedent's death, or ~~which~~ that was held by the decedent and passed to the decedent's surviving spouse pursuant to Section 13500, shall be excluded in determining the property or estate of the decedent or its value. This excluded property shall include, but not be limited to, property in a trust revocable by the decedent during ~~his or her~~ the decedent's lifetime.

(2) A multiple-party account to which the decedent was a party at the time of the decedent's death shall be excluded in determining the property or estate of the decedent or its value, whether or not all or a portion of the sums on deposit are community property, to the extent that the sums on deposit belong after the death of the decedent to a surviving party, P.O.D. payee, or beneficiary. For the purposes of this paragraph, the terms "multiple-party account," "party," "P.O.D. payee," and "beneficiary" are defined in Article 2 (commencing with Section 5120) of Chapter 1 of Part 2 of Division 5.

(b) For the purposes of this part, all of the following property shall be excluded in determining the property or estate of the decedent or its value:

(1) Any vehicle registered under Division 3 (commencing with Section 4000) of the Vehicle Code or titled under Division 16.5 (commencing with Section 38000) of the Vehicle Code.

(2) Any vessel numbered under Division 3.5 (commencing with Section 9840) of the Vehicle Code.

(3) Any manufactured home, mobilehome, commercial coach, truck camper, or floating home registered under Part 2 (commencing with Section 18000) of Division 13 of the Health and Safety Code.

(c) For the purposes of this part, the value of the following property shall be excluded in determining the value of the decedent's property in this state:

(1) Any amounts due to the decedent for services in the Armed Forces of the United States.

(2) The amount, not exceeding ~~fifteen thousand dollars ($15,000)~~ sixteen thousand six hundred twenty-five dollars ($16,625), as adjusted periodically in accordance with Section 890, of salary or other compensation, including compensation for unused vacation, owing to the decedent for personal services from any employment.

Comment. Section 13050 is amended to adjust the dollar amount contained in this section. The adjusted amount reflects cost-of-living increases since the amount was last changed. See 2011 Cal. Stat. ch. 117, § 3. The dollar amount is subject to periodic cost-of-living adjustments going forward. See Section 890.

Paragraph (a)(1) of Section 13050 is amended to make technical changes.

Prob. Code § 13100 (amended). Collection or transfer of personal property without probate

SEC. 5. Section 13100 of the Probate Code is amended to read:

13100. Excluding the property described in Section 13050, if the gross value of the decedent's real and personal property in this state does not exceed ~~one hundred fifty thousand dollars ($150,000)~~ one hundred sixty-six thousand two hundred fifty dollars ($166,250), as adjusted periodically in accordance with Section 890, and if 40 days have elapsed since the death of the decedent, the successor of the decedent may, without procuring letters of administration or awaiting probate of the will, do any of the following with respect to one or more particular items of property:

(a) Collect any particular item of property that is money due the decedent.

(b) Receive any particular item of property that is tangible personal property of the decedent.

(c) Have any particular item of property that is evidence of a debt, obligation, interest, right, security, or chose in action belonging to the decedent transferred, whether or not secured by a lien on real property.

Comment. Section 13100 is amended to adjust the dollar amount contained in this section. The adjusted amount reflects cost-of-living increases since the amount was last changed. See 2011 Cal. Stat. ch. 117, § 4. This dollar amount is subject to periodic cost-of-living adjustments going forward. See Section 890.

Prob. Code § 13101 (amended). Contents of affidavit or declaration to collect or transfer personal property without probate

SEC. 6. Section 13101 of the Probate Code is amended to read:

13101. (a) To collect money, receive tangible personal property, or have evidences of a debt, obligation, interest, right, security, or chose in action transferred under this chapter, an affidavit or a declaration under penalty of perjury under the laws of this state shall be furnished to the holder of the decedent's property stating all of the following:

(1) The decedent's name.

(2) The date and place of the decedent's death.

(3) "At least 40 days have elapsed since the death of the decedent, as shown in a certified copy of the decedent's death certificate attached to this affidavit or declaration."

(4) Either of the following, as appropriate:

(A) "No proceeding is now being or has been conducted in California for administration of the decedent's estate."

(B) "The decedent's personal representative has consented in writing to the payment, transfer, or delivery to the affiant or declarant of the property described in the affidavit or declaration."

(5) "The current gross fair market value of the decedent's real and personal property in California, excluding the property described in Section 13050 of the California Probate Code, does not exceed ~~one hundred fifty thousand dollars ($150,000)~~ [Insert dollar amount specified in subdivision (g) of Section 13101 of the California Probate Code]."

(6) A description of the property of the decedent that is to be paid, transferred, or delivered to the affiant or declarant.

(7) The name of the successor of the decedent (as defined in Section 13006 of the California Probate Code) to the described property.

(8) Either of the following, as appropriate:

(A) "The affiant or declarant is the successor of the decedent (as defined in Section 13006 of the California Probate Code) to the decedent's interest in the described property."

(B) "The affiant or declarant is authorized under Section 13051 of the California Probate Code to act on behalf of the successor of the decedent (as defined in Section 13006 of the California Probate Code) with respect to the decedent's interest in the described property."

(9) "No other person has a superior right to the interest of the decedent in the described property."

(10) "The affiant or declarant requests that the described property be paid, delivered, or transferred to the affiant or declarant."

(11) "The affiant or declarant affirms or declares under penalty of perjury under the laws of the State of California that the foregoing is true and correct."

(b) Where more than one person executes the affidavit or declaration under this section, the statements required by subdivision (a) shall be modified as appropriate to reflect that fact.

(c) If the particular item of property to be transferred under this chapter is a debt or other obligation secured by a lien on real property and the instrument creating the lien has been recorded in the office of the county recorder of the county where the real property is located, the affidavit or declaration shall satisfy the requirements both of this section and of Section 13106.5.

(d) A certified copy of the decedent's death certificate shall be attached to the affidavit or declaration.

(e) If the decedent's personal representative has consented to the payment, transfer, or delivery of the described property to the affiant or declarant, a copy of the consent and of the personal

representative's letters shall be attached to the affidavit or declaration.

(f) If the decedent dies on or after April 1, 2022, the list of adjusted dollar amounts, published in accordance with subdivision (c) of Section 890, in effect on the date of the decedent's death, shall be attached to the affidavit or declaration.

(g)(1) If the decedent dies prior to April 1, 2022, the dollar amount for paragraph (5) of subdivision (a) is one hundred sixty-six thousand two hundred fifty dollars ($166,250).

(2) If the decedent dies on or after April 1, 2022, the dollar amount for paragraph (5) of subdivision (a) is the adjusted dollar amount, published in accordance with subdivision (c) of Section 890, in effect on the date of the decedent's death.

Comment. Paragraph (a)(5) of Section 13101 is amended to adjust the dollar amount, as set forth in subdivision (g).

Subdivision (f) is added to require that, after the dollar amounts are adjusted, the published adjusted dollar amounts be attached to the affidavit or declaration.

Paragraph (g)(1) is added to adjust the amount to reflect cost-of-living increases since the amount was last changed. See 2011 Cal. Stat. ch. 117, § 5. Paragraph (g)(2) is added to clarify that this dollar amount is subject to periodic cost-of-living adjustments going forward. See Section 890.

Prob. Code § 13151 (amended). Petition for order determining succession to real property

SEC. 7. Section 13151 of the Probate Code is amended to read:

13151. Exclusive of the property described in Section 13050, if a decedent dies leaving real property in this state and the gross value of the decedent's real and personal property in this state does not exceed ~~one hundred fifty thousand dollars ($150,000)~~ one hundred sixty-six thousand two hundred fifty dollars ($166,250), as adjusted periodically in accordance with Section 890, and 40 days have elapsed since the death of the decedent, the successor of the decedent to an interest in a particular item of property that is real property, without procuring letters of administration or awaiting the probate of the will, may file a petition in the superior court of

the county in which the estate of the decedent may be administered requesting a court order determining that the petitioner has succeeded to that real property. A petition under this chapter may include an additional request that the court make an order determining that the petitioner has succeeded to personal property described in the petition.

Comment. Section 13151 is amended to adjust the dollar amount contained in this section. The adjusted amount reflects cost-of-living increases since the amount was last changed. See 2011 Cal. Stat. ch. 117, § 6. The dollar amount is subject to periodic cost-of-living adjustments going forward. See Section 890.

Prob. Code § 13152 (amended). Contents of petition for order determining succession to real property

SEC. 8. Section 13152 of the Probate Code is amended to read:

13152. (a) The petition shall be verified by each petitioner, shall contain a request that the court make an order under this chapter determining that the property described in the petition is property passing to the petitioner, and shall state all of the following:

(1) The facts necessary to determine that the petition is filed in the proper county.

(2) The gross value of the decedent's real and personal property in this state, excluding the property described in Section 13050, as shown by the inventory and appraisal attached to the petition, does not exceed ~~one hundred fifty thousand dollars ($150,000)~~ the dollar amount specified in subdivision (f).

(3) A description of the particular item of real property in this state ~~which~~ that the petitioner alleges is property of the decedent passing to the petitioner, and a description of the personal property ~~which~~ that the petitioner alleges is property of the decedent passing to the petitioner if the requested order also is to include a determination that the described personal property is property passing to the petitioner.

(4) The facts upon which the petitioner bases the allegation that the described property is property passing to the petitioner.

(5) Either of the following, as appropriate:

(A) A statement that no proceeding is being or has been conducted in this state for administration of the decedent's estate.

(B) A statement that the decedent's personal representative has consented in writing to use of the procedure provided by this chapter.

(6) Whether estate proceedings for the decedent have been commenced in any other jurisdiction and, if so, where those proceedings are pending or were conducted.

(7) The name, age, address, and relation to the decedent of each heir and devisee of the decedent, the names and addresses of all persons named as executors of the will of the decedent, and, if the petitioner is the trustee of a trust that is a devisee under the will of the decedent, the names and addresses of all persons interested in the trust, as determined in cases of future interests pursuant to paragraph (1), (2), or (3) of subdivision (a) of Section 15804, so far as known to any petitioner.

(8) The name and address of each person serving as guardian or conservator of the estate of the decedent at the time of the decedent's death, so far as known to any petitioner.

(b) ~~There shall be attached to the petition an~~ An inventory and appraisal in the form set forth in Section 8802 of the decedent's real and personal property in this state, excluding the property described in Section 13050, shall be attached to the petition. The appraisal shall be made by a probate referee selected by the petitioner from those probate referees appointed by the Controller under Section 400 to appraise property in the county where the real property is located. The appraisal shall be made as provided in Part 3 (commencing with Section 8800) of Division 7. The petitioner may appraise the assets ~~which~~ that a personal representative could appraise under Section 8901.

(c) If the petitioner bases ~~his or her~~ the petitioner's claim to the described property upon the will of the decedent, a copy of the will shall be attached to the petition.

(d) If the decedent's personal representative has consented to use of the procedure provided by this chapter, a copy of the consent shall be attached to the petition.

(e) If the decedent dies on or after April 1, 2022, the list of adjusted dollar amounts, published in accordance with subdivision (c) of Section 890, in effect on the date of the decedent's death shall be attached to the petition.

(f)(1) If the decedent dies prior to April 1, 2022, the dollar amount for paragraph (2) of subdivision (a) is one hundred sixty-six thousand two hundred fifty dollars ($166,250).

(2) If the decedent dies on or after April 1, 2022, the dollar amount for paragraph (2) of subdivision (a) is the adjusted dollar amount, published in accordance with subdivision (c) of Section 890, in effect on the date of the decedent's death.

Comment. Paragraph (a)(2) of Section 13152 is amended to adjust the dollar amount, as set forth in subdivision (f).

Subdivision (b) is amended to make technical changes.

Subdivision (e) is added to require that, after the dollar amounts are adjusted, the published adjusted dollar amounts be attached to the petition.

Paragraph (f)(1) is added to adjust the amount to reflect cost-of-living increases since the amount was last changed. See 2011 Cal. Stat. ch. 117, § 5. Paragraph (f)(2) is added to clarify that this dollar amount is subject to periodic cost-of-living adjustments going forward. See Section 890.

Prob. Code § 13154 (amended). Court order determining succession to real property

SEC. 9. Section 13154 of the Probate Code is amended to read:

13154. (a) If the court makes the determinations required under subdivision (b), the court shall issue an order determining (1) that real property, to be described in the order, of the decedent is property passing to the petitioners and the specific property interest of each petitioner in the described property and (2) if the petition so requests, that personal property, to be described in the order, of the decedent is property passing to the petitioners and the specific property interest of each petitioner in the described property.

(b) The court may make an order under this section only if the court makes all of the following determinations:

(1) The gross value of the decedent's real and personal property in this state, excluding the property described in Section 13050, does not exceed ~~one hundred fifty thousand dollars ($150,000)~~ one hundred sixty-six thousand two hundred fifty dollars ($166,250), as adjusted periodically in accordance with Section 890.

(2) Not less than 40 days have elapsed since the death of the decedent.

(3) Whichever of the following is appropriate:

(A) No proceeding is being or has been conducted in this state for administration of the decedent's estate.

(B) The decedent's personal representative has consented in writing to use of the procedure provided by this chapter.

(4) The property described in the order is property of the decedent passing to the petitioner.

(c) If the petition has attached an inventory and appraisal that satisfies the requirements of subdivision (b) of Section 13152, the determination required by paragraph (1) of subdivision (b) of this section shall be made on the basis of the verified petition and the attached inventory and appraisal, unless evidence is offered by a person opposing the petition that the gross value of the decedent's real and personal property in this state, excluding the property described in Section 13050, exceeds ~~one hundred fifty thousand dollars ($150,000)~~ one hundred sixty-six thousand two hundred fifty dollars ($166,250), as adjusted periodically in accordance with Section 890.

Comment. Section 13154 is amended to adjust the dollar amount contained in this section. The adjusted amount reflects cost-of-living increases since the amount was last changed. See 2011 Cal. Stat. ch. 117, § 8. The dollar amount is subject to periodic cost-of-living adjustments going forward. See Section 890.

Prob. Code § 13200 (amended). Contents of affidavit for collection of real property of small value

SEC. 10. Section 13200 of the Probate Code is amended to read:

13200. (a) No sooner than six months from the death of a decedent, a person or persons claiming as successor of the decedent to a particular item of property that is real property may file in the superior court in the county in which the decedent was domiciled at the time of death, or if the decedent was not domiciled in this state at the time of death, then in any county in which real property of the decedent is located, an affidavit in the form prescribed by the Judicial Council pursuant to Section 1001 stating all of the following:

(1) The name of the decedent.

(2) The date and place of the decedent's death.

(3) A legal description of the real property and the interest of the decedent therein.

(4) The name and address of each person serving as guardian or conservator of the estate of the decedent at the time of the decedent's death, so far as known to the affiant.

(5) "The gross value of all real property in the decedent's estate located in California, as shown by the inventory and appraisal attached to this affidavit, excluding the real property described in Section 13050 of the California Probate Code, does not exceed ~~fifty thousand dollars ($50,000)~~ [Insert dollar amount specified in subdivision (h)]."

(6) "At least six months have elapsed since the death of the decedent as shown in a certified copy of decedent's death certificate attached to this affidavit."

(7) Either of the following, as appropriate:

(A) "No proceeding is now being or has been conducted in California for administration of the decedent's estate."

(B) "The decedent's personal representative has consented in writing to use of the procedure provided by this chapter."

(8) "Funeral expenses, expenses of last illness, and all unsecured debts of the decedent have been paid."

(9) "The affiant is the successor of the decedent (as defined in Section 13006 of the Probate Code) and to the decedent's interest in the described property, and no other person has a superior right to the interest of the decedent in the described property."

(10) "The affiant declares under penalty of perjury under the laws of the State of California that the foregoing is true and correct."

(b) For each person executing the affidavit, the affidavit shall contain a notary public's certificate of acknowledgment identifying the person.

(c) ~~There shall be attached to the affidavit an~~ An inventory and appraisal of the decedent's real property in this state, excluding the real property described in Section 13050, shall be attached to the affidavit. The inventory and appraisal of the real property shall be made as provided in Part 3 (commencing with Section 8800) of Division 7. The appraisal shall be made by a probate referee selected by the affiant from those probate referees appointed by the Controller under Section 400 to appraise property in the county where the real property is located.

(d) If the affiant claims under the decedent's will and no estate proceeding is pending or has been conducted in California, a copy of the will shall be attached to the affidavit.

(e) A certified copy of the decedent's death certificate shall be attached to the affidavit. If the decedent's personal representative has consented to the use of the procedure provided by this chapter, a copy of the consent and of the personal representative's letters shall be attached to the affidavit.

(f) If the decedent dies on or after April 1, 2022, the list of adjusted dollar amounts, published in accordance with subdivision (c) of Section 890, in effect on the date of the decedent's death shall be attached to the affidavit.

~~(f)~~ (g) The affiant shall deliver pursuant to Section 1215 a copy of the affidavit and attachments to any person identified in paragraph (4) of subdivision (a).

(h)(1) When the decedent dies prior to April 1, 2022, the dollar amount for paragraph (5) of subdivision (a) is fifty-five thousand four hundred twenty-five ($55,425).

(2) When the decedent dies on or after April 1, 2022, the dollar amount for paragraph (5) of subdivision (a) is the adjusted dollar

amount, published in accordance with subdivision (c) of Section 890, in effect on the date of the decedent's death.

Comment. Paragraph (a)(5) of Section 13200 is amended to adjust the dollar amount, as set forth in subdivision (h).

Subdivision (c) is amended to make technical changes.

Subdivision (f) is added to require that, after the dollar amounts are adjusted, the published adjusted dollar amounts be attached to the affidavit.

Paragraph (h)(1) is added to adjust the amount to reflect cost-of-living increases since the amount was last changed. See 2011 Cal. Stat. ch. 117, § 9. Paragraph (h)(2) is added to clarify that this dollar amount is subject to periodic cost-of-living adjustments going forward. See Section 890.

Prob. Code § 13600 (amended). Authority to collect salary or other compensation

SEC. 11. Section 13600 of the Probate Code is amended to read:

13600. (a) At any time after a spouse dies, the surviving spouse or the guardian or conservator of the estate of the surviving spouse may, without procuring letters of administration or awaiting probate of the will, collect salary or other compensation owed by an employer for personal services of the deceased spouse, including compensation for unused vacation, not in excess of ~~fifteen thousand dollars ($15,000)~~ sixteen thousand six hundred twenty-five dollars ($16,625), as adjusted periodically in accordance with Section 890, net.

(b) Not more than ~~fifteen thousand dollars ($15,000)~~ sixteen thousand six hundred twenty-five dollars ($16,625), as adjusted periodically in accordance with Section 890, net in the aggregate may be collected by or for the surviving spouse under this chapter from all of the employers of the decedent.

(c) For the purposes of this chapter, a guardian or conservator of the estate of the surviving spouse may act on behalf of the surviving spouse without authorization or approval of the court in which the guardianship or conservatorship proceeding is pending.

(d) The ~~fifteen thousand dollars ($15,000) net limitation~~ dollar limit set forth in subdivisions (a) and (b) does not apply to the surviving spouse or the guardian or conservator of the estate of the

surviving spouse of a firefighter or peace officer described in subdivision (a) of Section 22820 of the Government Code.

~~(e) On January 1, 2003, and on January 1 of each year thereafter, the maximum net amount of salary or compensation payable under subdivisions (a) and (b) to the surviving spouse or the guardian or conservator of the estate of the surviving spouse may be adjusted to reflect any increase in the cost of living occurring after January 1 of the immediately preceding year. The United States city average of the "Consumer Price Index for All Urban Consumers," as published by the United States Bureau of Labor Statistics, shall be used as the basis for determining the changes in the cost of living. The cost-of-living increase shall equal or exceed 1 percent before any adjustment is made. The net amount payable may not be decreased as a result of the cost-of-living adjustment.~~

Comment. Section 13600 is amended to adjust the dollar amount contained in this section. The adjusted amount reflects cost-of-living increases since the amount was last changed. See 2011 Cal. Stat. ch. 117, § 10. The dollar amount is subject to periodic cost-of-living adjustments going forward. See Section 890.

Subdivision (d) is amended to make a technical change.

Subdivision (e) is repealed. The dollar amounts in this section will be subject to periodic cost-of-living adjustments going forward. See Section 890.

Prob. Code § 13601 (amended). Contents of affidavit or declaration and proof of identity to collect salary or other compensation

SEC. 12. Section 13601 of the Probate Code is amended to read:

13601. (a) To collect salary or other compensation under this chapter, an affidavit or a declaration under penalty of perjury under the laws of this state shall be furnished to the employer of the deceased spouse stating all of the following:

(1) The name of the decedent.

(2) The date and place of the decedent's death.

(3) Either of the following, as appropriate:

(A) "The affiant or declarant is the surviving spouse of the decedent."

(B) "The affiant or declarant is the guardian or conservator of the estate of the surviving spouse of the decedent."

(4) "The surviving spouse of the decedent is entitled to the earnings of the decedent under the decedent's will or by intestate succession and no one else has a superior right to the earnings."

(5) "No proceeding is now being or has been conducted in California for administration of the decedent's estate."

(6) "Sections 13600 to 13605, inclusive, of the California Probate Code require that the earnings of the decedent, including compensation for unused vacation, not in excess of ~~fifteen thousand dollars ($15,000)~~ [Insert dollar amount specified in subdivision (e) of Section 13601 of the California Probate Code] net, be paid promptly to the affiant or declarant."

(7) "Neither the surviving spouse, nor anyone acting on behalf of the surviving spouse, has a pending request to collect compensation owed by another employer for personal services of the decedent under Sections 13600 to 13605, inclusive, of the California Probate Code."

(8) "Neither the surviving spouse, nor anyone acting on behalf of the surviving spouse, has collected any compensation owed by an employer for personal services of the decedent under Sections 13600 to 13605, inclusive, of the California Probate Code except the sum of ____ dollars ($____) ~~which~~ that was collected from ____."

(9) "The affiant or declarant requests that ~~he or she~~ the affiant or declarant be paid the salary or other compensation owed by you for personal services of the decedent, including compensation for unused vacation, not to exceed ~~fifteen thousand dollars ($15,000)~~ [Insert dollar amount specified in subdivision (e) of Section 13601 of the California Probate Code] net, less the amount of ____ dollars ($____) ~~which~~ that was previously collected."

(10) "The affiant or declarant affirms or declares under penalty of perjury under the laws of the State of California that the foregoing is true and correct."

(b) Where the decedent is a firefighter or peace officer described in subdivision (a) of Section 22820 of the Government Code, the

affidavit or declaration need not include the content specified in paragraphs (6) to (9), inclusive, of subdivision (a). The affidavit shall instead include the following statements:

(1) "The decedent was a firefighter or peace officer described in subdivision (a) of Section 22820 of the Government Code. Sections 13600 to 13605, inclusive, of the California Probate Code require that the earnings of the decedent, including compensation for unused vacation, be paid promptly to the affiant or declarant."

(2) "The affiant or declarant requests to be paid the salary or other compensation owed by you for personal services of the decedent, including compensation for unused vacation."

~~(b)~~ (c) Reasonable proof of the identity of the surviving spouse shall be provided to the employer. If a guardian or conservator is acting for the surviving spouse, reasonable proof of the identity of the guardian or conservator shall also be provided to the employer. Proof of identity that is sufficient under Section 13104 is sufficient proof of identity for the purposes of this subdivision.

~~(c)~~ (d) If a person presenting the affidavit or declaration is a person claiming to be the guardian or conservator of the estate of the surviving spouse, the employer shall be provided with reasonable proof, satisfactory to the employer, of the appointment of the person to act as guardian or conservator of the estate of the surviving spouse.

(e)(1) When the decedent dies prior to April 1, 2022, the dollar amount for paragraphs (6) and (9) of subdivision (a) is sixteen thousand six hundred twenty-five dollars ($16,625).

(2) When the decedent dies on or after April 1, 2022, the dollar amount for paragraphs (6) and (9) of subdivision (a) is the adjusted dollar amount, published in accordance with subdivision (c) of Section 890, in effect on the date of the decedent's death. The affiant or declarant shall attach the list of adjusted dollar amounts, published in accordance with subdivision (c) of Section 890, in effect on the date of the decedent's death to the affidavit or declaration.

Comment. Paragraphs (a)(6) and (a)(9) of Section 13601 are amended to adjust the dollar amount, as set forth in subdivision (e).

Subdivision (b) is added to clarify that the affidavit or declaration of a surviving spouse (or guardian or conservator of the estate of a surviving spouse, if applicable) of a firefighter or peace officer described in Government Code Section 22820(a) need not include provisions related to the dollar limit set forth in Section 13600(a) and (b). This change is made to conform to the effect of Section 13600(d).

Paragraph (e)(1) is added to adjust the amount to reflect cost-of-living increases since the amount was last changed. See 2011 Cal. Stat. ch. 117, § 11. Paragraph (e)(2) is added to clarify that this dollar amount is subject to periodic cost-of-living adjustments going forward. See Section 890. Paragraph (e)(2) also requires that, after the dollar amounts are adjusted, the published adjusted dollar amounts be attached to the affidavit or declaration.

Prob. Code § 13602 (amended). Payment of salary or other compensation by employer

SEC. 13. Section 13602 of the Probate Code is amended to read:

13602. If the requirements of Section 13600 are satisfied, the employer to whom the affidavit or declaration is presented shall promptly pay the earnings of the decedent, including compensation for unused vacation, ~~not in excess of fifteen thousand dollars ($15,000) net~~ <u>as provided in Section 13600</u>, to the person presenting the affidavit or declaration.

Comment. Section 13602 is amended to clarify that the employer's obligation to pay the person presenting the affidavit or declaration is subject to any applicable limitation set forth in Section 13600. This technical change is made to conform to the effect of Section 13600(d).

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Disposition of Estate Without Administration: Interest Rate

August 2018

California Law Revision Commission
c/o UC Davis School of Law
Davis, CA 95616
www.clrc.ca.gov

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

Cite this report as *Disposition of Estate Without Administration: Interest Rate*, 45 Cal. L. Revision Comm'n Reports 419 (2018).

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION
c/o UC Davis School of Law
Davis, CA 95616

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August 17, 2018

To: The Honorable Edmund G. Brown, Jr.
Governor of California, and
The Legislature of California

The Probate Code contains a number of provisions that permit an estate or a portion of an estate to be disposed of without administration (or with substantially simplified administration). The recipient of the decedent's property under some of these procedures is liable (to the extent of the property's value) to the decedent's estate, an unsecured creditor of the decedent, or a person with a superior right to succeed to the property. Where the recipient has disposed of or improved the property, the extent of the recipient's liability also often includes interest on the property's value.

The Commission concluded that the ten percent interest rate imposed by these statutes (through incorporation of a rate specified in the Code of Civil Procedure) is too high and unduly burdens a recipient of the decedent's property. The Commission recommends that the default interest rate be changed to seven percent per annum, which is the default rate for judgments set by the California Constitution.

In addition, the Commission recommends that a court be granted discretion to reduce or waive the recipient's liability for interest where it would be equitable to do so, if the recipient has acted

reasonably and in good faith, under the circumstances known to the recipient.

This recommendation was prepared pursuant to Resolution Chapter 150 of the Statutes of 2016.

Respectfully submitted,

Thomas Hallinan
Chairperson

DISPOSITION OF ESTATE WITHOUT ADMINISTRATION: INTEREST RATE

BACKGROUND

The Probate Code contains a number of provisions that permit an estate or a portion of an estate to be disposed of without administration (or with substantially simplified administration). The recipient of the decedent's property under some of these procedures is liable (to the extent of the property's value) to the decedent's estate, an unsecured creditor of the decedent, or a person with a superior right to succeed to the property. Where the recipient has disposed of or improved the property, the extent of the recipient's liability also often includes interest on the property's value, at the rate payable on a money judgment.[1]

Currently, the law provides for a ten percent interest rate in these situations.[2]

SCOPE OF THE STUDY

The Commission's study of this topic focused on statutory provisions that impose interest in computing the recipient's liability to the estate, an unsecured creditor of the decedent, or a person with a superior right to succeed to the property. In particular, the Commission focused on the following provisions of the Probate Code:

- *Affidavit Procedure for Collection or Transfer of Personal Property* (Sections 13111, 13112). These provisions impose liability on a person who receives the decedent's personal property using the statutory affidavit procedure.[3] Where the recipient of the

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1. See, e.g., Prob. Code § 13206(a)(2), (c)(2).

2. See, e.g., Prob. Code § 13111(a)(2) (interest accrues at rate payable on money judgment); Code Civ. Proc. § 685.010 (interest of 10% per annum accrues on principal amount of money judgment remaining unsatisfied).

3. See generally Prob. Code §§ 13100-13116.

decedent's property has disposed of the property, the extent of the recipient's liability includes interest on the fair market value of the property from the date of disposition.

- *Affidavit Procedure for Real Property of Small Value* (Sections 13206, 13207, 13210). These provisions impose liability on a person who receives the decedent's real property of small value using the statutory affidavit procedure.[4] Where the recipient of the decedent's property has disposed of the property or improved the property, the extent of the recipient's liability can include interest on the fair market value[5] of the property.
- *Surviving Spouse Liability for Decedent's Property* (Sections 13562, 13563). These provisions impose liability on a surviving spouse who receives the decedent's property without probate administration.[6] Where the surviving spouse has disposed of the property or improved the property, the extent of the surviving spouse's liability can include interest on the fair market value[7] of the property.

This recommendation addresses only the interest rates in the provisions noted above. For ease of reference, these provisions will

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4. See generally Prob. Code §§ 13200-13210.

5. Where the property is disposed of, the fair market value of the property is computed at the time of disposition. See Prob. Code § 13206(a)(2). Where the property is improved, the fair market value of the property is computed at the time that the certified copy of the affidavit used to claim the property was issued. See Prob. Code § 13206(c)(2).

6. See generally Prob. Code §§ 13560-13564.

7. Where the property is disposed of, the fair market value of the property is computed at the time of disposition. See Prob. Code § 13562(a)(2). Where the property is improved, the fair market value of the property is computed at the time of the decedent's death. See Prob. Code § 13562(b)(2).

be referred to as the "interest rate provisions" in this recommendation.

This recommendation does not address and the Commission takes no position on the suitability of interest rates or lack thereof in other provisions of the Probate Code.

PROBLEM

Currently, the interest rate is ten percent.[8] At the time of the Commission recommendation proposing the interest rate provisions,[9] the ten percent interest rate was in the range of the prevailing market rate.[10] Under those conditions, the ten percent interest rate would approximate the expected investment returns that a property recipient would receive on investing the proceeds of the property sale.

The ten percent interest rate is significantly higher than the current market interest rates.[11] Under current market conditions, the ten percent interest rate does not reflect the expected value that

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8. See *supra* note 2.

9. See *Recommendation Relating to Disposition of Estate Without Administration*, 18 Cal. L. Revision Comm'n Reports 1005 (1986); see also *Recommendation Relating to Right of Surviving Spouse to Dispose of Community Property*, 20 Cal. L. Revision Comm'n Reports 2769 (1990).

10. See, e.g., <https://fred.stlouisfed.org/series/CD6M> (6-month certificate of deposit secondary market rate was 7.80% in December 1985); <https://fred.stlouisfed.org/series/CD1M> (1-month certificate of deposit secondary market rate 7.87% in December 1985); see also <https://www.bankrate.com/banking/cds/historical-cd-interest-rates-1984-016/> (1 year certificate of deposit yield was 7.89% and 5 year certificate of deposit yield was 9.09% on January 8, 1986).

11. See, e.g., <https://fred.stlouisfed.org/series/CD6NRJD> (The national rate on jumbo deposits (greater than or equal to $100,000) for 6 Month CD was 0.28% on July 23, 2018); <https://fred.stlouisfed.org/series/CD6NRNJ> (The national rate on non-jumbo deposits (less than $100,000) for 6 Month CD was 0.24% on July 23, 2018); <https://fred.stlouisfed.org/series/CD12NRJD> (The national rate on jumbo deposits (greater than or equal to $100,000) for 12 Month CD was 0.46% on July 23, 2018).

a recipient would receive by investing the proceeds of sale. Instead, the ten percent interest rate acts as a de facto penalty, imposing liability on the recipient far in excess of the value that the recipient could expect to realize from the decedent's property. This places the recipient of the decedent's property in a worse position than if the recipient had not received the property at all.

For example, under Probate Code Section 13101, the successor to the decedent's property could use an affidavit to collect the decedent's personal property worth $100,000. The successor could then sell the property immediately after receiving it. If, after three years, the successor received notice that the property must be returned to the estate,[12] the successor would owe, in addition to the $100,000 value from the property sale, approximately $30,000 in interest (not taking into account compounding).[13] If the successor had invested the proceeds of sale in certificate of deposit offering two percent interest,[14] the investment would have only earned roughly $6,000. In this situation, the successor would have a net loss of $24,000 resulting from the imposition of the ten percent interest rate.

RECOMMENDATION

The Commission recommends that the interest rate imposed in the interest rate provisions be changed to seven percent per annum. The seven percent rate is the default rate for judgments in the California Constitution and is used in other contexts under

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12. See Prob. Code § 13111(e) ("An action to enforce the liability under this section is forever barred three years after presentation of the affidavit or declaration under this chapter to the holder of the decedent's property….").

13. See Prob. Code § 13111(a)(2).

14. Under current market conditions, two percent is significantly higher than the average interest rate. See *supra* note 11.

California law.[15] While the seven percent interest rate is still significantly higher than the current market interest rate, seven percent is closer to current rates than the ten percent interest rate. Although a variable rate tied to the market could provide a better approximation of market rates, a variable rate is more difficult to administer than a fixed rate.

The Commission recognizes that, in some circumstances, the fixed rate of seven percent per annum may produce inequitable results, as described above. For this reason, the Commission also recommends that a court be given discretion to excuse a recipient's liability for interest, in whole or in part, where it would be equitable to do so, if the recipient acted reasonably and in good faith, under the circumstances known to the recipient.[16] Under existing law, courts are granted discretion to offer relief from liability in similar circumstances.[17]

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15. See Cal. Const. art. XV, § 1; see also Palomar Grading & Paving, Inc. v. Wells Fargo Bank, N.A., 230 Cal. App. 4th 686 (2014) (prejudgment interest on a mechanics lien); Prob. Code § 12001 (interest on unpaid devises).

16. See, e.g., proposed Prob. Code § 13117.

17. See Prob. Code §§ 2401.3(b), 2401.5(b), 9601(b), 9602(b), 16440(b), 16441(b).

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PROPOSED LEGISLATION

Prob. Code § 13111 (amended). Restitution if estate proceeding commenced or on request of personal representative

SECTION 1. Section 13111 of the Probate Code is amended to read:

13111. (a) Subject to the provisions of this section, if proceedings for the administration of the decedent's estate are commenced in this state, or if the decedent's personal representative has consented to the payment, transfer, or delivery of the decedent's property under this chapter and the personal representative later requests that the property be restored to the estate, each person to whom payment, delivery, or transfer of the decedent's property is made under this chapter is liable for:

(1) The restitution of the property to the estate if the person still has the property, together with (A) the net income the person received from the property and (B) if the person encumbered the property after it was delivered or transferred to the person, the amount necessary to satisfy the balance of the encumbrance as of the date the property is restored to the estate.

(2) The restitution to the estate of the fair market value of the property if the person no longer has the property, together with (A) the net income the person received from the property and (B) interest on the fair market value of the property from the date of disposition at the rate ~~payable on a money judgment~~ <u>of 7 percent per annum</u>. For the purposes of this subdivision, the "fair market value of the property" is the fair market value, determined as of the time of the disposition of the property, of the property paid, delivered, or transferred to the person under this chapter, less any liens and encumbrances on the property at that time.

(b) Subject to subdivision (c) and subject to any additional liability the person has under Sections 13109 to 13112, inclusive, if the person fraudulently secured the payment, delivery, or transfer of the decedent's property under this chapter, the person is liable under this section for restitution to the decedent's estate of three times the fair market value of the property. For the purposes of this

subdivision, the "fair market value of the property" is the fair market value, determined as of the time the person liable under this subdivision presents the affidavit or declaration under this chapter, of the property paid, delivered, or transferred to the person under this chapter, less the amount of any liens and encumbrances on the property at that time.

(c) The property and amount required to be restored to the estate under this section shall be reduced by any property or amount paid by the person to satisfy a liability under Section 13109 or 13110.

(d) An action to enforce the liability under this section may be brought only by the personal representative of the estate of the decedent. Whether or not the personal representative brings an action under this section, the personal representative may enforce the liability only to the extent necessary to protect the interests of the heirs, devisees, and creditors of the decedent.

(e) An action to enforce the liability under this section is forever barred three years after presentation of the affidavit or declaration under this chapter to the holder of the decedent's property, or three years after the discovery of the fraud, whichever is later. The three-year period specified in this subdivision is not tolled for any reason.

(f) In the case of a nondomiciliary decedent, restitution under this section shall be made to the estate in an ancillary administration proceeding.

Comment. Section 13111(a)(2) is amended to change the interest rate. The liability for interest imposed by this section may be modified by a court under appropriate circumstances. See Section 13117.

Prob. Code § 13112 (amended). Extent of liability

SEC. 2. Section 13112 of the Probate Code is amended to read:

13112. (a) A person to whom payment, delivery, or transfer of the decedent's property has been made under this chapter is not liable under Section 13109 or 13110 if proceedings for the administration of the decedent's estate are commenced in this state, and the person satisfies the requirements of Section 13111.

(b) Except as provided in subdivision (b) of Section 13110, the aggregate of the personal liability of a person under Sections 13109 and 13110 shall not exceed the sum of the following:

(1) The fair market value, valued as of the time the affidavit or declaration is presented under this chapter, of the property paid, delivered, or transferred to the person under this chapter, less the amount of any liens and encumbrances on that property at that ~~time, together with the~~ time.

(2) The net income the person received from the property.

(3) If ~~and, if~~ the property has been disposed of, interest on the fair market value of the property accruing from the date of disposition at the rate ~~payable on a money judgment~~ of 7 percent per annum. For the purposes of this ~~subdivision~~ paragraph, "fair market value of the property" has the same meaning as defined in paragraph (2) of subdivision (a) of Section 13111.

Comment. Section 13112 is amended to change the interest rate. The liability for interest imposed by this section may be modified by a court under appropriate circumstances. See Section 13117.

Section 13112 is also amended to add paragraph numbering in subdivision (b). This is a technical change made for parallelism with similar provisions. See, e.g., Section 13207.

Prob. Code § 13117 (added). Waiver of interest

SEC. 3. Section 13117 of the Probate Code is added, to read:

13117. If the court finds that a person to whom payment, delivery, or transfer of the decedent's property has been made under this chapter has acted reasonably and in good faith under the circumstances as known to the person, the court may, in its discretion, excuse the person from liability to pay interest, in whole or in part, under paragraph (2) of subdivision (a) of Section 13111 or paragraph (3) of subdivision (b) of Section 13112, if it would be equitable to do so.

Comment. Section 13117 is comparable to Section 9602(b). This section is added to give the court discretion to waive or reduce liability for interest in appropriate circumstances.

Prob. Code § 13206 (amended). Restitution if estate proceeding commenced or on request of personal representative

SEC. 4. Section 13206 of the Probate Code is amended to read:

13206. (a) Subject to subdivisions (b), (c), (d), and (e), if proceedings for the administration of the decedent's estate are commenced, or if the decedent's personal representative has consented to use of the procedure provided by this chapter and the personal representative later requests that the property be restored to the estate, each person who is designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 is liable for:

(1) The restitution to the decedent's estate of the property the person took under the certified copy of the affidavit if the person still has the property, together with (A) the net income the person received from the property and (B) if the person encumbered the property after the certified copy of the affidavit was issued, the amount necessary to satisfy the balance of the encumbrance as of the date the property is restored to the estate.

(2) The restitution to the decedent's estate of the fair market value of the property if the person no longer has the property, together with (A) the net income the person received from the property prior to disposing of it and (B) interest from the date of disposition at the rate ~~payable on a money judgment~~ <u>of 7 percent per annum</u> on the fair market value of the property. For the purposes of this paragraph, the "fair market value of the property" is the fair market value, determined as of the time of the disposition of the property, of the property the person took under the certified copy of the affidavit, less the amount of any liens and encumbrances on the property at the time the certified copy of the affidavit was issued.

(b) Subject to subdivision (d), if the person fraudulently executed or filed the affidavit under this chapter, the person is liable under this section for restitution to the decedent's estate of three times the fair market value of the property. For the purposes of this subdivision, the "fair market value of the property" is the

fair market value, determined as of the time the certified copy of the affidavit was issued, of the property the person took under the certified copy of the affidavit, less the amount of any liens and encumbrances on the property at that time.

(c) Subject to subdivision (d), if proceedings for the administration of the decedent's estate are commenced and a person designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 made a significant improvement to the property taken by the person under the certified copy of the affidavit in the good faith belief that the person was the successor of the decedent to that property, the person is liable for whichever of the following the decedent's estate elects:

(1) The restitution of the property, as improved, to the estate of the decedent upon the condition that the estate reimburse the person making restitution for (A) the amount by which the improvement increases the fair market value of the property restored, determined as of the time of restitution, and (B) the amount paid by the person for principal and interest on any liens or encumbrances that were on the property at the time the certified copy of the affidavit was issued.

(2) The restoration to the decedent's estate of the fair market value of the property, determined as of the time of the issuance of the certified copy of the affidavit under Section 13202, less the amount of any liens and encumbrances on the property at that time, together with interest on the net amount at the rate ~~payable on a money judgment~~ of 7 percent per annum running from the date of the issuance of the certified copy of the affidavit.

(d) The property and amount required to be restored to the estate under this section shall be reduced by any property or amount paid by the person to satisfy a liability under Section 13204 or 13205.

(e) An action to enforce the liability under this section may be brought only by the personal representative of the estate of the decedent. Whether or not the personal representative brings an action under this section, the personal representative may enforce

the liability only to the extent necessary to protect the interests of the heirs, devisees, and creditors of the decedent.

(f) An action to enforce the liability under this section is forever barred three years after the certified copy of the affidavit is issued under Section 13202, or three years after the discovery of the fraud, whichever is later. The three-year period specified in this subdivision is not tolled for any reason.

Comment. Section 13206 is amended to change the interest rate. The liability for interest imposed by this section may be modified by a court under appropriate circumstances. See Section 13211.

Prob. Code § 13207 (amended). Extent of liability

SEC. 5. Section 13207 of the Probate Code is amended to read:

13207. (a) A person designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 is not liable under Section 13204 or 13205 if proceedings for the administration of the decedent's estate are commenced, or if the decedent's personal representative has consented to use of the procedure provided by this chapter and the personal representative later requests that the property be restored to the estate, and the person satisfies the requirements of Section 13206.

(b) Except as provided in subdivision (b) of Section 13205, the aggregate of the personal liability of a person under Sections 13204 and 13205 shall not exceed the sum of the following:

(1) The fair market value at the time of the issuance of the certified copy of the affidavit under Section 13202 of the decedent's property received by that person under this chapter, less the amount of any liens and encumbrances on the property at that time.

(2) The net income the person received from the property.

(3) If the property has been disposed of, interest on the fair market value of the property from the date of disposition at the rate ~~payable on a money judgment~~ <u>of 7 percent per annum</u>. For the purposes of this paragraph, "fair market value of the property" has

the same meaning as defined in paragraph (2) of subdivision (a) of Section 13206.

Comment. Section 13207 is amended to change the interest rate. The liability for interest imposed by this section may be modified by a court under appropriate circumstances. See Section 13211.

Prob. Code § 13211 (added). Waiver of interest

SEC. 6. Section 13211 of the Probate Code is added, to read:

13211. If the court finds that a person designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 has acted reasonably and in good faith under the circumstances as known to the person, the court may, in its discretion, excuse the person from liability to pay interest, in whole or in part, under paragraph (2) of subdivision (a) of Section 13206, paragraph (2) of subdivision (c) of Section 13206, or paragraph (3) of subdivision (b) of Section 13207, if it would be equitable to do so.

Comment. Section 13211 is comparable to Section 9602(b). This section is added to give the court discretion to waive or reduce liability for interest in appropriate circumstances.

Prob. Code § 13562 (amended). Restitution if estate proceeding commenced

SEC. 7. Section 13562 of the Probate Code is amended to read:

13562. (a) Subject to subdivisions (b), (c), and (d), if proceedings for the administration of the decedent's estate are commenced, the surviving spouse is liable for:

(1) The restitution to the decedent's estate of the decedent's property if the surviving spouse still has the decedent's property, together with (A) the net income the surviving spouse received from the decedent's property and (B) if the surviving spouse encumbered the decedent's property after the date of death, the amount necessary to satisfy the balance of the encumbrance as of the date the decedent's property is restored to the estate.

(2) The restitution to the decedent's estate of the fair market value of the decedent's property if the surviving spouse no longer has the decedent's property, together with (A) the net income the

surviving spouse received from the decedent's property prior to disposing of it and (B) interest from the date of disposition at the rate ~~payable on a money judgment~~ of 7 percent per annum on the fair market value of the decedent's property. For the purposes of this paragraph, the "fair market value of the decedent's property" is the fair market value of the decedent's property, determined as of the time of the disposition of the decedent's property, less the amount of any liens and encumbrances on the decedent's property at the time of the decedent's death.

(b) Subject to subdivision (c), if proceedings for the administration of the decedent's estate are commenced and the surviving spouse made a significant improvement to the decedent's property in the good faith belief that the surviving spouse was the successor of the decedent to the decedent's property, the surviving spouse is liable for whichever of the following the decedent's estate elects:

(1) The restitution of the decedent's property, as improved, to the estate of the decedent upon the condition that the estate reimburse the surviving spouse for (A) the amount by which the improvement increases the fair market value of the decedent's property restored, valued as of the time of restitution, and (B) the amount paid by the surviving spouse for principal and interest on any liens or encumbrances that were on the decedent's property at the time of the decedent's death.

(2) The restoration to the decedent's estate of the fair market value of the decedent's property, valued as of the time of the decedent's death, excluding the amount of any liens and encumbrances on the decedent's property at that time, together with interest on the net amount at the rate ~~payable on a money judgment~~ of 7 percent per annum running from the date of the decedent's death.

(c) The property and amount required to be restored to the estate under this section shall be reduced by any property or amount paid by the surviving spouse to satisfy a liability under Chapter 3 (commencing with Section 13550).

(d) An action to enforce the liability under this section may be brought only by the personal representative of the estate of the decedent. Whether or not the personal representative brings an action under this section, the personal representative may enforce the liability only to the extent necessary to protect the interests of the heirs, devisees, and creditors of the decedent.

(e) An action to enforce the liability under this section is forever barred three years after the death of the decedent. The three-year period specified in this subdivision is not tolled for any reason.

Comment. Section 13562 is amended to change the interest rate. The liability for interest imposed by this section may be modified by a court under appropriate circumstances. See Section 13565.

Prob. Code § 13563 (amended). Extent of liability

SEC. 8. Section 13563 of the Probate Code is amended to read:

13563. (a) The surviving spouse is not liable under Section 13561 if proceedings for the administration of the decedent's estate are commenced and the surviving spouse satisfies the requirements of Section 13562.

(b) The aggregate of the personal liability of the surviving spouse under Section 13561 shall not exceed the sum of the following:

(1) The fair market value at the time of the decedent's death, less the amount of any liens and encumbrances on the decedent's property at that time, of the portion of the decedent's property that passes to any person having a superior right by testate succession from the decedent.

(2) The net income the surviving spouse received from the portion of the decedent's property that passes to any person having a superior right by testate succession from the decedent.

(3) If the decedent's property has been disposed of, interest on the fair market value of the portion of the decedent's property that passes to any person having a superior right by testate succession from the decedent from the date of disposition at the rate ~~payable on a money judgment~~ <u>of 7 percent per annum</u>. For the purposes of this paragraph, "fair market value" is fair market value, determined as of the time of disposition of the decedent's property, less the

amount of any liens and encumbrances on the decedent's property at the time of the decedent's death.

Comment. Section 13563 is amended to change the interest rate. The liability for interest imposed by this section may be modified by a court under appropriate circumstances. See Section 13565.

Prob. Code § 13565 (added). Waiver of interest

SEC. 9. Section 13565 of the Probate Code is added, to read:

13565. If the court finds that the surviving spouse has acted reasonably and in good faith under the circumstances as known to the surviving spouse, the court may, in its discretion, excuse the surviving spouse from liability to pay interest, in whole or in part, under paragraph (2) of subdivision (a) of Section 13562, paragraph (2) of subdivision (b) of Section 13562, or paragraph (3) of subdivision (b) of Section 13563, if it would be equitable to do so.

Comment. Section 13565 is comparable to Section 9602(b). This section is added to give the court discretion to waive or reduce liability for interest in appropriate circumstances.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Trial Court Restructuring Clean-Up: Obsolete “Constable” References

October 2018

California Law Revision Commission
c/o UC Davis School of Law
Davis, CA 95616
www.clrc.ca.gov

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

Cite this report as *Trial Court Restructuring Clean-Up: Obsolete "Constable" References,* 45 Cal. L. Revision Comm'n Reports 441 (2018).

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION
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October 11, 2018

To: The Honorable Edmund G. Brown, Jr.
Governor of California, and
The Legislature of California

In the past, constables and deputy constables provided court security services for justice courts. Upon elimination of the justice courts in 1995, most statutory references to constables and deputy constables became obsolete.

Many of those references have already been deleted from the codes. The Law Revision Commission examined the remaining statutory references to constables and deputy constables, and determined that they fall into three categories:

(1) *Constable References in Code Sections Previously Amended by a Statewide Initiative*. Two Penal Code provisions still refer to constables (Penal Code §§ 412, 413). These provisions cannot be amended through the normal legislative process, because they were last amended through a statewide vote on an initiative measure. The Commission recommends that they be amended through the initiative process to delete the obsolete references to constables. Due to the cost of that process, however, a stand-alone measure is not warranted. It appears preferable to

combine these technical amendments with other reforms when an appropriate opportunity arises.

(2) *Retirement-Related References to Constables*. Most of the remaining statutory references to constables and deputy constables relate to retirement benefits of such employees. The Commission is inclined to leave those provisions alone, because they may have continuing relevance.

(3) *Other References to Constables*. Only one other code section still refers to constables (Corp. Code § 14502). The Commission recommends that it be amended to delete the obsolete reference to constables.

This recommendation was prepared pursuant to Government Code Section 71674 and Resolution Chapter 150 of the Statutes of 2016.

Respectfully submitted,

Jane McAllister
Chairperson

TRIAL COURT RESTRUCTURING CLEAN-UP: OBSOLETE "CONSTABLE" REFERENCES

The Law Revision Commission is responsible for determining whether any statutory provisions are obsolete due to several major reforms of California's trial court system that occurred around the turn of the century.[1] In fulfilling that responsibility, the Commission has made numerous recommendations to the Legislature and the Governor,[2] resulting in amendment or repeal of hundreds of code sections.[3]

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1. See Gov't Code § 71674; see also 2016 Cal. Stat. res. ch. 150.

2. See *Statutes Made Obsolete by Trial Court Restructuring: Part 1,* 32 Cal. L. Revision Comm'n Reports 1 (2002) (hereafter, "*TCR: Part 1*"); *Statutes Made Obsolete by Trial Court Restructuring: Part 2,* 33 Cal. L. Revision Comm'n Reports 169 (2003) (hereafter, "*TCR: Part 2*"); *Statutes Made Obsolete by Trial Court Restructuring: Part 3,* 36 Cal. L. Revision Comm'n Reports 341 (2006) (hereafter, "*TCR: Part 3*"); *Statutes Made Obsolete by Trial Court Restructuring: Part 4,* 37 Cal. L. Revision Comm'n Reports 171 (2007) (hereafter, "*TCR: Part 4*"); *Trial Court Restructuring: Transfer of Case Based on Lack of Jurisdiction,* 37 Cal. L. Revision Comm'n Reports 195 (2007); *Statutes Made Obsolete by Trial Court Restructuring: Part 5,* 39 Cal. L. Revision Comm'n Reports 109 (2009) (hereafter, "*TCR: Part 5*"); *Trial Court Restructuring: Rights and Responsibilities of the County as Compared to the Superior Court (Part 1),* 39 Cal. L. Revision Comm'n Reports 157 (2009) (hereafter, "*TCR: Court & County #1*"); *Trial Court Restructuring: Appellate Jurisdiction of Bail Forfeiture,* 41 Cal. L. Revision Comm'n Reports 265 (2011) (hereafter, "*TCR: Bail Forfeiture (2011)*"); *Trial Court Restructuring: Writ Jurisdiction in a Small Claims Case,* 41 Cal. L. Revision Comm'n Reports 315 (2011) (hereafter, "*TCR: Writ Jurisdiction*"); see also *Civil Procedure: Technical Corrections,* 30 Cal. L. Revision Comm'n Reports 479 (2000); *Authority of Court Commissioner,* 33 Cal. L. Revision Comm'n Reports 673 (2003).

3. See 2002 Cal. Stat. ch. 784 (implementing recommendation on *TCR: Part 1*); 2003 Cal. Stat. ch. 149 (implementing recommendation on *TCR: Part 2*); 2007 Cal. Stat. ch. 43 (implementing recommendation on *TCR: Part 3*); 2008 Cal. Stat. ch. 56 (implementing recommendations on *TCR: Part 4* and *Transfer of Case Based on Lack of Jurisdiction*); 2010 Cal. Stat. ch. 212, §§ 2, 3, 6, 7, 8, 10, 11, 12 (partially implementing recommendation on *TCR: Part 5*); 2012 Cal.

This recommendation continues the Commission's work on trial court restructuring. It focuses on statutory references to "constables."

Background

In the early 1990's, California had three different types of trial courts: superior courts, municipal courts, and justice courts. Each type of court received security services from a different source. Sheriffs served the superior courts, marshals served the municipal courts, and constables served the justice courts.[4]

Today, superior courts are the only type of trial court left in California. Justice courts were eliminated statewide at the beginning of 1995, pursuant to a proposition approved by the voters.[5] Municipal courts were eliminated more gradually, through county-by-county unification of the municipal and superior courts upon a majority vote of the judges in each type of court. The process started in mid-1998 and ended when the municipal and superior courts in Kings County unified in early 2001.[6]

Due to the elimination of the justice courts, constables no longer exist. In contrast, there are still some marshals, despite the elimination of the municipal courts. Those marshals serve superior courts, rather than municipal courts.[7]

Stat. ch. 470 (implementing recommendations on *TCR: Court & County #1, TCR: Writ Jurisdiction,* and *TCR: Bail Forfeiture (2011)*, and partially implementing recommendation on *TCR: Part 5*); see also 2001 Cal. Stat. ch. 44 (implementing recommendation on *Civil Procedure: Technical Corrections*); 2004 Cal. Stat. ch. 49 (implementing recommendation on *Authority of Court Commissioner*).

4. *TCR: Part 1, supra* note 2, at 7, 15.

5. See 1994 Cal. Stat. res. ch. 113 (SCA 7) (Prop. 191, approved Nov. 8, 1994 & operative Jan. 1, 1995).

6. See *TCR: Part 3, supra* note 2, at 311 & sources cited therein.

7. See Gov't Code § 69921.5 ("Except for court security services provided by the marshal in the Counties of Shasta and Trinity, the sheriff is responsible for the necessary level of court security services ...."); see also

Statutory References to "Constables"

When constables were eliminated, most statutory references to constables became obsolete. On recommendation of the Commission, many code sections have already been revised to delete such references.[8]

Some references to constables remain in the codes. Those references fall into three categories:

- References in code sections previously amended by a statewide initiative.
- Retirement-related references.
- Other references.

Each category is discussed below.

Constable References in Code Sections Previously Amended by a Statewide Initiative

Penal Code Sections 412 and 413 impose restrictions on boxing contests.[9] They were enacted in the Penal Code of 1872 and later amended several times,[10] most recently by a statewide initiative in 1914.[11]

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http://www.shastacourts.com/Divisions/Marshal.shtml ("The Shasta County Marshal's Office is the law enforcement division of the Superior Court."); https://www.trinity.courts.ca.gov/security ("The Marshal's Office is the law enforcement arm of the Trinity Superior Court.").

8. See, e.g., *Trial Court Unification: Revision of Codes,* 28 Cal. L. Revision Comm'n Reports 51, 249-51, 302-03, 356-58, 361-62, 366, 372-77, 387-88, 398-401, 412-14, 506-07, 510, 556-59 (1998); 1998 Cal. Stat. ch. 931, §§ 139, 214, 215, 272, 274, 275, 285, 296, 313, 335, 347, 365, 366, 446-449, 451, 452, 478, 479.

9. For the text of Penal Code Sections 412 and 413, see the proposed amendments of those sections in "Recommended Statutory Revisions to Incorporate in an Initiative Measure" *infra*.

10. See 1899 Cal. Stat. ch. 121, § 1; 1903 Cal. Stat. ch. 283, §§ 1, 2.

11. The initiative measure was adopted at a statewide election on Nov. 3, 2014. For the text of the measure, see 1915 Cal. Stat., pp. 1930-32.

Both of these code sections refer to constables. Section 412 outlaws most boxing contests, permits an amateur boxing exhibition under certain conditions, and gives *constables* and other types of peace officers the right and duty to stop an amateur boxing exhibition when a contestant has been seriously injured or there is a danger of such injury. Under specified circumstances, Section 413 permits a magistrate to issue a warrant commanding a *constable* (or a sheriff, marshal, or policeman) to arrest a person accused of taking steps towards promoting or participating in an illegal boxing contest.

Because constables no longer exist, the references to them in Sections 412 and 413 are obsolete and should be deleted. That cannot be accomplished through the normal legislative process, however, because the current versions of those sections were adopted through a statewide vote on an initiative measure. Amending a section adopted in that manner (an "initiative statute") requires a statewide vote unless the section expressly permits amendment without voter approval.[12]

The Commission thus recommends that Sections 412 and 413 be amended through the initiative process to delete the obsolete references to "constables."[13] That is a very expensive and burdensome process, however, so it would not make sense to propose such minor amendments in a separate initiative measure.

Rather, the proposed amendments of those sections should be incorporated into an appropriate measure that is broader in scope. The Commission does not anticipate proposing that type of measure in the foreseeable future. If another person or entity does so, they could consider including the Commission's proposed amendments of Sections 412 and 413.

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12. Cal. Const. art. II, § 10(c).

13. See the proposed amendments of Sections 412 and 413 in "Recommended Statutory Revisions to Incorporate in an Initiative Measure" *infra*.

Retirement-Related References to Constables

Most of the remaining statutory references to constables and deputy constables relate to retirement of such employees.[14] It seems too early to presume that the references to constables in these code sections are obsolete. The justice courts were not eliminated until 1995, so there might still be some former constables or former deputy constables who are entitled to retirement benefits pursuant to the statutory schemes in question. The retirement-related references to constables and deputy constables should remain in place until it is clear that they no longer have any importance.

Other References to Constables

Only one other code section refers to constables: Corporations Code Section 14502. This extremely long section relates to humane officers (individuals appointed to enforce the laws for the prevention of cruelty to animals). Among many other things, it says that if a court confirms an appointment of a humane officer, the appointee shall "take and subscribe the oath of office prescribed for *constables* or other peace officers."[15]

Because constables no longer exist, Section 14502 should no longer refer to their oath of office. Instead, it should just direct an appointee to "take and subscribe an oath of office prescribed for peace officers." The Law Revision Commission proposes to amend the section in that manner.[16]

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14. See Gov't Code §§ 20437, 31469.1, 31470.2, 31470.25, 31904, 32050.5, 33003, 71300, 71301, 71302, 71303, 71305.

15. Corp. Code § 14502(c)(2) (emphasis added).

16. See "Proposed Legislation" *infra*.

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RECOMMENDED STATUTORY REVISIONS TO INCORPORATE IN AN INITIATIVE MEASURE

Penal Code § 412 (amended). Boxing contests

412. Any person, who, within this state, engages in, or instigates, aids, encourages, or does any act to further, a pugilistic contest, or fight, or ring or prize fight, or sparring or boxing exhibition, taking or to take place either within or without this state, between two or more persons, with or without gloves, for any price, reward or compensation, directly or indirectly, or who goes into training preparatory to such pugilistic contest, or fight, or ring or prize fight, or sparring or boxing exhibition, or acts as aider, abettor, backer, umpire, referee, trainer, second, surgeon, or assistant, at such pugilistic contest, or fight, or ring or prize fight, or sparring or boxing exhibition, or who sends or publishes a challenge or acceptance of a challenge, or who knowingly carries or delivers such challenge or acceptance, or who gives or takes or receives any tickets, tokens, prize, money, or thing of value, from any person or persons, for the purpose of seeing or witnessing any such pugilistic contest, or fight, or ring or prize fight, or sparring or boxing exhibition, or who, being the owner, lessee, agent, or occupant of any vessel, building, hotel, room, enclosure or ground, or any part thereof, whether for gain, hire, reward or gratuitously or otherwise, permits the same to be used or occupied for such a pugilistic contest, or fight, or ring or prize fight, or sparring or boxing exhibition, or who lays, makes, offers or accepts, a bet or bets, or wager or wagers, upon the result or any feature of any pugilistic contest, or fight, or ring or prize fight, or sparring or boxing exhibition, or acts as stakeholder of any such bet or bets, or wager or wagers, shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than one hundred dollars nor more than one thousand dollars and be imprisoned in the county jail not less than thirty days nor exceeding one year; provided, however, that amateur boxing exhibitions may be held within this state, of a limited number of rounds, not exceeding four of the duration of

three minutes each; the interval between each round shall be one minute, and the contestants weighing one hundred and forty-five pounds or over shall wear gloves of not less than eight ounces each in weight, and contestants weighing under one hundred and forty-five pounds may wear gloves of not less than six ounces each in weight. All gloves used by contestants in such amateur boxing exhibitions shall be so constructed, as that the soft padding between the outside coverings shall be evenly distributed over the back of said gloves and cover the knuckles and back of the hands. And no bandages of any kind shall be used on the hands or arms of the contestants. For the purpose of this statute an amateur boxing exhibition shall be and is hereby defined as one in which no contestant has received or shall receive in any form, directly or indirectly, any money, prize, reward or compensation either for the expenses of training for such contest or for taking part therein, except as herein expressly provided. Nor shall any person appear as contestant in such amateur exhibition who prior thereto has received any compensation or reward in any form for displaying, exercising or giving any example of his skill in or knowledge of athletic exercises, or for rendering services of any kind to any athletic organization or to any person or persons as trainer, coach, instructor or otherwise, or who shall have been employed in any manner professionally by reason of his athletic skill or knowledge; provided, however, that a medal or trophy may be awarded to each contestant in such amateur boxing exhibitions, not to exceed in value the sum of $35.00 each, which such medal or trophy must have engraved thereon the name of the winner and the date of the event; but no portion of any admission fee or fees charged or received for any amateur boxing exhibition shall be paid or given to any contestant in such amateur boxing exhibition, either directly or indirectly, nor shall any gift be given to or received by such contestants for participating in such boxing exhibition, except said medal or trophy. At every amateur boxing exhibition held in this state and permitted by this section of the Penal Code, any sheriff, ~~constable,~~ marshal, policeman or other peace officer of the city,

county or other political subdivision, where such exhibition is being held, shall have the right to, and it is hereby declared to be his duty to stop such exhibition, whenever it shall appear to him that the contestants are so unevenly matched or for any other reason, the said contestants have been, or either of them, has been seriously injured or there is danger that said contestants, or either of them, will be seriously injured if such contest continues, and he may call to his assistance in enforcing his order to stop said exhibition, as many peace officers or male citizens of the state as may be necessary for that purpose. Provided, further, that any contestant who shall continue to participate in such exhibition after an order to stop such exhibition shall have been given by such peace officer, or who shall violate any of the regulations herein prescribed, for governing amateur boxing exhibitions, shall be deemed guilty of violating this section of the Penal Code and subject to the punishment herein provided.

Nothing in this section contained shall be construed to prevent any county, city and county, or incorporated city or town from prohibiting, by ordinance, the holding or conducting of any boxing exhibition, or any person from engaging in any such boxing exhibition therein.

Comment. Section 412 is amended to reflect elimination of the justice court and the office of constable. See 1994 Cal. Stat. res. ch. 113 (SCA 7) (Prop. 191, approved Nov. 8, 1994 & operative Jan. 1, 1995).

Note. Section 412 could also benefit from extensive stylistic clean-up to conform to modern drafting conventions (e.g., to make it gender-neutral, insert paragraph breaks, label paragraphs, delete the disfavored word "such," and eliminate "of the Penal Code" where that phrase is unnecessary). The above amendment does not incorporate such clean-up, because that would unduly distract from the revision being proposed to reflect trial court restructuring.

Penal Code § 413 (amended). Arrest warrant and ban on spectators

413. Every person wilfully present as spectator at any fight or contention prohibited in the preceding section, is guilty of a misdemeanor.

An information may be laid before any of the magistrates mentioned in section eight hundred and eight of this code, that a person has taken steps toward promoting or participating in a contemplated pugilistic contest, or fight, or ring or prize fight, or sparring or boxing exhibition, prohibited under the provision of section four hundred and twelve of this code, or is about to commit an offense under said section four hundred and twelve. When said information is laid before said magistrate, he must examine, on oath, the informer, and any witness or witnesses he may produce, and must take their depositions in writing and cause them to be subscribed by the parties making them. If it appears from the deposition that there is just reason to fear the commission of the offense contemplated by the person so informed against, the magistrate must issue a warrant directed generally to the sheriff of the county, or any ~~constable,~~ marshal, or policeman in the state, reciting the substance of the information and commanding the officer forthwith to arrest the person informed against and bring him before the magistrate. When the person informed against is brought before the magistrate, if the charge be controverted, the magistrate must take testimony in relation thereto. The evidence must be reduced to writing and subscribed by the witnesses. If it appears there is no just reason to fear the commission of the offense alleged to have been contemplated, the person complained against must be discharged. If, however, there is just reason to fear the commission of the offense, the person complained of must be required to enter into an undertaking in such sum, not less than three thousand dollars, as the magistrate may direct, with one or more sufficient sureties, conditioned that such person will not, for a period of one year thereafter, commit any such contemplated offense.

Comment. Section 413 is amended to reflect elimination of the justice court and the office of constable. See 1994 Cal. Stat. res. ch. 113 (SCA 7) (Prop. 191, approved Nov. 8, 1994 & operative Jan. 1, 1995).

Note. Section 413 could also benefit from extensive stylistic clean-up to conform to modern drafting conventions (e.g., to make it gender-neutral,

insert paragraph breaks, label paragraphs, delete the disfavored word "such," and use conventional means of referring to other code sections). The above amendment does not incorporate such clean-up, because that would unduly distract from the revision being proposed to reflect trial court restructuring.

PROPOSED LEGISLATION

Corp. Code § 14502 (amended). Humane officers

14502. (a)(1)(A)(i) On and after July 1, 1996, no entity, other than a humane society or society for the prevention of cruelty to animals, shall be eligible to petition for confirmation of an appointment of any individual as a humane officer, the duty of which shall be the enforcement of the laws for the prevention of cruelty to animals.

(ii) On and after July 1, 1996, only a person who meets the requirements of this section may be appointed as, or perform the duties of, a humane officer.

(iii) Any person appointed as a humane officer prior to July 1, 1996, may continue to serve as a humane officer until the expiration of the term of appointment only if the appointing society maintains records pursuant to subparagraph (B) documenting that both the appointing society and the humane officer meet the requirements of this section.

(B) Each humane society or society for the prevention of cruelty to animals for which an individual is acting as a humane officer shall maintain complete and accurate records documenting that the individual has successfully completed all requirements established in this section and shall make those records available, upon request, to the superior court, the Attorney General, or any entity duly authorized to review that information, including the State Humane Association of California. The records shall include the full name and address of each humane officer.

(2) The humane society or society for the prevention of cruelty to animals shall possess insurance of at least one million dollars ($1,000,000) for liability for bodily injury or property damage.

(3) Each appointment of a humane officer shall be by separate resolution by the board of directors or trustees of the humane society or society for the prevention of cruelty to animals duly entered in its minutes. The resolution shall state the full name and address of the principal office of the appointing society, the full name of the person so appointed, the fact that he or she is a citizen

of the State of California, that he or she has met the training requirements set forth in subdivision (h), and whether he or she is authorized to carry a weapon pursuant to this section. The resolution shall also designate the number of the badge to be allotted to the officer, and the date on which the term of office shall expire.

(b) A humane society or a society for the prevention of cruelty to animals seeking confirmation of a humane officer's appointment shall comply with each of the following provisions:

(1) Prior to filing a Petition for Order Confirming Appointment of a Humane Officer under paragraph (3), the humane society or society for the prevention of cruelty to animals shall submit to the Department of Justice fingerprint images and related information of all humane officer applicants for the purposes of obtaining information as to the existence and content of a record of state and federal convictions and state and federal arrests and also information as to the existence and content of a record of state and federal arrests for which the Department of Justice establishes that the person is free on bail or on his or her own recognizance pending trial or appeal.

(A) When received, the Department of Justice shall forward to the Federal Bureau of Investigation requests for federal summary criminal history information received pursuant to this section. The Department of Justice shall review the information returned from the Federal Bureau of Investigation and compile and disseminate a fitness determination regarding the humane officer applicants to the humane society or society for the prevention of cruelty to animals.

(B) The Department of Justice shall provide a state response to the humane society or society for the prevention of cruelty to animals pursuant to paragraph (1) of subdivision (p) of Section 11105 of the Penal Code.

(C) The humane society or society for the prevention of cruelty to animals shall request from the Department of Justice subsequent arrest notification service, as provided pursuant to Section 11105.2

of the Penal Code, for persons whose appointments are confirmed as described in subdivision (c).

(D) The Department of Justice shall charge a fee sufficient to cover the cost of processing the request described in this paragraph.

(2) When filing a Petition for Order Confirming Appointment of a Humane Officer under paragraph (3), the humane society or society for the prevention of cruelty to animals shall serve a copy of the petition on each of the following:

(A) The police department having jurisdiction in the city in which the principal office of the appointing society is located.

(B) The sheriff's department having jurisdiction in the county in which the principal office of the appointing society is located.

(C) The Department of the California Highway Patrol.

(D) The State Humane Association of California.

(E) The animal control agency having jurisdiction in the city in which the principal office of the appointing society is located. If the sheriff's department or police department entitled to notice under subparagraph (A) or (B) provides animal control services for the city in which the principal office of the appointing society is located, no separate notice is required under this subparagraph.

(F) The Department of Justice.

(3) The humane society or society for the prevention of cruelty to animals shall file with the superior court in and for the county or city and county in which the principal office of the humane society is located a Petition for Order Confirming Appointment of a Humane Officer, and shall attach to the petition all of the following:

(A) A copy of the resolution appointing the person, duly certified to be correct by the president and secretary of the society and attested by its seal.

(B) A copy of the criminal record offender information, if any, obtained regarding the person pursuant to paragraph (1).

(C) Proof of the society's proper incorporation in compliance with Part 9 (commencing with Section 10400) of Division 2,

including the date the articles of incorporation were filed with the Secretary of State.

(D) A copy of the society's liability insurance policy for bodily injury or property damage in the amount of at least one million dollars ($1,000,000).

(E) Documentation establishing that the appointee has satisfactorily completed the training requirements set forth in this section.

(F) Documentation establishing that the society has a written agreement with another entity, such as a public or private animal shelter or licensed veterinary clinic, that (i) provides for the humane care and treatment of any animals seized by the society, (ii) is capable of preserving evidence that may be used to prosecute an animal cruelty case, and (iii) is compliant with all applicable federal, state, and local laws, including licensing laws. Alternatively, the society may provide documentation that it is operating its own animal shelter that meets the requirements of clauses (i), (ii), and (iii).

(G) If the society has not previously appointed a humane officer:

(i) An affidavit signed under penalty of perjury from the president of the society that demonstrates the society's competence to appoint a humane officer by providing information, including, but not limited to, the following:

(I) Partnerships or collaborations, if any, with other nonprofit or community agencies.

(II) Cash reserve on hand, if any, to pay for veterinary expenses, housing, food, and care of seized animals.

(III) Established donor base, if any.

(IV) Current or prior law enforcement, legal, or other relevant experience, if any, of persons who will supervise the appointee.

(V) Current or prior experience of managers, if any, in operating a society or other nonprofit organization.

(VI) Statement that each board member is in good standing in the community and has not been convicted of a misdemeanor or felony involving animals.

(VII) Ongoing training beyond the minimum required for appointment of the humane officer, if any.

(VIII) The need for a humane officer in the society's county.

(IX) Any other documentation demonstrating compliance with applicable federal, state, or local laws.

(ii) Affidavits, if any, from personnel of local animal control agencies, law enforcement agencies, or other societies pertaining to the appointee's fitness to act as a humane officer.

(H) As the last page, proof of service of a copy of the petition upon those parties required to be served.

(4) Any party described in paragraph (2) may file an opposition to the petition described in paragraph (3). All papers filed in opposition to the petition and in reply to the opposition shall conform to law and motion pleading requirements, pursuant to Rule 3.1113(d) of the California Rules of Court. An opposition shall not exceed 15 pages and a reply shall not exceed 10 pages, excluding exhibits and declarations. The opposition shall be limited to the competency of the society to appoint and supervise a humane officer and the qualifications, background, and fitness of the appointee that are specific to the work of a humane officer.

(A) Any opposition shall be filed no later than 15 court days after the petition is filed with the court. Any opposition shall be served on all parties indicated on the proof of service attached to the petition.

(B) The petitioner's reply, if any, to the opposition shall be filed within 10 court days after service of the opposition. The reply shall be served on all parties listed in the proof of service attached to the petition and to any other person who has filed an opposition.

(C) The court shall rule on the petition without a hearing unless the court notifies the parties of an intention to hold a hearing.

(D) The petitioner shall serve a certified copy of the court's order ruling on the petition on all parties listed in the proof of service attached to the petition and to any other person or entity who has filed an opposition.

(c)(1) Upon receipt of the Petition for Order Confirming Appointment of a Humane Officer, the court shall first determine

the society's date of incorporation, and the length of time between the date the society filed its articles of incorporation with the Secretary of State and the date it filed the petition described in paragraph (3) of subdivision (b) with the court. If the society was incorporated on or after January 1, 2011, then the following shall apply:

(A) For a petition to confirm appointment of a level 1 humane officer, the court shall issue an order denying confirmation of the appointment if a minimum of five years has not elapsed from the date the society filed its articles of incorporation with the Secretary of State to the date it filed the petition.

(B) For a petition to confirm appointment of a level 2 humane officer, the court shall issue an order denying confirmation of the appointment if a minimum of one year has not elapsed from the date the society filed its articles of incorporation with the Secretary of State to the date it filed the petition.

(C) For a petition to confirm appointment of either a level 1 or level 2 humane officer, the court shall issue an order denying confirmation of the appointment if the society has not established, through submission of appropriate documentation, that the society is either operating its own animal shelter or has a written agreement with another entity, in compliance with subparagraph (F) of paragraph (3) of subdivision (b).

(2) If the court has not issued an order denying the petition pursuant to paragraph (1), then the court shall review the matter of the appointee's qualifications and fitness to act as a humane officer. The court shall also consider any documentation it has received in support of, or in opposition to, the confirmation of the person's appointment. If the court finds that the appointee is qualified and fit to act as a humane officer, the court shall issue an order confirming the appointment. The society shall thereupon file a certified copy of the court order in the office of the county clerk of the county or city and county in which the court is located. The appointee shall, at the same time, take and subscribe ~~the~~ an oath of office prescribed for ~~constables or other~~ peace officers. The society

shall also provide a copy of the Order Confirming Appointment to the State Humane Association of California and the Department of Justice. The Department of Justice may charge a reasonable fee sufficient to cover the costs of maintaining records of Orders Confirming Appointment. If the court does not find the appointee qualified and fit to act as a humane officer, the court shall issue an order denying confirmation of the appointment.

(d) If the court grants the petition, the county clerk shall immediately enter in a book to be kept in his or her office and designated "Record of Humane Officers" the name of the officer, the name of the society appointing him or her, the number of his or her badge, the date of the filing, and the case number of the court order confirming the appointment. At the time of the filing, the county clerk shall collect from the society a fee of five dollars ($5), which shall be full payment for all services to be performed by the county clerk under this section.

(e) All appointments of humane officers shall automatically expire if the society disbands or legally dissolves.

(f)(1) The society appointing an officer may revoke an appointment at any time by filing in the office of the county clerk in which the appointment of the officer is recorded a copy of the revocation in writing under the letterhead of the society and duly certified by its executive officer. Upon the filing the county clerk shall enter the fact of the revocation and the date of the filing thereof opposite the name of the officer in the record of humane officers.

(2) Notwithstanding paragraph (1), any duly authorized sheriff or local police agency or the State Humane Association of California may initiate a revocation hearing by filing a petition to Revoke Appointment of a Humane Officer. The petition shall show cause why an appointment should be revoked and shall be made to the superior court in the jurisdiction of the appointment. Filing, service, and format of the petition and any oppositions and reply papers shall conform to the law and motion requirements under the Code of Civil Procedure, California Rules of Court, and this code. A proceeding pursuant to this paragraph shall be a special

proceeding within the meaning of Section 23 of the Code of Civil Procedure.

(A) Notice of the hearing date and a copy of the petition shall be served in the same manner as a summons upon the humane officer subject to the petition, the society that appointed the officer, the agencies and association described in paragraph (2) of subdivision (b); except the party filing the petition shall not be required to serve copies of those documents upon itself.

(B) Upon a finding of good cause, the court shall issue an order granting the petition to revoke the appointment. The county clerk shall immediately enter the revocation and the date of the court order opposite the name of the officer in the record of humane officers. The clerk of the superior court shall give notice of the order to the parties described in subparagraph (A) and to the county clerk-recorder.

(g) The society appointing the humane officer shall pay the training expenses of the humane officer attending the training required pursuant to this section.

(h)(1)(A) A level 1 humane officer is not a peace officer, but may exercise the powers of a peace officer at all places within the state in order to prevent the perpetration of any act of cruelty upon any animal and to that end may summon to his or her aid any bystander. A level 1 humane officer may use reasonable force necessary to prevent the perpetration of any act of cruelty upon any animal.

(B) A level 1 humane officer may make arrests for the violation of any penal law of this state relating to or affecting animals in the same manner as any peace officer and may serve search warrants.

(C) A level 1 humane officer is authorized to carry firearms while exercising the duties of a humane officer, upon satisfactory completion of the training specified in subparagraph (D), if the requirements in subparagraph (F) are met.

(D) A level 1 humane officer shall, prior to appointment, provide evidence satisfactory to the appointing society that he or she has successfully completed the following requirements:

(i) At least 20 hours of a course of training in animal care sponsored or provided by an accredited postsecondary institution or any other provider approved by the California Veterinary Medical Association the focus of which shall be the identification of disease, injury, and neglect in domestic animals and livestock.

(ii) At least 40 hours of a course of training in the state humane laws relating to the powers and duties of a humane officer, sponsored or provided by an accredited postsecondary institution, law enforcement agency, or the State Humane Association of California.

(iii) The basic training for a level 1 reserve officer by the Commission on Peace Officer Standards and Training pursuant to paragraph (1) of subdivision (a) of Section 832.6 of the Penal Code.

(E) A person shall not be appointed as a level 1 humane officer until he or she meets the criteria in Sections 1029, 1030, and 1031 of the Government Code. A humane society or society for the prevention of cruelty to animals shall complete a background investigation, using standards defined by the Commission on Peace Officer Standards and Training as guidelines for all level 1 humane officer appointments.

(F)(i) Notwithstanding any other provision of this section, a level 1 humane officer may carry a firearm only if authorized by, and only under the terms and conditions specified by, his or her appointing society.

(ii) Notwithstanding any other provision of this section, a level 1 humane officer shall not be authorized to carry a firearm unless and until his or her appointing society has adopted a policy on the use of deadly force by its officers and the officer has been instructed in that policy.

(2)(A) A level 2 humane officer is not a peace officer, but may exercise the powers of a peace officer at all places within the state in order to prevent the perpetration of any act of cruelty upon any animal and to that end may summon to his or her aid any bystander. A level 2 humane officer may use reasonable force

necessary to prevent the perpetration of any act of cruelty upon any animal.

(B) A level 2 humane officer may make arrests for the violation of any penal law of this state relating to or affecting animals in the same manner as any peace officer and may serve search warrants during the course and within the scope of appointment, upon the successful completion of a course relating to the exercise of the police powers specified in Section 832 of the Penal Code, except the power to carry and use firearms.

(C) A level 2 humane officer is not authorized to carry firearms.

(D) A level 2 humane officer shall, prior to appointment, provide evidence satisfactory to the appointing society that he or she has successfully completed courses of training in the following subjects:

(i) At least 20 hours of a course of training in animal care sponsored or provided by an accredited postsecondary institution or any other provider approved by the California Veterinary Medical Association, the focus of which is the identification of disease, injury, and neglect in domestic animals and livestock.

(ii) At least 40 hours of a course of training in the state humane laws relating to the powers and duties of a humane officer, sponsored or provided by an accredited postsecondary institution, law enforcement agency, or the State Humane Association of California.

(E) A person shall not be appointed as a level 2 humane officer until he or she meets the criteria in Sections 1029, 1030, and 1031 of the Government Code. A humane society or society for the prevention of cruelty to animals shall complete a background investigation, using standards defined by the Commission on Peace Officer Standards and Training as guidelines, for all level 2 humane officer appointments.

(3) During each three-year period following the date on which the certified copy of the court order confirming the appointment of a humane officer was filed with the county clerk, the humane officer shall complete 40 hours of continuing education and

training relating to the powers and duties of a humane officer, which education and training shall be sponsored or provided by an accredited postsecondary institution, law enforcement agency, or the State Humane Association of California. A certificate of compliance shall be served no later than 21 days after the expiration of each three-year period on the Department of Justice with copies served on the superior court, agencies, and associations described in subparagraphs (A) through (E) of paragraph (2) of subdivision (b). The Department of Justice may charge a reasonable fee sufficient to cover the costs of maintaining records of certificates of compliance. The certificate of compliance shall also include documentation that the humane society or society for the prevention of cruelty to animals is in compliance with subparagraph (F) of paragraph (3) of subdivision (b). Service on the Department of Justice shall be in compliance with procedures set forth by the Department of Justice. The Department of Justice shall post the filing procedures, as they may be updated from time to time, on its Internet Web site. Failure to file the certificate of compliance with the Department of Justice no later than 21 days after the expiration of a three-year period shall result in immediate revocation of the appointment.

(4) If the humane officer is authorized to carry a firearm, he or she shall complete ongoing weapons training and range qualifications at least every six months pursuant to subdivision (t) of Section 830.3 of the Penal Code. A certificate of compliance pursuant to this section shall be served no later than 21 days after the expiration of a six-month period on the Department of Justice with copies served on the superior court, and on the agencies and associations described in subparagraphs (A) through (E) of paragraph (2) of subdivision (b). The Department of Justice may charge a reasonable fee sufficient to cover the costs of maintaining records of certificates of compliance. The certificate of compliance shall also include documentation that the humane society or society for the prevention of cruelty to animals is in compliance with subparagraph (F) of paragraph (3) of subdivision (b). Service on the Department of Justice shall be in compliance with

procedures set forth by the Department of Justice. The Department of Justice shall post the filing procedures, as they may be updated from time to time, on its Internet Web site. Failure to file the certificate of compliance with the Department of Justice no later than 21 days after the expiration of a six-month period shall result in immediate revocation of the appointment.

(i) Every humane officer shall, when making an arrest, exhibit and expose a suitable badge to be adopted by the society under this part of which he or she is an appointee which shall bear its name and a number. Uniforms worn by humane officers shall prominently display the name of the appointing society. Humane officer uniforms shall not display the words "state" or "California," except to the extent that one or both of those words are part of the appointing society's incorporated name.

(j) Any person resisting a humane officer in the performance of his or her duty as provided in this section is guilty of a misdemeanor. Any person who has not been appointed and qualified as a humane officer as provided in this section, or whose appointment has been revoked as provided in this section, or whose appointment, having expired, has not been renewed as provided in this section, who shall represent himself or herself to be or shall attempt to act as an officer shall be guilty of a misdemeanor.

(k) No humane officer shall serve a search warrant without providing prior notice to local law enforcement agencies operating within that jurisdiction.

(l) Any humane society, society for the prevention of cruelty to animals, or person, who knowingly provides a court with false or forged documentation for the appointment of a humane officer, is guilty of a misdemeanor and shall be punished by a fine of up to ten thousand dollars ($10,000).

(m) Except as otherwise provided by this section, a humane officer shall serve only in the county in which the court that appointed him or her sits. A humane officer may serve in another county if the humane officer gives notice requesting consent to the

sheriff of the county in which he or she intends to serve, and acquires consent from that sheriff of the county in which he or she intends to serve, or from a person authorized by the sheriff to give that consent. A sheriff shall promptly respond to any request by a humane officer to serve in his or her jurisdiction and any request shall not be unreasonably denied.

Comment. Paragraph (2) of subdivision (c) of Section 14502 is amended to reflect elimination of the justice court and the office of constable. See 1994 Cal. Stat. res. ch. 113 (SCA 7) (Prop. 191, approved Nov. 8, 1994 & operative Jan. 1, 1995).

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

2018-2019 Annual Report

California Law Revision Commission
c/o UC Davis School of Law
Davis, CA 95616
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Cite this report as *2018-2019 Annual Report*, 45 Cal. L. Revision Comm'n Reports 473 (2018).

SUMMARY OF WORK OF COMMISSION

Recommendations to the 2018 Legislature

In 2018, bills effectuating two Commission recommendations were enacted, relating to the following subjects:

- Revocable Transfer on Death Deed: Recordation
- Deadly Weapons: Minor Clean-Up Issues

Recommendations to the 2019 Legislature

In 2019, the Commission plans to seek the introduction of legislation effectuating Commission recommendations on the following subjects:

- Disposition of Estate Without Administration: Interest Rate
- Disposition of Estate Without Administration: Dollar Amounts

Commission Activities Planned for 2019

During 2019, the Commission intends to work on the following major topics: revision of the Fish and Game Code, California Public Records Act clean-up, nonsubstantive clean-up of toxic substance statutes, liability of nonprobate transfers for creditor claims and family protections, revocable transfer on death deeds, disposition of estate without administration, trial court restructuring, and eminent domain pre-condemnation activities.

The Commission will work on other topics as time permits.

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STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION
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SENATOR RICHARD ROTH

December 7, 2018

To: The Honorable Edmund G. Brown, Jr.
Governor of California, and
The Legislature of California

In conformity with Government Code Section 8293, the California Law Revision Commission submits this report of its activities during 2018 and its plans for 2019.

Two Commission recommendations considered by the Legislature in 2018 were enacted into law.

The Commission is grateful to the members of the Legislature who carried Commission-recommended legislation in 2018:

- Assembly Member Ed Chau (Revocable Transfer on Death Deed: Recordation)
- Assembly Member Reginald Jones-Sawyer, Sr. (Deadly Weapons: Minor Clean-Up Issues)
- Senator Richard Roth (Resolution Authorizing Topics for Study)

The Commission held six one-day meetings in 2018. Meetings were held in Sacramento and Burbank.

Respectfully submitted,

Jane McAllister
Chairperson

2018-2019 ANNUAL REPORT

Introduction

The California Law Revision Commission was created in 1953 and commenced operation in 1954 as the permanent successor to the Code Commission,[1] with responsibility for a continuing substantive review of California statutory and decisional law.[2] The Commission studies the law to discover defects and anachronisms and recommends legislation to make needed reforms.

The Commission ordinarily works on major topics, assigned by the Legislature, that require detailed study and cannot easily be handled in the ordinary legislative process. The Commission's work is independent, nonpartisan, and objective.

The Commission consists of:[3]

- A Member of the Senate appointed by the Rules Committee
- A Member of the Assembly appointed by the Speaker
- Seven members appointed by the Governor with the advice and consent of the Senate
- The Legislative Counsel, who is an ex officio member

The Commission may study only topics that the Legislature has authorized.[4]

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1. See 1953 Cal. Stat. ch. 1445, operative September 9, 1953. The first meeting of the Commission was held on February 23, 1954.

2. See Gov't Code §§ 8280-8298 (statute establishing Law Revision Commission) (Appendix 1 *infra*). See also *1955 Report* [Annual Report for 1954] at 7, 1 Cal. L. Revision Comm'n Reports (1957).

3. For current membership, see "Personnel of Commission" infra.

4. Under its general authority, the Commission may study only topics that the Legislature, by concurrent resolution, authorizes for study. See *Calendar of Topics Authorized for Stud*y, Appendix 2 *infra*. However, the Commission may study and recommend revisions to correct technical or minor substantive defects in state statutes without a prior concurrent resolution. Gov't Code § 8298. Additionally, a concurrent resolution or statute may directly confer authority to study a particular subject. See, e.g., 2016 Cal. Stat. ch. 179 [AB 1779] and 2015

The Commission has submitted 413 recommendations to the Legislature, of which 383 (more than 90%) have been enacted in whole or in substantial part.[5] Commission recommendations have resulted in the enactment of legislation affecting 25,299 sections of California law: 5,239 sections amended, 11,097 sections added, and 8,963 sections repealed.

The Commission's recommendations, reports, and other selected materials are published annually in hardcover volumes. Recent materials are also available through the Internet. A list of past publications and information on obtaining printed or electronic versions of Commission material can be found at the end of this Annual Report.[6]

2019 Legislative Program

In 2019, the Commission plans to seek the introduction of legislation effectuating Commission recommendations on the following subjects:

- Disposition of Estate Without Administration: Interest Rate
- Disposition of Estate Without Administration: Dollar Amounts

Major Studies in Progress

During 2019, the Commission intends to work on the following major topics: revision of the Fish and Game Code, California Public Records Act clean-up, nonsubstantive clean-up of toxic substance

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Cal. Stat. ch. 293 [AB 139] (revocable transfer on death deeds); 2014 Cal. Stat. ch. 243 [SB 406] (standards for recognition of tribal and foreign court money judgments); 2013 Cal. Stat. res. ch. 115 [SCR 54] (state and local agency access to customer information from communications service providers); 2006 Cal. Stat. res. ch. 128 [ACR 73] (nonsubstantive reorganization of weapon statutes); 2006 Cal. Stat. ch. 216 [AB 2034] (donative transfer restrictions).

5. See *Legislative Action on Commission Recommendations*, Appendix 3 *infra*.

6. See *Commission Publications*, Appendix 5 *infra*.

statutes, liability of nonprobate transfers for creditor claims and family protections, revocable transfer on death deeds, disposition of estate without administration, trial court restructuring, and eminent domain pre-condemnation activities.

The Commission will work on other topics as time permits.

Revision of the Fish and Game Code

The Commission will continue to study the revision of the Fish and Game Code and related statutory law to improve organization, clarify meaning, resolve inconsistencies, eliminate unnecessary or obsolete provisions, standardize terminology, clarify program authority and funding sources, and make other minor improvements, without making any significant substantive change to the effect of the law.[7]

California Public Records Act Clean-Up

The Commission will continue to study the nonsubstantive revision of the California Public Records Act (Gov't Code §§ 6250-6276.48) and related provisions.[8]

Toxic Substance Statute Clean-Up

The Commission will continue to study the nonsubstantive revision of two chapters of the Health and Safety Code relating to toxic substances.[9]

Nonprobate Transfers for Creditor Claims and Family Protections

The Commission will continue to study the treatment of creditor claims and family protections, with respect to property passing outside of probate.[10]

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7. See 2018 Cal. Stat. res. ch. 158.
8. *Id.*
9. *Id.*
10. *Id.*

Revocable Transfer on Death Deeds

The Commission will continue to study the effect of California's revocable transfer on death deed.[11]

Disposition of Estate Without Administration

The Commission will continue to study possible defects in existing statutes governing disposition of estates without administration.[12]

Trial Court Restructuring

The Commission will continue to work on cleaning up the codes to reflect three major trial court restructuring reforms: (1) trial court unification, (2) enactment of the Lockyer-Isenberg Trial Court Funding Act, and (3) enactment of the Trial Court Employment Protection and Governance Act.[13]

Eminent Domain Pre-Condemnation Activities

The Commission will continue to study whether to codify the holding of *Property Reserve Inc. v Superior Court*, 1 Cal. 5th 151 (2016) and related issues.[14]

Other Subjects

The studies described above will dominate the Commission's time and resources during 2019. As time permits, the Commission will consider other subjects authorized for study.

Calendar of Topics for Study

The Commission's calendar includes 25 topics authorized by the Legislature for study.[15]

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11. See 2016 Cal. Stat. ch. 179, § 1 (AB 1779 (Gatto)); 2015 Cal. Stat. ch. 293, § 21 (AB 139 (Gatto)).

12. See 2018 Cal. Stat. res. ch. 158.

13. See Gov't Code § 71674; see also 2018 Cal. Stat. res. ch. 158.

14. See 2018 Cal. Stat. res. ch. 158.

15. See *Calendar of Topics Authorized for Study*, Appendix 2 *infra*.

Function and Procedure of Commission

The principal duties of the Commission are to:[16]

(1) Examine the common law and statutes for the purpose of discovering defects and anachronisms.

(2) Receive and consider suggestions and proposed changes in the law from the American Law Institute, the National Conference of Commissioners on Uniform State Laws,[17] bar associations, and other learned bodies, and from judges, public officials, lawyers, and the public generally.

(3) Recommend such changes in the law as it deems necessary to bring California law into harmony with modern conditions.[18]

The Commission is required to file a report at each regular session of the Legislature containing a calendar of topics selected by it for study, listing both studies in progress and topics intended for future consideration. Under its general authority, the Commission may study only topics that the Legislature, by concurrent resolution, authorizes for study.[19] However, the Commission may study and recommend revisions to correct technical or minor substantive

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16. Gov't Code §§ 8280-8298 (statute governing California Law Revision Commission). See Appendix 1 *infra*.

17. The Legislative Counsel, an ex officio member of the Law Revision Commission, serves as a Commissioner of the Commission on Uniform State Laws. See Gov't Code § 10271.

18. Gov't Code § 8289. The Commission is also directed to recommend the express repeal of all statutes repealed by implication, or held unconstitutional by the California Supreme Court or the United States Supreme Court. Gov't Code § 8290. See "Report on Statutes Repealed by Implication or Held Unconstitutional" *infra*.

19. Gov't Code § 8293. Section 8293 requires a concurrent resolution authorizing the Commission to study topics contained in the calendar of topics set forth in the Commission's regular report to the Legislature. Section 8293 also requires that the Commission study any topic that the Legislature by concurrent resolution or statute refers to the Commission for study.

defects in state statutes without a prior concurrent resolution.[20] Additionally, a concurrent resolution[21] or statute[22] may directly confer authority to study a particular subject.

Background Studies and Expert Consultants

The Commission's work on a recommendation typically begins after a background study has been prepared. The background study may be prepared by a member of the Commission's staff or by a specialist in the field who is retained as a consultant. Law professors and practicing attorneys who serve as consultants have already acquired the considerable knowledge necessary to understand the specific problems under consideration, and receive little more than an honorarium for their services.

From time to time, the Commission requests expert assistance from law professors and other legal professionals, who may provide written input or testify at meetings.

Recommendations

After making its preliminary decisions on a subject, the Commission ordinarily distributes a tentative recommendation to

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20. Gov't Code § 8298.

21. For an example of a concurrent resolution referring a specific topic to the Commission for study, see 2013 Cal. Stat. res. ch. 115 [SCR 54] (state and local agency access to customer information from communications service providers).

22. For example, Government Code Section 70219 requires the Commission, in consultation with the Judicial Council, to perform follow-up studies taking into consideration the experience in courts that have unified. For a list of specific studies, see *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm'n Reports 51, 82-86 (1998).

Government Code Section 71674 requires the Commission to recommend repeal of provisions made obsolete by the Trial Court Employment Protection and Governance Act (Gov't Code § 71600 *et seq.*), Lockyer-Isenberg Trial Court Funding Act of 1997 (1997 Cal. Stat. ch. 850), and the implementation of trial court unification.

Pursuant to Code of Civil Procedure Section 681.035, the Commission also has continuing authority to study enforcement of judgments.

Statutory authority may be uncodified. See, e.g., 2016 Cal. Stat. ch. 179 (revocable transfer on death deeds).

interested persons and organizations, including the State Bar, local and specialized bar associations, public interest organizations, and business and professional associations. Notice of the availability of the tentative recommendation is mailed to interested persons on the Commission's mailing list and publicized in legal newspapers and other relevant publications. Notice is also posted on the Commission's website and emailed to interested persons.

Comments received on the tentative recommendation are considered by the Commission in determining what recommendation, if any, will be made to the Legislature.[23] When the Commission has reached a conclusion on the matter,[24] its recommendation to the Legislature (including a draft of any necessary legislation) is published and distributed in printed form and on the Internet. If a background study has been prepared in connection with the recommendation, it may be published by the Commission or in a law review.[25]

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23. For a step-by-step description of the procedure followed by the Commission in preparing the 1963 governmental liability statute, see DeMoully, *Fact Finding for Legislation: A Case Study,* 50 A.B.A. J. 285 (1964). The procedure followed in preparing the Evidence Code is described in 7 Cal. L. Revision Comm'n Reports 3 (1965). See also Gaal, *Evidence Legislation in California,* 36 S.W.U. L. Rev. 561, 563-69 (2008); Quillinan, *The Role and Procedures of the California Law Revision Commission in Probate and Trust Law Changes,* 8 Est. Plan. & Cal. Prob. Rep. 130-31 (Cal. Cont. Ed. Bar 1987).

24. Occasionally, one or more members of the Commission may not join in all or part of a recommendation submitted to the Legislature by the Commission. Dissents are noted in the minutes of the meeting at which the recommendation is approved.

25. For recent background studies published in law reviews, see Méndez, *California Evidence Code—Federal Rules of Evidence, IX. General Provisions*, 44 U.S.F. L. Rev. 891 (2010); Méndez, *California Evidence Code—Federal Rules of Evidence, VIII. Judicial Notice*, 44 U.S.F. L. Rev. 141 (2009); Méndez, *California Evidence Code—Federal Rules of Evidence, VII. Relevance: Definition and Limitations*, 42 U.S.F. L. Rev. 329 (2007); Méndez, *California Evidence Code—Federal Rules of Evidence, VI. Authentication and the Best and Secondary Evidence Rules*, 41 U.S.F. L. Rev. 1 (2006); Méndez, *California Evidence Code—Federal Rules of Evidence, V. Witnesses: Conforming the*

Official Comments

The Commission ordinarily prepares an official Comment explaining each section it recommends for enactment, amendment, or repeal. The Comments are included in the Commission's published recommendations. A Comment indicates the derivation of a section and often explains its purpose, its relation to other law, and potential issues concerning its meaning or application.[26]

Commission Materials as Legislative History

Commission recommendations are printed and sent to both houses of the Legislature, as well as to the Legislative Counsel and Governor.[27] Receipt of a recommendation by the Legislature is

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California Evidence Code to the Federal Rules of Evidence, 39 U.S.F. L. Rev. 455 (2005); Alford, *Report to Law Revision Commission Regarding Recommendations for Changes to California Arbitration Law*, 4 Pepp. Disp. Resol. L.J. 1 (2004); Méndez, *California Evidence Code—Federal Rules of Evidence, IV. Presumptions and Burden of Proof: Conforming the California Evidence Code to the Federal Rules of Evidence*, 38 U.S.F. L. Rev. 139 (2003); Méndez, *California Evidence Code—Federal Rules of Evidence, I. Hearsay and Its Exceptions: Conforming the Evidence Code to the Federal Rules*, 37 U.S.F. L. Rev. 351 (2003); Méndez, *California Evidence Code—Federal Rules of Evidence, II. Expert Testimony and the Opinion Rule: Conforming the Evidence Code to the Federal Rules*, 37 U.S.F. L. Rev. 411 (2003); Méndez, *California Evidence Code—Federal Rules of Evidence, III. The Role of Judge and Jury: Conforming the Evidence Code to the Federal Rules,* 37 U.S.F. L. Rev. 1003 (2003).

For a list of background studies published in law reviews before 2003, see 32 Cal. L. Revision Comm'n Reports 585 n.14 (2002); 20 Cal. L. Revision Comm'n Reports 198 n.16 (1990); 19 Cal. L. Revision Comm'n Reports 513 n.22 (1988); 18 Cal. L. Revision Comm'n Reports 212 n.17, 1713 n.20 (1986); 17 Cal. L. Revision Comm'n Reports 819 n.6 (1984); 16 Cal. L. Revision Comm'n Reports 2021 n.6 (1982); 13 Cal. L. Revision Comm'n Reports 1628 n.5 (1976); 11 Cal. L. Revision Comm'n Reports 1008 n.5, 1108 n.5 (1973); 10 Cal. L. Revision Comm'n Reports 1108 n.5 (1971).

26. Commission Comments are published by LexisNexis and Thomson Reuters in their print editions of the annotated codes, and printed in selected codes prepared by other publishers. Comments are also available on Westlaw and LexisNexis.

27. See Gov't Code §§ 8291, 9795, 11094-11099; see also Reynolds v. Superior Court, 12 Cal. 3d 834, 847 n.18, 528 P.2d 45, 53 n.18, 117 Cal. Rptr.

noted in the legislative journals, and the recommendation is referred to the appropriate policy committee.[28]

The bill introduced to effectuate a Commission recommendation is assigned to legislative committees charged with study of the matter in depth.[29] A copy of the recommendation is provided to legislative committee members and staff before the bill is heard and throughout the legislative process. The legislative committees rely on the recommendation in analyzing the bill and making recommendations to the Legislature concerning it.[30]

If an amendment is made to the bill that renders one of the Commission's original Comments inconsistent, the Commission generally will adopt a revised Comment and provide it to the committee. The Commission also provides this material to the Governor's office once the bill has passed the Legislature and is before the Governor for action. These materials are a matter of public record.

Until the mid-1980s, a legislative committee, on approving a bill implementing a Commission recommendation, would adopt the Commission's recommendation as indicative of the committee's

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437, 445 n.18 (1974) (Commission "submitted to the Governor and the Legislature an elaborate and thoroughly researched study").

28. See, e.g., Senate J. Aug. 18, 2003, at 2031 (noting receipt of 2002-2003 recommendations and their transmittal to the Committee on Judiciary).

29. See, e.g., Office of Chief Clerk, California State Assembly, California's Legislature 126-27 (2000) (discussing purpose and function of legislative committee system).

30. The Commission does not concur with the suggestion of the court in *Conservatorship of Wendland*, 26 Cal. 4th 519, 542, 28 P.3d 151, 166, 110 Cal. Rptr. 2d 412, 430 (2001), that a Commission Comment might be entitled to less weight based on speculation that the Legislature may not have read and endorsed every statement in the Commission's report. That suggestion belies the operation of the committee system in the Legislature. See White, *Sources of Legislative Intent in California*, 3 Pac. L.J. 63, 85 (1972) ("The best evidence of legislative intent must surely be the records of the legislature itself and the reports which the committees relied on in recommending passage of the legislation.").

intent in approving the bill.[31] If a Comment required revision, the revised Comment would be adopted as a legislative committee Comment. The committee's report would be printed in the journal of the relevant house.[32]

The Legislature has discontinued the former practice due to increased committee workloads and an effort to decrease the volume of material reprinted in the legislative journals. Under current practice, a legislative committee relies on Commission materials in its analysis of a bill, but does not separately adopt the materials. Instead, the Commission makes a report detailing the legislative history of the bill, including any revised Comments. Bill reports are published as appendices to the Commission's annual reports.[33]

Use of Commission Materials to Determine Legislative Intent

Commission materials that have been placed before and considered by the Legislature are legislative history, are declarative of legislative intent,[34] and are entitled to great weight in construing

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31. See, e.g., Baldwin v. State, 6 Cal. 3d 424, 433, 491 P.2d 1121, 1126, 99 Cal. Rptr. 145, 150 (1972). For a description of legislative committee reports adopted in connection with the bill that became the Evidence Code, see Arellano v. Moreno, 33 Cal. App. 3d 877, 884, 109 Cal. Rptr. 421, 426 (1973).

32. For an example of such a report, see *Report of Senate Committee on Judiciary on Assembly Bill 3472*, Senate J. June 14, 1984, *reprinted in* 18 Cal. L. Revision Comm'n Reports 1, 115 (1986).

33. Commission reports have in the past been published as well in the legislative journals. See, e.g., *In re* Marriage of Neal, 153 Cal. App. 3d 117, 124, 200 Cal. Rptr. 341, 345 (1984) (noting that Chairman of Senate Judiciary Committee, when reporting on AB 26 on Senate floor, moved that revised Commission report be printed in Senate Journal as evidence of legislative intent).

34. See, e.g., Fair v. Bakhtiari, 40 Cal. 4th 189, 195, 147 P.3d 653, 657, 51 Cal. Rptr. 3d 871, 875 (2006) ("The Commission's official comments are deemed to express the Legislature's intent."); People v. Williams, 16 Cal. 3d 663, 667-68, 547 P.2d 1000, 128 Cal. Rptr. 888 (1976) ("The official comments of the California Law Revision Commission on the various sections of the Evidence Code are declarative of the intent not only of the draft[ers] of the code but also of the legislators who subsequently enacted it.").

statutes.[35] The materials are a key interpretive aid for practitioners as well as courts,[36] and courts may judicially notice and rely on them.[37] Courts at all levels of the state[38] and federal[39] judicial systems depend on Commission materials to construe statutes

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35. See, e.g., Dep't of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd., 40 Cal. 4th 1, 12-13 n.9, 145 P.3d 462, 469 n.9, 50 Cal. Rptr. 3d 585, 593 n.9 (2006) (Commission's official comments are persuasive evidence of Legislature's intent); Hale v. S. Cal. IPA Med. Group, Inc., 86 Cal. App. 4th 919, 927, 103 Cal. Rptr. 2d 773, 778 (2001):

> In an effort to discern legislative intent, an appellate court is entitled to take judicial notice of the various legislative materials, including committee reports, underlying the enactment of a statute. (*Kern v. County of Imperial* (1990) 226 Cal. App. 3d 391, 400, fn. 8 [276 Cal. Rptr. 524]; *Coopers & Lybrand v. Superior Court* (1989) 212 Cal. App. 3d 524, 535, fn. 7 [260 Cal. Rptr. 713].) In particular, reports and interpretive opinions of the Law Revision Commission are entitled to great weight. (*Schmidt v. Southern Cal. Rapid Transit Dist.* (1993) 14 Cal. App. 4th 23, 30, fn. 10 [17 Cal. Rptr. 2d 340].)

36. Cf. 7 B. Witkin, Summary of California Law *Constitutional Law* § 123, at 230 (10th ed. 2005) (Commission reports as aid to construction); Gaylord, *An Approach to Statutory Construction*, 5 Sw. U. L. Rev. 349, 384 (1973).

37. See, e.g., Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc., 133 Cal. App. 4th 26, 34 Cal. Rptr. 3d 520 (2005) (providing overview of materials that may be judicially noticed in determining legislative intent); *Hale*, 86 Cal. App. 4th at 927; Barkley v. City of Blue Lake, 18 Cal. App. 4th 1745, 1751 n.3, 23 Cal. Rptr. 2d 315, 318-19 n.3 (1993).

38. See, e.g., Sullivan v. Delta Air Lines, Inc., 15 Cal. 4th 288, 298, 935 P.2d 781, 63 Cal. Rptr. 2d 74 (1997) (California Supreme Court); Admin. Mgmt. Services, Inc. v. Fid. Deposit Co. of Md., 129 Cal. App. 3d 484, 488, 181 Cal. Rptr. 141 (1982) (court of appeal); Rossetto v. Barross, 90 Cal. App. 4th Supp. 1, 110 Cal. Rptr. 2d 255 (2001) (appellate division of superior court).

39. See, e.g., California v. Green, 399 U.S. 149, 154 n.3 (1970) (United States Supreme Court); S. Cal. Bank v. Zimmerman (*In re* Hilde), 120 F.3d 950, 953 (9th Cir. 1997) (federal court of appeals); Williams v. Townsend, 283 F. Supp. 580, 582 (C.D. Cal. 1968) (federal district court); Ford Consumer Fin. Co. v. McDonell (*In re* McDonell), 204 B.R. 976, 978-79 (B.A.P. 9th Cir. 1996) (bankruptcy appellate panel); *In re* Garrido, 43 B.R. 289, 292-93 (Bankr. S.D. Cal. 1984) (bankruptcy court).

enacted on Commission recommendation.[40] Appellate courts have cited Commission materials in more than a thousand published opinions.[41]

Commission materials have been used as direct support for a court's interpretation of a statute,[42] as one of several indicia of legislative intent,[43] to explain the public policy behind a statute,[44] and on occasion to demonstrate (by their silence) the Legislature's intention not to change the law.[45] The Legislature's failure to adopt

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40. See, e.g., Jevne v. Superior Court, 35 Cal. 4th 935, 947, 111 P.3d 954, 962, 28 Cal. Rptr. 3d 685, 694-95 (2005) (Commission report entitled to substantial weight in construing statute); Collection Bureau of San Jose v. Rumsey, 24 Cal. 4th 301, 308 & n.6, 6 P.3d 713, 718 & n.6, 99 Cal. Rptr. 2d 792, 797 & n.6 (2000) (Comments to reenacted statute reiterate the clear understanding and intent of original enactment); Brian W. v. Superior Court, 20 Cal. 3d 618, 623, 574 P.2d 788, 791, 143 Cal. Rptr. 717, 720 (1978) (Comments persuasive evidence of Legislature's intent); Volkswagen Pac., Inc. v. City of Los Angeles, 7 Cal. 3d 48, 61-63, 496 P.2d 1237, 1247-48, 101 Cal. Rptr. 869, 879-80 (1972) (Comments evidence clear legislative intent of law); Van Arsdale v. Hollinger, 68 Cal. 2d 245, 249-50, 437 P.2d 508, 511, 66 Cal. Rptr. 20, 23 (1968) (Comments entitled to substantial weight), overruled on other grounds by Privette v. Superior Court, 5 Cal. 4th 689, 854 P.2d 721, 21 Cal. Rptr. 2d 72 (1993); County of Los Angeles v. Superior Court, 62 Cal. 2d 839, 843-44, 402 P.2d 868, 870-71, 44 Cal. Rptr. 796, 798-99 (1965) (statutes reflect policy recommended by Commission).

41. It should be noted that the Law Revision Commission should not be cited as the "Law Revision Committee" or as the "Law Review Commission." See, e.g., Venerable v. City of Sacramento, 185 F. Supp. 2d 1128, 1132 (E.D. Cal. 2002) (Law Revision "Committee"); Ryan v. Garcia, 27 Cal. App. 4th 1006, 1010 n.2, 33 Cal. Rptr. 2d 158, 160 n.2 (1994) (Law "Review" Commission).

42. See, e.g., People v. Ainsworth, 45 Cal. 3d 984, 1015, 755 P.2d 1017, 1036, 248 Cal. Rptr. 568, 586 (1988).

43. See, e.g., Heieck & Moran v. City of Modesto, 64 Cal. 2d 229, 233 n.3, 411 P.2d 105, 108 n.3, 49 Cal. Rptr. 377, 380 n.3 (1966).

44. See, e.g., Southern Cal. Gas Co. v. Public Utils. Comm'n, 50 Cal. 3d 31, 38 n.8, 784 P.2d 1373, 1376 n.8, 265 Cal. Rptr. 801, 804 n.8 (1990).

45. See, e.g., State *ex rel*. State Pub. Works Bd. v. Stevenson, 5 Cal. App. 3d 60, 64-65, 84 Cal. Rptr. 742, 745-46 (1970) (finding that Legislature had no intention of changing existing law where "not a word" in Commission's reports indicated intent to abolish or emasculate well-settled rule).

a Commission recommendation may be used as evidence of legislative intent to reject the proposed rule.[46]

Commission materials are entitled to great weight, but they are not conclusive.[47] While the Commission endeavors in Comments to explain any changes in the law made by a section, the Commission does not claim that every consistent or inconsistent case is noted in the Comments,[48] nor can it anticipate judicial conclusions as to the significance of existing case authorities.[49] Hence, failure of the Comment to note every change the recommendation would make in prior law, or to refer to a consistent or inconsistent judicial decision, is not intended to, and should not, influence the construction of a clearly stated statutory provision.[50]

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46. See, e.g., McWilliams v. City of Long Beach, 56 Cal. 4th 613, 623-24, 300 P.3d 886, 155 Cal. Rptr. 3d 817 (2013); Nestle v. City of Santa Monica, 6 Cal. 3d 920, 935-36, 496 P.2d 480, 490, 101 Cal. Rptr. 568, 578 (1972).

47. See, e.g., Redevelopment Agency v. Metropolitan Theatres Corp., 215 Cal. App. 3d 808, 812, 263 Cal. Rptr. 637, 639 (1989) (Comment does not override clear and unambiguous statute). Commission materials are but one indicium of legislative intent. See, e.g., Estate of Joseph, 17 Cal. 4th 203, 216, 949 P.2d 472, 480, 70 Cal. Rptr. 2d 619, 627 (1998). The accuracy of a Comment may also be questioned. See, e.g., Buzgheia v. Leasco Sierra Grove, 30 Cal. App. 4th 766, 774, 36 Cal. Rptr. 2d 144, 149 (1994); In re Thomas, 102 B.R. 199, 202 (Bankr. E.D. Cal. 1989).

48. *Cf.* People v. Coleman, 8 Cal. App. 3d 722, 731, 87 Cal. Rptr. 554, 559 (1970) (Comments make clear intent to reflect existing law even if not all supporting cases are cited).

49. See, e.g., Arellano v. Moreno, 33 Cal. App. 3d 877, 885, 109 Cal. Rptr. 421, 426-27 (1973) (noting that decisional law cited in Comment was distinguished by the California Supreme Court in a case decided after enactment of the Commission recommendation).

50. The Commission does not concur in the *Kaplan* approach to statutory construction. See Kaplan v. Superior Court, 6 Cal. 3d 150, 158-59, 491 P.2d 1, 5-6, 98 Cal. Rptr. 649, 653-54 (1971). For a reaction to the problem created by the *Kaplan* approach, see *Recommendation Relating to Erroneously Ordered Disclosure of Privileged Information,* 11 Cal. L. Revision Comm'n Reports 1163 (1973); 1974 Cal. Stat. ch. 227.

Some types of Commission materials are not properly relied on as evidence of legislative intent. On occasion, courts have cited preliminary Commission materials such as tentative recommendations, correspondence, and staff memoranda and drafts in support of their construction of a statute.[51] While these materials may be indicative of the Commission's intent in proposing the legislation, only the Legislature's intent in adopting the legislation is entitled to weight in construing the statute.[52] Unless preliminary Commission materials were before the Legislature during its consideration of the legislation, those materials are not legislative history and are not relevant in determining the Legislature's intention in adopting the legislation.[53]

A Commission study prepared after enactment of a statute that analyzes the statute is not part of the legislative history of the statute.[54] However, documents prepared by or for the Commission

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51. See, e.g., Rojas v. Superior Court, 33 Cal. 4th 407, 93 P.3d 260, 15 Cal. Rptr. 3d 643 (2005) (tentative recommendation, correspondence, and staff memorandum and draft); Yamaha Corp. v. State Bd. of Equalization, 19 Cal. 4th 1, 12-13, 960 P.2d 1031, 1037, 78 Cal. Rptr. 2d 1, 7 (1998) (tentative recommendation). However, in some cases, proposed legislation will be based on a tentative, rather than final, Commission recommendation. See, e.g., Estate of Archer, 193 Cal. App. 3d 238, 243, 239 Cal. Rptr. 137, 140 (1987). In that event, reliance on the tentative recommendation is proper.

See also Ilkhchooyi v. Best, 37 Cal. App. 4th 395, 406, 45 Cal. Rptr. 2d 766, 772-73 (1995) (letter responding to tentative recommendation); D. Henke, California Legal Research Handbook § 3.51 (1971) (background studies).

52. Cf. Rittenhouse v. Superior Court, 235 Cal. App. 3d 1584, 1589, 1 Cal. Rptr. 2d 595, 598 (1991) (linking Commission's intent and Legislature's intent); Guthman v. Moss, 150 Cal. App. 3d 501, 508, 198 Cal. Rptr. 54, 58 (1984) (determination of Commission's intent used to infer Legislature's intent).

53. The Commission concurs with the opinion of the court in *Juran v. Epstein*, 23 Cal. App. 4th 882, 894 n.5, 28 Cal. Rptr. 2d 588, 594 n.5 (1994), that staff memoranda to the Commission should generally not be considered as legislative history.

54. See, e.g., Duarte v. Chino Community Hosp., 72 Cal. App. 4th 849, 856 n.3, 85 Cal. Rptr. 2d 521, 525 n.3 (1999).

may be used by the courts for their analytical value, apart from their role in statutory construction.[55]

Publications

Commission publications are distributed to the Governor, the Secretary of the Senate, the Chief Clerk of the Assembly, and the Legislative Counsel.[56] Commission materials are also distributed to interest groups, lawyers, law professors, courts, district attorneys, law libraries, and other individuals requesting materials.

The Commission's reports, recommendations, and studies are published in hardcover volumes that serve as a permanent record of the Commission's work and are a valuable contribution to the legal literature of California. These volumes are available at many county law libraries and at some other libraries. About half of the hardcover volumes are out of print, but others are available for purchase.[57] Publications that are out of print are available as electronic files.[58]

Electronic Publication and Internet Access

Since 1995, the Commission has provided a variety of information on the Internet, including online material and downloadable files.[59] Interested persons with Internet access can find the current agenda, meeting minutes, background studies, tentative and final

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55. See. e.g., Sierra Club v. San Joaquin Local Agency Formation Comm'n, 21 Cal. 4th 489, 502-03, 981 P.2d 543, 551-52, 87 Cal. Rptr. 2d 702, 712 (1999) (unenacted Commission recommendation useful as "opinion of a learned panel"); Hall v. Hall, 222 Cal. App. 3d 578, 585, 271 Cal. Rptr. 773, 777 (1990) (Commission staff report most detailed analysis of statute available); W.E.J. v. Superior Court, 100 Cal. App. 3d 303, 309-10, 160 Cal. Rptr. 862, 866 (1979) (law review article prepared for Commission provides insight into development of law); Schonfeld v. City of Vallejo, 50 Cal. App. 3d 401, 407 n.4, 123 Cal. Rptr. 669, 673 n.4 (1975) (court indebted to many studies of Commission for analytical materials).

56. See Gov't Code § 8291. For limitations on Section 8291, see Gov't Code §§ 9795, 11094-11099.

57. See *Commission Publications*, Appendix 5 *infra*.

58. See "Electronic Publication and Internet Access" *infra*.

59. The URL for the Commission's website is <http://www.clrc.ca.gov>.

recommendations, staff memoranda, and general background information.

Since 2002, all Commission publications and staff memoranda are available as electronic files. They can be downloaded from the Commission's website.

Electronic Mail

Email commenting on Commission proposals or suggesting issues for study is given the same consideration as letter correspondence. Email to the Commission may be sent to *commission@clrc.ca.gov*.

The Commission distributes the majority of its meeting agendas, staff memoranda, and other written materials electronically, by means of its website and email distribution lists. The Commission encourages use of email as an inexpensive and expedient means of communication with the Commission.

MCLE Credit

The Commission is approved by the State Bar of California as a minimum continuing legal education provider. Participants and attendees at Commission meetings may be eligible to receive MCLE credit. To receive credit for participation or attendance at a meeting, a person must register at the meeting. Meeting materials are available free of charge on the Internet[60] or may be purchased in advance from the Commission.

60. See "Electronic Publication and Internet Access" *supra*.

Personnel of Commission[61]

As of November 1, 2018, the following persons were members of the Law Revision Commission:

Legislative Members[62]

Assembly Member Ed Chau
Senator Richard Roth

Members Appointed by Governor[63]	***Term Expires***
Jane McAllister, Hilmar *Chairperson*	October 1, 2019
Victor King, La Crescenta *Vice-Chairperson*	October 1, 2019
Tom Hallinan, Ceres	October 1, 2019
Susan Duncan Lee, San Francisco	October 1, 2019
Olga Mack, Dublin	October 1, 2021
Crystal Miller-O'Brien, Los Angeles	October 1, 2021
Vacant	October 1, 2021

Legislative Counsel[64]

Diane F. Boyer-Vine, Sacramento

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61. See also *Biographies of 2018 Commissioners*, Appendix 4 *infra*.

62. The Senate and Assembly members of the Commission serve at the pleasure of their respective appointing powers, the Senate Committee on Rules and the Speaker of the Assembly. Gov't Code § 8281.

63. Seven Commission members are appointed by the Governor with the advice and consent of the Senate. Gov't Code § 8281. These Commissioners serve staggered four-year terms. *Id*. The provision in Government Code Section 8281 to the effect that Commission members appointed by the Governor hold office until the appointment and qualification of their successors has been superseded by the rule in Government Code Section 1774 declaring a vacancy if there is no reappointment 60 days following expiration of the term of office. See also Gov't Code § 1774.7 (Section 1774 overrides contrary special rules unless specifically excepted).

64. The Legislative Counsel serves on the Commission by virtue of office. Gov't Code § 8281.

On March 12, 2018, Olga Mack was appointed to the Commission.

The following persons are on the Commission's staff:

Legal

BRIAN HEBERT
Executive Director

BARBARA S. GAAL
Chief Deputy Counsel

KRISTIN BURFORD
Staff Counsel

STEVE COHEN
Staff Counsel

Administrative-Secretarial

DEBORA LARRABEE
Associate Governmental Program Analyst

VICTORIA V. MATIAS
Secretary

In December 2017, the Commission's secretary, Victoria V. Matias, retired after more than three decades on the Commission's staff. During her tenure, Ms. Matias provided invaluable support to the Commission's work. Her extensive knowledge of administrative processes and meticulous attention to detail in proofreading the Commission's reports were critical to the Commission's efforts and greatly appreciated.

Commission Budget

The Commission's operations for the 2018-19 fiscal year have been funded through a reimbursement from the California Office of Legislative Counsel, in the amount of $959,000.

That reimbursement is supplemented by monies budgeted for income generated from the sale of documents to the public, to recover the cost of the documents.

The Commission also receives substantial donations of necessary library materials from the legal publishing community, especially California Continuing Education of the Bar, LexisNexis, and Thomson Reuters. In addition, the Commission receives

benchbooks from the California Center for Judicial Education and Research (CJER). The Commission also receives a copy of the McGeorge Law Review, annually. The Commission receives additional library materials from other legal publishers and from other law reform agencies on an exchange basis, and has full access to the law libraries at the University of California, Davis, School of Law and at Stanford Law School. The Commission is grateful for these contributions.

Other Activities

The Commission is directed by statute to cooperate with bar associations and other learned, professional, or scientific associations, institutions, or foundations in any manner suitable for the fulfillment of the purposes of the Commission.[65]

National Conference of Commissioners on Uniform State Laws

The Commission is directed by statute to receive and consider proposed changes in the law recommended by the National Conference of Commissioners on Uniform State Laws.[66] Legislative Counsel and Commission member Diane F. Boyer-Vine is a member of the California Commission on Uniform State Laws and the National Conference. The Commission's Executive Director, Brian Hebert, is an associate member of the National Conference.

Legislative History of Recommendations in the 2018 Legislative Session

In 2018, bills to effectuate two Commission recommendations were introduced. Both proposals were enacted.

Revocable Transfer on Death Deed

Assembly Bill 1739 (2018 Cal. Stat. ch. 65) was introduced in 2018 by Assembly Member Ed Chau. The bill effectuated the

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65. Gov't Code § 8296.

66. Gov't Code § 8289.

Commission's recommendation on *Revocable Transfer on Death Deed: Recordation*, 45 Cal. L. Revision Comm'n Reports 1 (2017).

The measure was enacted, with amendments.

Deadly Weapons: Minor Clean-Up Issues

Assembly Bill 2176 (2018 Cal. Stat. ch. 185) was introduced in 2018 by Assembly Member Reginald Jones-Sawyer, Sr. The bill effectuated the Commission's recommendation on *Deadly Weapons: Minor Clean-Up Issues*, 44 Cal. L. Revision Comm'n Reports 471 (2017).

Resolution Authorizing Topics for Study

Senate Concurrent Resolution 91 (2018 Cal. Stat. res. ch. 158) was introduced by Senator Richard Roth. It authorizes the Commission's continued study of 24 previously authorized topics, and additionally authorizes the Commission to study a nonsubstantive recodification of specified toxic substance statutes.[67]

Report on Statutes Repealed by Implication or Held Unconstitutional

Government Code Section 8290 provides:

> The commission shall recommend the express repeal of all statutes repealed by implication, or held unconstitutional by the Supreme Court of the state or the Supreme Court of the United States.

Pursuant to this directive, the Commission has reviewed the decisions of the United States Supreme Court and the California Supreme Court published since the Commission's last Annual

67. Chapter 6.5 (commencing with Section 25100) and Chapter 6.8 (commencing with Section 25300) of Division 20 of the Health and Safety Code, and related provisions.

Report was prepared,[68] and has the following to report:[69]

- One decision holding a state statute repealed by implication has been found.
- One decision of the United States Supreme Court holding a state statute unconstitutional has been found.
- No decision of the California Supreme Court holding a state statute unconstitutional has been found.[70]

In *Lopez v. Sony Electronics, Inc.*, 5 Cal. 5th 627, 420 P.3d 767, 234 Cal. Rptr. 3d 856 (2018), the California Supreme Court held that the enactment of Code of Civil Procedure Section 340.8, specifying the time for commencement of a civil action for injury or illness based upon exposure to a hazardous material or toxic substance, repealed by implication a part of Code of Civil Procedure Section 340.4, which generally addresses the time for commencement of an action for prenatal personal injury. The court held that in enacting Section 340.8, the Legislature repealed by implication the part of Section 340.4 specifying the time for commencement of an action for prenatal personal injury based on toxic exposure.

In *Nat'l Inst. of Family & Life Advocates v. Becerra*, __ U.S. __, 138 S. Ct. 2361 (2018), the United States Supreme Court held that two provisions of Health and Safety Code Section 123472

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68. This study has been carried through opinions published on or before November 1, 2018.

69. It is the Commission's practice to enumerate only those decisions that have expressly considered a California statute, as contrasted with decisions reviewing a non-California statute that is materially similar to a California statute. For example, this report does not list *Janus v. AFSCME, Council 31*, __ U.S. __, 138 S. Ct. 2448 (2018) (Illinois statute requiring public employees to subsidize union violates First Amendment of the United States Constitution).

70. In *People v. Contreras*, 4 Cal. 5th 349, 411 P.3d 445, 229 Cal. Rptr. 3d 249 (2018), the California Supreme Court held that the sentencing of two juvenile nonhomicide offenders to terms of 50 years to life and 58 years to life pursuant to Penal Code Section 667.61 constitutes infliction of cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution.

applicable to specified family planning clinics abridge freedom of speech in violation of the First Amendment of the United States Constitution.[71]

Recommendations

The Commission respectfully recommends that the Legislature authorize the Commission to continue its study of the topics previously authorized.[72]

Pursuant to the mandate imposed by Government Code Section 8290, the Commission recommends the repeal of the provisions referred to under "Report on Statutes Repealed by Implication or Held Unconstitutional," *supra*, to the extent they have been held unconstitutional, and have not been amended, reformed, or repealed.

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71. The first provision requires licensed clinics to disseminate on site a government-drafted notice advising that California provides free or low-cost comprehensive family planning services, including abortions. The second provision requires unlicensed clinics to include a notice in its print and digital advertising materials advising that the clinic is not licensed by the State of California as a medical facility, and has no licensed medical provider who provides or directly supervises provision of services.

72. See discussion under "Calendar of Topics for Study" *supra*; *Calendar of Topics Authorized for Study*, Appendix 2 *infra*.

APPENDIX 1

STATUTE GOVERNING THE CALIFORNIA LAW REVISION COMMISSION

(Government Code Sections 8280-8298*)

§ 8280. Creation

8280. There is created in the State Government the California Law Revision Commission.

§ 8281. Membership

8281. The commission consists of one Member of the Senate appointed by the Committee on Rules, one Member of the Assembly appointed by the Speaker, and seven additional members appointed by the Governor with the advice and consent of the Senate. The Legislative Counsel shall be an ex officio member of the commission.

The Members of the Legislature appointed to the commission shall serve at the pleasure of the appointing power and shall participate in the activities of the commission to the extent that the participation is not incompatible with their respective positions as Members of the Legislature. For the purposes of this article, those Members of the Legislature shall constitute a joint interim investigating committee on the subject of this article and as a joint interim investigating committee shall have the powers and duties imposed upon those committees by the Joint Rules of the Senate and Assembly.

The members appointed by the Governor shall be appointed for a term of four years and shall hold office until the appointment and qualification of their successors. The terms of the members first appointed shall not commence earlier than October 1, 1953, and

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*Added by 1984 Cal. Stat. ch. 1335, § 2; see also 1985 Cal. Stat. ch. 106, § 45 (amending Section 8295); 1989 Cal. Stat. ch. 152, § 1 (adding Section 8298), 2004 Cal. Stat. ch. 193, § 33 (amending Section 8293). Formerly Gov't Code §§ 10300-10340, added by 1953 Cal. Stat. ch. 1445, § 2; amended by 1960 Cal. Stat. ch. 61, § 1 (1st Ex. Sess.); 1965 Cal. Stat. ch. 371, § 110; 1978 Cal. Stat. ch. 228, § 1; 1981 Cal. Stat. ch. 1106, § 2.

shall expire as follows: four on October 1, 1955, and three on October 1, 1957. When a vacancy occurs in any office filled by appointment by the Governor, he or she shall appoint a person to the office, who shall hold office for the balance of the unexpired term of his or her predecessor.

Note. The provision in the third paragraph to the effect that Commission members appointed by the Governor hold office until appointment and qualification of their successors is superseded by the rule in Government Code Section 1774 declaring a vacancy if there is no reappointment 60 days following expiration of the term of office. See also Gov't Code § 1774.7 (Section 1774 overrides contrary special rules unless specifically excepted).

§ 8282. Compensation and expenses

8282. (a) The members of the commission shall serve without compensation, except that each member appointed by the Governor shall receive fifty dollars ($50) for each day's attendance at a meeting of the commission.

(b) In addition, each member shall be allowed actual expenses incurred in the discharge of his or her duties, including travel expenses.

Note. Government Code Section 11564.5 provides a per diem compensation of $100, notwithstanding any other provision of law.

§ 8283. Chairperson

8283. The commission shall select one of its members chairperson.

§ 8284. Executive secretary

8284. The commission may appoint an executive secretary and fix his or her compensation, in accordance with law.

§ 8285. Employees

8285. The commission may employ and fix the compensation, in accordance with law, of such professional, clerical and other assistants as may be necessary.

§ 8286. Assistance of state

8286. The material of the State Library shall be made available to the commission. All state agencies, and other official state organizations, and all persons connected therewith shall give the commission full information, and reasonable assistance in any matters of research requiring recourse to them, or to data within their knowledge or control.

§ 8287. Assistance of bar

8287. The Board of Governors of the State Bar shall assist the commission in any manner the commission may request within the scope of its powers or duties.

§ 8288. Political activities of commissioners and staff

8288. No employee of the commission and no member appointed by the Governor shall, with respect to any proposed legislation concerning matters assigned to the commission for study pursuant to Section 8293, advocate the passage or defeat of the legislation by the Legislature or the approval or veto of the legislation by the Governor or appear before any committee of the Legislature as to such matters unless requested to do so by the committee or its chairperson. In no event shall an employee or member of the commission appointed by the Governor advocate the passage or defeat of any legislation or the approval or veto of any legislation by the Governor, in his or her official capacity as an employee or member.

§ 8289. Duties of commission

8289. The commission shall, within the limitations imposed by Section 8293:

(a) Examine the common law and statutes of the state and judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms.

(b) Receive and consider proposed changes in the law recommended by the American Law Institute, the National Conference of Commissioners on Uniform State Laws, any bar association or other learned bodies.

(c) Receive and consider suggestions from judges, justices, public officials, lawyers, and the public generally as to defects and anachronisms in the law.

(d) Recommend, from time to time, such changes in the law as it deems necessary to modify or eliminate antiquated and inequitable rules of law, and to bring the law of this state into harmony with modern conditions.

§ 8290. Unconstitutional and impliedly repealed statutes

8290. The commission shall recommend the express repeal of all statutes repealed by implication, or held unconstitutional by the Supreme Court of the state or the Supreme Court of the United States.

§ 8291. Submission and distribution of reports

8291. The commission shall submit its reports, and its recommendations as to revision of the laws, to the Governor and the Legislature, and shall distribute them to the Governor, the Members of the Legislature, and the heads of all state departments.

Note. Section 8291 is limited by later-enacted rules governing distribution of state reports set out in Government Code Sections 9795 and 11094-11099.

§ 8292. Contents of reports

8292. The commission may, within the limitations imposed by Section 8293, include in its report the legislative measures proposed by it to effect the adoption or enactment of the proposed revision. The reports may be accompanied by exhibits of various changes, modifications, improvements, and suggested enactments prepared or proposed by the commission with a full and accurate index thereto.

§ 8293. Calendar of topics

8293. 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.

§ 8294. Printing of reports

8294. The reports, exhibits, and proposed legislative measures shall be printed by the State Printing Office under the supervision of the commission. The exhibits shall be so printed as to show in the readiest manner the changes and repeals proposed by the commission.

§ 8295. Cooperation with legislative committees

8295. The commission shall confer and cooperate with any legislative committee on revision of the law and may contract with any committee for the rendition of service, by either for the other, in the work of revision.

§ 8296. Cooperation with bar and other associations

8296. The commission may cooperate with any bar association or other learned, professional, or scientific association, institution or foundation in any manner suitable for the fulfillment of the purposes of this article.

§ 8297. Research contracts

8297. The commission may, with the approval of the Director of General Services, enter into, amend and terminate contracts with colleges, universities, schools of law or other research institutions, or with qualified individuals for the purposes of research.

§ 8298. Recommendations concerning minor revisions

8298. The commission may study and recommend revisions to correct technical or minor substantive defects in the statutes of the state without a prior concurrent resolution of the Legislature referring the matter to it for study.

APPENDIX 2

CALENDAR OF TOPICS AUTHORIZED FOR STUDY

The Commission's calendar of topics authorized for study includes the subjects listed below.[1] Each of these topics has been authorized for Commission study by the Legislature. For the current authorizing resolution, see 2018 Cal. Stat. res. ch. 158.

1. Creditors' remedies. Whether the law should be revised that relates to creditors' remedies, including, but not limited to, attachment, garnishment, execution, repossession of property (including the claim and delivery statute, self-help repossession of property, and the Commercial Code provisions on repossession of property), confession of judgment procedures, default judgment procedures, enforcement of judgments, the right of redemption, procedures under private power of sale in a trust deed or mortgage, possessory and nonpossessory liens, insolvency, and related matters.[2]

2. Probate Code. Whether the California Probate Code should be revised, including, but not limited to, the issue of whether California should adopt, in whole or in part, the Uniform Probate Code, and related matters.[3]

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1. The calendar of topics lists only those topics selected by the Commission for study and authorized by the Legislature. The Commission also studies topics specifically directed to it by concurrent resolution of the Legislature or by statute. See, e.g., 2013 Cal. Stat. res. ch. 115 [SCR 54] (state and local agency access to customer information from communication service providers); 2014 Cal. Stat. ch. 243 [SB 406] (recognition of tribal and foreign court money judgments). The Commission may also study and recommend revisions to correct technical or minor substantive defects in state statutes without a prior concurrent resolution. Gov't Code § 8298.

2. See also 1983 Cal. Stat. res. ch. 40; 1974 Cal. Stat. res. ch. 45; 1972 Cal. Stat. res. ch. 27; 1957 Cal. Stat. res. ch. 202; 1 Cal. L. Revision Comm'n Reports, Annual Report for 1957, at 15-16 (1957). Revised in 2001 Cal. Stat. res. ch. 78; 30 Cal. L. Revision Comm'n Reports 661 (2000).

3. See also 1980 Cal. Stat. res. ch. 37. Revised in 2001 Cal. Stat. res. ch. 78; 30 Cal. L. Revision Comm'n Reports 661 (2000).

3. Real and personal property. Whether the law should be revised that relates to real and personal property, including, but not limited to, a marketable title act, covenants, servitudes, conditions, and restrictions on land use or relating to land, powers of termination, escheat of property and the disposition of unclaimed or abandoned property, eminent domain, quiet title actions, abandonment or vacation of public streets and highways, partition, rights and duties attendant on assignment, subletting, termination, or abandonment of a lease, and related matters.[4]

4. Family law. Whether the law should be revised that relates to family law, including, but not limited to, community property, the adjudication of child and family civil proceedings, child custody, adoption, guardianship, freedom from parental custody and control, and related matters, including other subjects covered by the Family Code.[5]

5. Discovery in civil cases. Whether the law relating to discovery in civil cases should be revised.[6]

6. Rights and disabilities of minors and incompetent persons. Whether the law relating to the rights and disabilities of minors and incompetent persons should be revised.[7]

7. Evidence. Whether the Evidence Code should be revised.[8]

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4. See 1983 Cal. Stat. res. ch. 40, consolidating various previously authorized aspects of real and personal property law into one comprehensive topic. Expanded in 1988 Cal Stat. res. ch. 81. Revised in 2001 Cal. Stat. res. ch. 78; 30 Cal. L. Revision Comm'n Reports 661 (2000).

5. See 1997 Cal. Stat. res. ch. 102, consolidating Family Code authority, child custody, adoption, and guardianship authority, and family law proceedings authority. See also 1995 Cal. Stat. res. ch. 87; 1989 Cal. Stat. res. ch. 70; 1983 Cal. Stat. res. ch. 40; 1978 Cal. Stat. res. ch. 65; 1972 Cal. Stat. res. ch. 27; 1956 Cal. Stat. res. ch. 42.

6. See also 1975 Cal. Stat. res. ch. 15; 12 Cal. L. Revision Comm'n Reports 526-28 (1974).

7. See also 1979 Cal. Stat. res. ch. 19; 14 Cal. L. Revision Comm'n Reports 217-18 (1978).

8. See also 1965 Cal. Stat. res. ch. 130.

8. Alternative Dispute Resolution. Whether the law relating to arbitration, mediation, and other alternative dispute resolution techniques should be revised.[9]

9. Administrative law. Whether there should be changes to administrative law.[10]

10. Attorney's fees. Whether the law relating to the payment and the shifting of attorney's fees between litigants should be revised.[11]

11. Uniform Unincorporated Nonprofit Association Act. Whether the Uniform Unincorporated Nonprofit Association Act, or parts of that uniform act, and related provisions should be adopted in California.[12]

12. Trial court unification. Recommendations to be reported pertaining to statutory changes that may be necessitated by court unification.[13]

13. Contract law. Whether the law of contracts should be revised, including the law relating to the effect of electronic communications on the law governing contract formation, the statute of frauds, the parol evidence rule, and related matters.[14]

14. Common interest developments. Whether the law governing common interest housing developments should be revised to clarify the law, eliminate unnecessary or obsolete provisions, consolidate existing statutes in one place in the codes, establish a clear, consistent, and unified policy with regard to formation and management of these developments and transaction of real property interests located within

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9. See also 1968 Cal. Stat. res. ch. 110; 8 Cal. L. Revision Comm'n Reports 1325-26 (1967). Revised in 2001 Cal. Stat. res. ch. 78; 30 Cal. L. Revision Comm'n Reports 661-62 (2000).

10. See also 1987 Cal. Stat. res. ch. 47.

11. See also 1995 Cal. Stat. res. ch. 87; 1988 Cal. Stat. res. ch. 20.

12. See also 1993 Cal. Stat. res. ch. 31; 22 Cal. L. Revision Comm'n Reports 846 (1992).

13. See also 1995 Cal. Stat. res. ch. 87; 1993 Cal. Stat. res. ch. 96.

14. See also 1996 Cal. Stat. res. ch. 38; 25 Cal. L. Revision Comm'n Reports 628-29 (1995).

them, and to determine to what extent they should be subject to regulation.[15]

15. Legal malpractice statutes of limitation. Whether the statutes of limitation for legal malpractice actions should be revised to recognize equitable tolling or other adjustment for the circumstances of simultaneous litigation, and related matters.[16]

16. Coordination of public records statutes. Whether the law governing disclosure of public records and the law governing protection of privacy in public records should be revised to better coordinate them, including consolidation and clarification of the scope of required disclosure and creation of a single set of disclosure procedures, to provide appropriate enforcement mechanisms, and to ensure that the law governing disclosure of public records adequately treats electronic information, and related matters.[17]

17. Criminal sentencing. Whether the law governing criminal sentences for enhancements relating to weapons or injuries should be revised to simplify and clarify the law and eliminate unnecessary or obsolete provisions.[18]

18. Subdivision Map Act and Mitigation Fee Act. Whether the Subdivision Map Act (Division 2 (commencing with Section 66410) of Title 7 of the Government Code) and the Mitigation Fee Act (Chapter 5 (commencing with Section 66000), Chapter 6 (commencing with Section 66010), Chapter 7 (commencing with Section 66012), Chapter 8 (commencing with Section 66016), and Chapter 9 (commencing with Section 66020) of Division 1 of Title 7 of the Government Code) should

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15. See also 1999 Cal. Stat. res. ch. 81; 28 Cal. L. Revision Comm'n Reports 693-94 (1998).

16. See also 1999 Cal. Stat. res. ch. 81; 28 Cal. L. Revision Comm'n Reports 696 (1998).

17. See also 1999 Cal. Stat. res. ch. 81; 28 Cal. L. Revision Comm'n Reports 695-96 (1998).

18. See also 1999 Cal. Stat. res. ch. 81; 28 Cal. L. Revision Comm'n Reports 695 (1998). Revised in 2002 Cal. Stat. res. ch. 166.

be revised to improve their organization, resolve inconsistencies, and clarify and rationalize provisions, and related matters.[19]

19. Uniform Statute and Rule Construction Act. Whether the Uniform Statute and Rule Construction Act (1995) should be adopted in California in whole or in part, and related matters.[20]

20. Place of trial in a civil case. Whether the law governing the place of trial in a civil case should be revised.[21]

21. Charter schools and the Government Claims Act. Analysis of the legal and policy implications of treating a charter school as a public entity for the purposes of Division 3.6 (commencing with Section 810) of Title 1 of the Government Code.[22]

22. Fish and Game Code. Whether the Fish and Game Code and related statutory law should be revised to improve its organization, clarify its meaning, resolve inconsistencies, eliminate unnecessary or obsolete provisions, standardize terminology, clarify program authority and funding sources, and make other minor improvements, without making any significant substantive change to the effect of the law.[23]

23. Mediation Confidentiality. (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:

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19. See also 2001 Cal. Stat. res. ch. 78; 30 Cal. L. Revision Comm'n Reports 662 (2000).

20. See also 2003 Cal. Stat. res. ch. 92; 33 Cal. L. Revision Comm'n Reports 599 (2003).

21. See also 2007 Cal. Stat. res. ch. 100; 38 Cal. L. Revision Comm'n Reports 30 (2008).

22. See also 2009 Cal. Stat. res. ch. 98; 39 Cal. L. Revision Comm'n Reports 28 (2009).

23. See also 2012 Cal. Stat. res. ch. 108; 42 Cal. L. Revision Comm'n Reports 361 (2012).

(1) 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.

(2) The availability and propriety of contractual waivers.

(3) 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.[24]

24. California Public Records Act. Study, report on, and prepare recommended legislation as soon as possible, considering the commission's preexisting duties and workload demands, concerning the revision of the California Public Records Act and related provisions. This legislation shall accomplish all of the following objectives:

(A) Reduce the length and complexity of current sections.

(B) Avoid unnecessary cross-references.

(C) Neither expand nor contract the scope of existing exemptions to the general rule that records are open to the public pursuant to the current provisions of the Public Records Act.

(D) To the extent compatible with (3), use terms with common definitions.

(E) Organize the existing provisions in such a way that similar provisions are located in close proximity to one another.

(F) Eliminate duplicative provisions.

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24. See also 2012 Cal. Stat. res. ch. 108; 42 Cal. L. Revision Comm'n Reports 361 (2012).

(G) Clearly express legislative intent without any change in the substantive provisions.[25]

25. Toxic Substance. Study, report on, and prepare recommended legislation to revise Chapter 6.5 (commencing with Section 25100) and Chapter 6.8 (commencing with Section 25300) of Division 20 of the Health and Safety Code, and related provisions, to improve the organization and expression of the law. Such revisions may include, but are not limited to, grouping similar provisions together, reducing the length and complexity of sections, eliminating obsolete or redundant provisions, and correcting technical errors. The recommended revisions shall not make any substantive changes to the law. The commission's report shall also include a list of substantive issues that the commission identifies in the course of its work, for possible future study.

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25. See also 2016 Cal. Stat. res. ch. 150; 44 Cal. L. Revision Comm'n Reports 782 (2016).

APPENDIX 3

LEGISLATIVE ACTION ON COMMISSION RECOMMENDATIONS

(Cumulative)

Note. The "Action by Legislature" column may include references to relevant legislative history in the Commission's Reports, following the italicized "*See*." These references are to pages in Commission bound volumes (e.g., "35:73" refers to bound volume 35, page 73).

Recommendation	Action by Legislature
1. *Partial Revision of Education Code*, 1 Cal. L. Revision Comm'n Reports, Annual Report for 1954, at 12 (1957)	Enacted. 1955 Cal. Stat. chs. 799, 877
2. *Summary Distribution of Small Estates Under Probate Code Sections 640 to 646*, 1 Cal. L. Revision Comm'n Reports, Annual Report for 1954, at 50 (1957)	Enacted. 1955 Cal. Stat. ch. 1183
3. *Fish and Game Code*, 1 Cal. L. Revision Comm'n Reports, Annual Report for 1956, at 13-14 (1957)	Enacted. 1957 Cal. Stat. ch. 456
4. *Maximum Period of Confinement in a County Jail*, 1 Cal. L. Revision Comm'n Reports, at A-1 (1957)	Enacted. 1957 Cal. Stat. ch. 139
5. *Notice of Application for Attorney's Fees and Costs in Domestic Relations Actions*, 1 Cal. L. Revision Comm'n Reports, at B-1 (1957)	Enacted. 1957 Cal. Stat. ch. 540
6. *Taking Instructions to Jury Room*, 1 Cal. L. Revision Comm'n Reports, at C-1 (1957)	Not enacted; but see Code Civ. Proc. § 612.5, enacting substance of this recommendation.
7. *The Dead Man Statute*, 1 Cal. L. Revision Comm'n Reports, at D-1 (1957)	Not enacted; but recommendation accomplished in enactment of Evidence Code. See Evid. Code § 1261 Comment
8. *Rights of Surviving Spouse in Property Acquired by Decedent While Domiciled Elsewhere*, 1 Cal. L. Revision Comm'n Reports, at E-1 (1957)	Enacted. 1957 Cal. Stat. ch. 490

Recommendation	Action by Legislature
9. *The Marital "For and Against" Testimonial Privilege*, 1 Cal. L. Revision Comm'n Reports, at F-1 (1957)	Not enacted; but recommendation accomplished in enactment of Evidence Code. See Evid. Code § 970 Comment
10. *Suspension of the Absolute Power of Alienation*, 1 Cal. L. Revision Comm'n Reports, at G-1 (1957); 2 Cal. L. Revision Comm'n Reports, Annual Report for 1959, at 14 (1959)	Enacted. 1959 Cal. Stat. ch. 470
11. *Elimination of Obsolete Provisions in Penal Code Sections 1377 and 1378*, 1 Cal. L. Revision Comm'n Reports, at H-1 (1957)	Enacted. 1957 Cal. Stat. ch. 102
12. *Judicial Notice of the Law of Foreign Countries*, 1 Cal. L. Revision Comm'n Reports, at I-1 (1957)	Enacted. 1957 Cal. Stat. ch. 249
13. *Choice of Law Governing Survival of Actions*, 1 Cal. L. Revision Comm'n Reports, at J-1 (1957)	No legislation recommended.
14. *Effective Date of Order Ruling on a Motion for New Trial*, 1 Cal. L. Revision Comm'n Reports, at K-1 (1957); 2 Cal. L. Revision Comm'n Reports, Annual Report for 1959, at 16 (1959)	Enacted. 1959 Cal. Stat. ch. 468
15. *Retention of Venue for Convenience of Witnesses*, 1 Cal. L. Revision Comm'n Reports, at L-1 (1957)	Not enacted.
16. *Bringing New Parties Into Civil Actions*, 1 Cal. L. Revision Comm'n Reports, at M-1 (1957)	Enacted. 1957 Cal. Stat. ch. 1498
17. *Grand Juries*, 2 Cal. L. Revision Comm'n Reports, Annual Report for 1959, at 20 (1959)	Enacted. 1959 Cal. Stat. ch. 501
18. *Procedure for Appointing Guardians*, 2 Cal. L. Revision Comm'n Reports, Annual Report for 1959, at 21 (1959)	Enacted. 1959 Cal. Stat. ch. 500
19. *Appointment of Administrator in Quiet Title Action*, 2 Cal. L. Revision Comm'n Reports, Annual Report for 1959, at 29 (1959)	No legislation recommended.

Recommendation	Action by Legislature
20. *Presentation of Claims Against Public Entities*, 2 Cal. L. Revision Comm'n Reports, at A-1 (1959)	Enacted. 1959 Cal. Stat. chs. 1715, 1724, 1725, 1726, 1727, 1728; Cal. Const., art. XI, § 10 (1960)
21. *Right of Nonresident Aliens to Inherit*, 2 Cal. L. Revision Comm'n Reports, at B-1 (1959); 11 Cal. L. Revision Comm'n Reports 421 (1973)	Enacted. 1974 Cal. Stat. ch. 425
22. *Mortgages to Secure Future Advances*, 2 Cal. L. Revision Comm'n Reports, at C-1 (1959)	Enacted. 1959 Cal. Stat. ch. 528
23. *Doctrine of Worthier Title*, 2 Cal. L. Revision Comm'n Reports, at D-1 (1959)	Enacted. 1959 Cal. Stat. ch. 122
24. *Overlapping Provisions of Penal and Vehicle Codes Relating to Taking of Vehicles and Drunk Driving*, 2 Cal. L. Revision Comm'n Reports, at E-1 (1959)	Not enacted; but see 1972 Cal. Stat. ch. 92, enacting substance of a portion of recommendation relating to drunk driving.
25. *Time Within Which Motion for New Trial May Be Made*, 2 Cal. L. Revision Comm'n Reports, at F-1 (1959)	Enacted. 1959 Cal. Stat. ch. 469
26. *Notice to Shareholders of Sale of Corporate Assets*, 2 Cal. L. Revision Comm'n Reports, at G-1 (1959)	Not enacted; but see Corp. Code §§ 1001, 1002, enacting substance of recommendation.
27. *Evidence in Eminent Domain Proceedings*, 3 Cal. L. Revision Comm'n Reports, at A-1 (1961)	Not enacted; but see Evid. Code § 810 *et seq.*, enacting substance of recommendation.
28. *Taking Possession and Passage of Title in Eminent Domain Proceedings*, 3 Cal. L. Revision Comm'n Reports, at B-1 (1961)	Enacted. 1961 Cal. Stat. chs. 1612, 1613
29. *Reimbursement for Moving Expenses When Property Is Acquired for Public Use*, 3 Cal. L. Revision Comm'n Reports, at C-1 (1961)	Not enacted; but see Gov't Code § 7260 *et seq.*, enacting substance of recommendation.
30. *Rescission of Contracts*, 3 Cal. L. Revision Comm'n Reports, at D-1 (1961)	Enacted. 1961 Cal. Stat. ch. 589

Recommendation	Action by Legislature
31. *Right to Counsel and Separation of Delinquent From Nondelinquent Minor in Juvenile Court Proceedings*, 3 Cal. L. Revision Comm'n Reports, at E-1 (1961)	Enacted. 1961 Cal. Stat. ch. 1616
32. *Survival of Actions*, 3 Cal. L. Revision Comm'n Reports, at F-1 (1961)	Enacted. 1961 Cal. Stat. ch. 657
33. *Arbitration*, 3 Cal. L. Revision Comm'n Reports, at G-1 (1961)	Enacted. 1961 Cal. Stat. ch. 461
34. *Presentation of Claims Against Public Officers and Employees*, 3 Cal. L. Revision Comm'n Reports, at H-1 (1961)	Not enacted 1961; but see recommendation to 1963 session (item 39 *infra*), which was enacted.
35. *Inter Vivos Marital Property Rights in Property Acquired While Domiciled Elsewhere*, 3 Cal. L. Revision Comm'n Reports, at I-1 (1961)	Enacted. 1961 Cal. Stat. ch. 636
36. *Notice of Alibi in Criminal Actions*, 3 Cal. L. Revision Comm'n Reports, at J-1 (1961)	Not enacted.
37. *Discovery in Eminent Domain Proceedings*, 4 Cal. L. Revision Comm'n Reports 701 (1963); 8 Cal. L. Revision Comm'n Reports 19 (1967)	Enacted. 1967 Cal. Stat. ch. 1104
38. *Tort Liability of Public Entities and Public Employees*, 4 Cal. L. Revision Comm'n Reports 801 (1963)	Enacted. 1963 Cal. Stat. ch. 1681 *See 4:211, 219*
39. *Claims, Actions and Judgments Against Public Entities and Public Employees*, 4 Cal. L. Revision Comm'n Reports 1001 (1963)	Enacted. 1963 Cal. Stat. ch. 1715 *See 4:211, 222*
40. *Insurance Coverage for Public Entities and Public Employees*, 4 Cal. L. Revision Comm'n Reports 1201 (1963)	Enacted. 1963 Cal. Stat. ch. 1682 *See 4:212, 223*
41. *Defense of Public Employees*, 4 Cal. L. Revision Comm'n Reports 1301 (1963)	Enacted. 1963 Cal. Stat. ch. 1683 *See 4:212, 224*
42. *Liability of Public Entities for Ownership and Operation of Motor Vehicles*, 4 Cal. L. Revision Comm'n Reports 1401 (1963); 7 Cal. L. Revision Comm'n Reports 401 (1965)	Enacted. 1965 Cal. Stat. ch. 1527

Recommendation	Action by Legislature
43. *Workmen's Compensation Benefits for Persons Assisting Law Enforcement or Fire Control Officer*, 4 Cal. L. Revision Comm'n Reports 1501 (1963)	Enacted. 1963 Cal. Stat. ch. 1684 *See 4:212, 224*
44. *Sovereign Immunity — Amendments and Repeals of Inconsistent Statutes*, 4 Cal. L. Revision Comm'n Reports 1601 (1963)	Enacted. 1963 Cal. Stat. chs. 1685, 1686, 2029 *See 4:213*
45. *Evidence Code*, 7 Cal. L. Revision Comm'n Reports 1 (1965)	Enacted. 1965 Cal. Stat. ch. 299 *See 7:912, 923*
46. *Claims and Actions Against Public Entities and Public Employees*, 7 Cal. L. Revision Comm'n Reports 401 (1965)	Enacted. 1965 Cal. Stat. ch. 653 *See 7:914, 928*
47. *Evidence Code Revisions*, 8 Cal. L. Revision Comm'n Reports 101 (1967)	Enacted in part. 1967 Cal. Stat. ch. 650 Balance enacted. 1970 Cal. Stat. ch. 69 *See 8:1315*
48. *Evidence — Agricultural Code Revisions*, 8 Cal. L. Revision Comm'n Reports 201 (1967)	Enacted. 1967 Cal. Stat. ch. 262
49. *Evidence — Commercial Code Revisions*, 8 Cal. L. Revision Comm'n Reports 301 (1967)	Enacted. 1967 Cal. Stat. ch. 703
50. *Whether Damage for Personal Injury to a Married Person Should Be Separate or Community Property*, 8 Cal. L. Revision Comm'n Reports 401 (1967); 8 Cal. L. Revision Comm'n Reports 1385 (1967)	Enacted. 1968 Cal. Stat. chs. 457, 458 *See 8:1318; 9:18*
51. *Vehicle Code Section 17150 and Related Sections*, 8 Cal. L. Revision Comm'n Reports 501 (1967)	Enacted. 1967 Cal. Stat. ch. 702 *See 8:1317*
52. *Additur*, 8 Cal. L. Revision Comm'n Reports 601 (1967)	Enacted. 1967 Cal. Stat. ch. 72 *See 8:1317*
53. *Abandonment or Termination of a Lease*, 8 Cal. L. Revision Comm'n Reports 701 (1967); 9 Cal. L. Revision Comm'n Reports 401 (1969); 9 Cal. L. Revision Comm'n Reports 153 (1969)	Enacted. 1970 Cal. Stat. ch. 89 *See 8:1319; 10:1018*

Recommendation	Action by Legislature
54. *Good Faith Improver of Land Owned by Another*, 8 Cal. L. Revision Comm'n Reports 801 (1967); 8 Cal. L. Revision Comm'n Reports 1373 (1967)	Enacted. 1968 Cal. Stat. ch. 150 *See 8:2319; 9:19*
55. *Suit By or Against an Unincorporated Association*, 8 Cal. L. Revision Comm'n Reports 901 (1967)	Enacted. 1967 Cal. Stat. ch. 1324 *See 8:1317*
56. *Escheat*, 8 Cal. L. Revision Comm'n Reports 1001 (1967)	Enacted. 1968 Cal. Stat. chs. 247, 356 *See 9:16*
57. *Recovery of Condemnee's Expenses on Abandonment of an Eminent Domain Proceeding*, 8 Cal. L. Revision Comm'n Reports 1361 (1967)	Enacted. 1968 Cal. Stat. ch. 133 *See 9:19*
58. *Service of Process on Unincorporated Associations*, 8 Cal. L. Revision Comm'n Reports 1403 (1967)	Enacted. 1968 Cal. Stat. ch. 132 *See 9:18*
59. *Sovereign Immunity — Statute of Limitations*, 9 Cal. L. Revision Comm'n Reports 49 (1969); 9 Cal. L. Revision Comm'n Reports 175 (1969)	Enacted. 1970 Cal. Stat. ch. 104 *See 9:98*
60. *Additur and Remittitur*, 9 Cal. L. Revision Comm'n Reports 63 (1969)	Enacted. 1969 Cal. Stat. ch. 115 *See 9:99*
61. *Fictitious Business Names*, 9 Cal. L. Revision Comm'n Reports 71 (1969)	Enacted. 1969 Cal. Stat. ch. 114 *See 9:98*
62. *Quasi-Community Property*, 9 Cal. L. Revision Comm'n Reports 113 (1969)	Enacted. 1970 Cal. Stat. ch. 312 *See 10:1019*
63. *Arbitration of Just Compensation*, 9 Cal. L. Revision Comm'n Reports 123 (1969)	Enacted. 1970 Cal. Stat. ch. 417 *See 10:1018*
64. *Revisions of Evidence Code*, 9 Cal. L. Revision Comm'n Reports 137 (1969)	Enacted in part. 1970 Cal. Stat. ch. 69 See also 1970 Cal. Stat. chs. 1396, 1397; 1972 Cal. Stat. ch. 888 *See 10:1018*
65. *Mutuality of Remedies in Suits for Specific Performance*, 9 Cal. L. Revision Comm'n Reports 201 (1969)	Enacted. 1969 Cal. Stat. ch. 156 *See 9:99*
66. *Powers of Appointment*, 9 Cal. L. Revision Comm'n Reports 301 (1969)	Enacted. 1969 Cal. Stat. chs. 113, 155 *See 9:98*

Recommendation	Action by Legislature
67. *Evidence Code — Revisions of Privileges Article*, 9 Cal. L. Revision Comm'n Reports 501 (1969)	Vetoed; but see 1970 Cal. Stat. chs. 1396, 1397 *See 9:98*
68. *Fictitious Business Names*, 9 Cal. L. Revision Comm'n Reports 601 (1969)	Enacted. 1970 Cal. Stat. ch. 618 *See 10:1019*
69. *Representation as to the Credit of Third Persons and the Statute of Frauds*, 9 Cal. L. Revision Comm'n Reports 701 (1969)	Enacted. 1970 Cal. Stat. ch. 720 *See 10:1021*
70. *Revisions of Governmental Liability Act*, 9 Cal. L. Revision Comm'n Reports 801 (1969)	Enacted in part. 1970 Cal. Stat. chs. 662, 1099 *See 10:1020*
71. *"Vesting" of Interests Under Rule Against Perpetuities*, 9 Cal. L. Revision Comm'n Reports 901 (1969)	Enacted. 1970 Cal. Stat. ch. 45 *See 10:1021*
72. *Counterclaims and Cross-Complaints, Joinder of Causes of Action, and Related Provisions*, 10 Cal. L. Revision Comm'n Reports 501 (1971)	Enacted. 1971 Cal. Stat. chs. 244, 950; see also 1973 Cal. Stat. ch. 828 *See 10:1125*
73. *Wage Garnishment and Related Matters*, 10 Cal. L. Revision Comm'n Reports 701 (1971); 11 Cal. L. Revision Comm'n Reports 101 (1973); 12 Cal. L. Revision Comm'n Reports 901 (1974); 13 Cal. L. Revision Comm'n Reports 601 (1976); 13 Cal. L. Revision Comm'n Reports 1703 (1976); 14 Cal. L. Revision Comm'n Reports 261 (1978)	Enacted in part. 1978 Cal. Stat. ch. 1133; see also 1979 Cal. Stat. ch. 66 *See 11:1024; 11:1123; 12:530; 13:2012; 14:13, 223; 15:1024*
74. *Proof of Foreign Official Records*, 10 Cal. L. Revision Comm'n Reports 1022 (1971)	Enacted. 1970 Cal. Stat. ch. 41
75. *Inverse Condemnation — Insurance Coverage*, 10 Cal. L. Revision Comm'n Reports 1051 (1971)	Enacted. 1971 Cal. Stat. ch. 140 *See 10:1126*
76. *Discharge From Employment Because of Wage Garnishment*, 10 Cal. L. Revision Comm'n Reports 1147 (1971)	Enacted. 1971 Cal. Stat. ch. 1607 *See 10:1126*
77. *Civil Arrest*, 11 Cal. L. Revision Comm'n Reports 1 (1973)	Enacted. 1973 Cal. Stat. ch. 20 *See 11:1123*

Recommendation	Action by Legislature
78. *Claim and Delivery Statute*, 11 Cal. L. Revision Comm'n Reports 301 (1973)	Enacted. 1973 Cal. Stat. ch. 526 *See 11:1124*
79. *Unclaimed Property*, 11 Cal. L. Revision Comm'n Reports 401 (1973); 12 Cal. L. Revision Comm'n Reports 609 (1974)	Proposed resolution enacted. 1973 Cal. Stat. res. ch. 76 Legislation enacted. 1975 Cal. Stat. ch. 25 *See 11:1124; 12:530; 13:2012*
80. *Enforcement of Sister State Money Judgments*, 11 Cal. L. Revision Comm'n Reports 451 (1973)	Enacted. 1974 Cal. Stat. ch. 211 *See 12:534*
81. *Prejudgment Attachment*, 11 Cal. L. Revision Comm'n Reports 701 (1973)	Enacted. 1974 Cal. Stat. ch. 1516 See also 1975 Cal. Stat. ch. 200 *See 12:530*
82. *Landlord-Tenant Relations*, 11 Cal. L. Revision Comm'n Reports 951 (1973)	Enacted. 1974 Cal. Stat. chs. 331, 332 *See 12:536*
83. *Pleading* (technical change), 11 Cal. L. Revision Comm'n Reports 1024 (1973)	Enacted. 1972 Cal. Stat. ch. 73
84. *Evidence — Judicial Notice* (technical change), 11 Cal. L. Revision Comm'n Reports 1025 (1973)	Enacted. 1972 Cal. Stat. ch. 764
85. *Evidence — "Criminal Conduct" Exception*, 11 Cal. L. Revision Comm'n Reports 1147 (1973)	Not enacted 1974; see recommendation to 1975 session (item 90 *infra*), which was enacted. *See 12:535*
86. *Erroneously Compelled Disclosure of Privileged Information*, 11 Cal. L. Revision Comm'n Reports 1163 (1973)	Enacted. 1974 Cal. Stat. ch. 227 *See 12:535*
87. *Liquidated Damages*, 11 Cal. L. Revision Comm'n Reports 1201 (1973); 13 Cal. L. Revision Comm'n Reports 1735 (1976); 13 Cal. L. Revision Comm'n Reports 2139 (1976)	Enacted. 1977 Cal. Stat. ch. 198 *See 12:535; 13:1616; 14:13*
88. *Payment of Judgments Against Local Public Entities*, 12 Cal. L. Revision Comm'n Reports 575 (1974)	Enacted. 1975 Cal. Stat. ch. 285 *See 13:2011*
89. *View by Trier of Fact in a Civil Case*, 12 Cal. L. Revision Comm'n Reports 587 (1974)	Enacted. 1975 Cal. Stat. ch. 301 *See 13:2011*

Recommendation	Action by Legislature
90. *Good Cause Exception to the Physician-Patient Privilege*, 12 Cal. L. Revision Comm'n Reports 601 (1974)	Enacted. 1975 Cal. Stat. ch. 318 *See 13:2012*
91. *Improvement Acts*, 12 Cal. L. Revision Comm'n Reports 1001 (1974)	Enacted. 1974 Cal. Stat. ch. 426 *See 12:534*
92. *Condemnation Law and Procedure: Conforming Changes in Special District Statutes*, 12 Cal. L. Revision Comm'n Reports 1101 (1974); 12 Cal. L. Revision Comm'n Reports 2004 (1974)	Enacted. 1975 Cal. Stat. chs. 581, 582, 584, 585, 586, 587, 1176, 1276
93. *The Eminent Domain Law*, 12 Cal. L. Revision Comm'n Reports 1601 (1974)	Enacted. 1975 Cal. Stat. chs. 1239, 1240, 1275 *See 13:2010*
94. *Oral Modification of Written Contracts*, 13 Cal. L. Revision Comm'n Reports 301 (1976); 13 Cal. L. Revision Comm'n Reports 2129 (1976)	Enacted. 1975 Cal. Stat. ch. 7; 1976 Cal. Stat. ch. 109 *See 13:2011; 13:1616*
95. *Partition of Real and Personal Property*, 13 Cal. L. Revision Comm'n Reports 401 (1976)	Enacted. 1976 Cal. Stat. ch. 73 *See 13:2013, 1610*
96. *Revision of the Attachment Law*, 13 Cal. L. Revision Comm'n Reports 801 (1976)	Enacted. 1976 Cal. Stat. ch. 437 *See 13:1612*
97. *Undertakings for Costs*, 13 Cal. L. Revision Comm'n Reports 901 (1976)	Not enacted 1976; but see recommendation to 1979 session (item 118 *infra*), which was enacted. *See 13:1614*
98. *Service of Process on Unincorporated Associations*, 13 Cal. L. Revision Comm'n Reports 1657 (1976)	Enacted. 1976 Cal. Stat. ch. 888 *See 13:1616*
99. *Sister State Money Judgments*, 13 Cal. L. Revision Comm'n Reports 1669 (1976)	Enacted. 1977 Cal. Stat. ch. 232 *See 14:12*
100. *Damages in Action for Breach of Lease*, 13 Cal. L. Revision Comm'n Reports 1679 (1976)	Enacted. 1977 Cal. Stat. ch. 49 *See 14:13*
101. *Admissibility of Copies of Business Records in Evidence*, 13 Cal. L. Revision Comm'n Reports 2051 (1976)	Not enacted. *See 13:2012*

Recommendation	Action by Legislature
102. *Turnover Orders Under the Claim and Delivery Law*, 13 Cal. L. Revision Comm'n Reports 2079 (1976)	Enacted. 1976 Cal. Stat. ch. 145 *See 13:1614*
103. *Relocation Assistance by Private Condemnors*, 13 Cal. L. Revision Comm'n Reports 2085 (1976)	Enacted. 1976 Cal. Stat. ch. 143 *See 13:1614*
104. *Condemnation for Byroads and Utility Easements*, 13 Cal. L. Revision Comm'n Reports 2091 (1976)	Enacted in part (utility easements). 1976 Cal. Stat. ch. 994 *See 13:1615*
105. *Transfer of Out-of-State Trusts to California*, 13 Cal. L. Revision Comm'n Reports 2101 (1976)	Enacted. 1976 Cal. Stat. ch. 144 *See 13:1615*
106. *Admissibility of Duplicates in Evidence*, 13 Cal. L. Revision Comm'n Reports 2115 (1976)	Enacted in bill not sponsored by Commission. See 1985 Cal. Stat. ch. 100 *For original history, see 13:1615*
107. *Nonprofit Corporation Law*, 13 Cal. L. Revision Comm'n Reports 2201 (1976)	Not enacted.; legislation on this subject, not sponsored by Commission, was enacted in 1978. *For original history, see 14:11*
108. *Use of Keepers Pursuant to Writs of Execution*, 14 Cal. L. Revision Comm'n Reports 49 (1978)	Enacted. 1977 Cal. Stat. ch. 155 *See 14:12*
109. *Attachment Law: Effect of Bankruptcy Proceedings; Effect of General Assignments for the Benefit of Creditors*, 14 Cal. L. Revision Comm'n Reports 61 (1978)	Enacted. 1977 Cal. Stat. ch. 499 *See 14:12*
110. *Review of Resolution of Necessity by Writ of Mandate*, 14 Cal. L. Revision Comm'n Reports 83 (1978)	Enacted. 1978 Cal. Stat. ch. 286 *See 14:224*
111. *Use of Court Commissioners Under the Attachment Law*, 14 Cal. L. Revision Comm'n Reports 93 (1978)	Enacted. 1978 Cal. Stat. ch. 151 *See 14:224*
112. *Evidence of Market Value of Property*, 14 Cal. L. Revision Comm'n Reports 105 (1978)	Enacted in part. 1978 Cal. Stat. ch. 294 Substance of remainder enacted in 1980. See item 123 *infra* *See 14:225*

Recommendation	Action by Legislature
113. *Psychotherapist-Patient Privilege*, 14 Cal. L. Revision Comm'n Reports 127 (1978); 15 Cal. L. Revision Comm'n Reports 1307 (1980)	Enacted in part. 1985 Cal. Stat. chs. 545 (licensed educational psychologist), 1077 (repeal of Evid. Code § 1028) *See 14:225*
114. *Parol Evidence Rule*, 14 Cal. L. Revision Comm'n Reports 143 (1978)	Enacted. 1978 Cal. Stat. ch. 150 *See 14:224*
115. *Attachment Law — Unlawful Detainer Proceedings; Bond for Levy on Joint Deposit Account or Safe Deposit Box; Definition of "Chose in Action,"* 14 Cal. L. Revision Comm'n Reports 241 (1978)	Enacted. 1978 Cal. Stat. ch. 273 *See 14:224*
116. *Powers of Appointment* (technical changes), 14 Cal. L. Revision Comm'n Reports 257 (1978)	Enacted. 1978 Cal. Stat. ch. 266
117. *Ad Valorem Property Taxes in Eminent Domain Proceedings*, 14 Cal. L. Revision Comm'n Reports 291 (1978)	Enacted. 1979 Cal. Stat. ch. 31 *See 15:1025*
118. *Security for Costs*, 14 Cal. L. Revision Comm'n Reports 319 (1978)	Enacted. 1980 Cal. Stat. ch. 114 *See 15:1025*
119. *Guardianship-Conservatorship Law*, 14 Cal. L. Revision Comm'n Reports 501 (1978); 15 Cal. L. Revision Comm'n Reports 451 (1980)	Enacted. 1979 Cal. Stat. chs. 165, 726, 730 *See 15:1024, 1427*
120. *Interest Rate on Judgments*, 15 Cal. L. Revision Comm'n Reports 7 (1980)	Enacted. 1982 Cal. Stat. ch. 150 *See 15:1427; 16:2025*
121. *Married Women as Sole Traders*, 15 Cal. L. Revision Comm'n Reports 21 (1980)	Enacted. 1980 Cal. Stat. ch. 123 *See 15:1426*
122. *State Tax Liens*, 15 Cal. L. Revision Comm'n Reports 29 (1980)	Enacted. 1980 Cal. Stat. ch. 600 *See 15:1427*
123. *Application of Evidence Code Property Valuation Rules in Noncondemnation Cases*, 15 Cal. L. Revision Comm'n Reports 301 (1980)	Enacted. 1980 Cal. Stat. ch. 381 *See 15:1429*
124. *Uniform Durable Power of Attorney Act*, 15 Cal. L. Revision Comm'n Reports 351 (1980)	Enacted. 1981 Cal. Stat. ch. 511 *See 16:25*
125. *Probate Homestead*, 15 Cal. L. Revision Comm'n Reports 401 (1980)	Enacted. 1980 Cal. Stat. ch. 119 *See 15:1428*

Recommendation	Action by Legislature
126. *Effect of New Bankruptcy Law on the Attachment Law*, 15 Cal. L. Revision Comm'n Reports 1043 (1980)	Enacted. 1979 Cal. Stat. ch. 177 *See 15:1024*
127. *Confessions of Judgment*, 15 Cal. L. Revision Comm'n Reports 1053 (1980)	Enacted. 1979 Cal. Stat. ch. 568 *See 15:1024*
128. *Special Assessment Liens on Property Taken for Public Use*, 15 Cal. L. Revision Comm'n Reports 1101 (1980)	Enacted. 1980 Cal. Stat. ch. 122 *See 15:1428*
129. *Assignments for the Benefit of Creditors*, 15 Cal. L. Revision Comm'n Reports 1117 (1980)	Enacted. 1980 Cal. Stat. ch. 135 *See 15:1427*
130. *Vacation of Public Streets, Highways, and Service Easements*, 15 Cal. L. Revision Comm'n Reports 1137 (1980)	Enacted. 1980 Cal. Stat. ch. 1050 *See 15:1429*
131. *Quiet Title Actions*, 15 Cal. L. Revision Comm'n Reports 1187 (1980)	Enacted. 1980 Cal. Stat. ch. 44 *See 15:1428*
132. *Agreements for Entry of Paternity and Support Judgments*, 15 Cal. L. Revision Comm'n Reports 1237 (1980)	Enacted. 1980 Cal. Stat. ch. 682 *See 15:1426*
133. *Enforcement of Claims and Judgments Against Public Entities*, 15 Cal. L. Revision Comm'n Reports 1257 (1980)	Enacted. 1980 Cal. Stat. ch. 215 *See 15:1426*
134. *Uniform Veterans Guardianship Act*, 15 Cal. L. Revision Comm'n Reports 1289 (1980)	Enacted. 1980 Cal. Stat. ch. 89 *See 15:1428*
135. *Enforcement of Obligations After Death*, 15 Cal. L. Revision Comm'n Reports 1327 (1980)	Enacted. 1980 Cal. Stat. ch. 124 *See 15:1426*
136. *Guardianship-Conservatorship* (technical change), 15 Cal. L. Revision Comm'n Reports 1427 (1980)	Enacted. 1980 Cal. Stat. ch. 246
137. *Revision of Guardianship-Conservatorship Law*, 15 Cal. L. Revision Comm'n Reports 1463 (1980)	Enacted. 1981 Cal. Stat. ch. 9 *See 16:24*

Recommendation	Action by Legislature
138. *Non-Probate Transfers*, 15 Cal. L. Revision Comm'n Reports 1605 (1980); 16 Cal. L. Revision Comm'n Reports 129 (1982)	Enacted in part (pay-on-death accounts). 1982 Cal. Stat. ch. 269; (credit unions and industrial loan companies) 1983 Cal. Stat. ch. 92 Substance of balance enacted. 1989 Cal. Stat. ch. 397 (banks and savings and loan associations) (item 229 *infra*) *See 16:2026; 17:823*
139. *Revision of the Powers of Appointment Statute*, 15 Cal. L. Revision Comm'n Reports 1667 (1980)	Enacted. 1981 Cal. Stat. ch. 63 *See 16:25*
140. *The Enforcement of Judgments Law*, 15 Cal. L. Revision Comm'n Reports 2001 (1980)	Enacted. 1982 Cal. Stat. chs. 497, 1364 *See 16:2024*
141. *State Tax Liens* (technical change), 16 Cal. L. Revision Comm'n Reports 24 (1982)	Enacted. 1981 Cal. Stat. ch. 217
142. *Assessment Liens on Property Taken for Public Use* (technical change), 16 Cal. L. Revision Comm'n Reports 25 (1982)	Enacted. 1981 Cal. Stat. ch. 139
143. *Federal Pensions as Community Property*, 16 Cal. L. Revision Comm'n Reports 47 (1982)	Proposed resolution adopted. 1982 Cal. Stat. res. ch. 44 *See 16:2027*
144. *Missing Persons*, 16 Cal. L. Revision Comm'n Reports 105 (1982)	Enacted. 1983 Cal. Stat. ch. 201 *See 17:822*
145. *Escheat* (technical change), 16 Cal. L. Revision Comm'n Reports 124 (1982)	Enacted. 1982 Cal. Stat. ch. 182
146. *Emancipated Minors*, 16 Cal. L. Revision Comm'n Reports 183 (1982)	Enacted. 1983 Cal. Stat. ch. 6 *See 17:823*
147. *Notice in Limited Conservatorship Proceedings*, 16 Cal. L. Revision Comm'n Reports 199 (1982)	Enacted. 1983 Cal. Stat. ch. 72 *See 17:823*
148. *Disclaimer of Testamentary and Other Interests*, 16 Cal. L. Revision Comm'n Reports 207 (1982)	Enacted. 1983 Cal. Stat. ch. 17 *See 17:823*
149. *Holographic and Nuncupative Wills*, 16 Cal. L. Revision Comm'n Reports 301 (1982)	Enacted. 1982 Cal. Stat. ch. 187 *See 16:2026*

Recommendation	Action by Legislature
150. *Marketable Title of Real Property*, 16 Cal. L. Revision Comm'n Reports 401 (1982)	Enacted. 1982 Cal. Stat. ch. 1268 *See 16:2026*
151. *Statutory Bonds and Undertakings*, 16 Cal. L. Revision Comm'n Reports 501 (1982)	Enacted. 1982 Cal. Stat. chs. 517, 998 *See 16:2025*
152. *Attachment*, 16 Cal. L. Revision Comm'n Reports 701 (1982)	Enacted. 1982 Cal. Stat. ch. 1198 *See 16:2025*
153. *Division of Joint Tenancy and Tenancy in Common Property at Dissolution of Marriage*, 16 Cal. L. Revision Comm'n Reports 2165 (1982), 17 Cal. L. Revision Comm'n Reports 863 (1984)	Enacted. 1983 Cal. Stat. ch. 342 *See 17:823*
154. *Creditors' Remedies*, 16 Cal. L. Revision Comm'n Reports 2175 (1982)	Enacted. 1983 Cal. Stat. ch. 155 *See 17:824*
155. *Conforming Changes to the Bond and Undertaking Law*, 16 Cal. L. Revision Comm'n Reports 2239 (1982)	Enacted. 1983 Cal. Stat. ch. 18 *See 17:825*
156. *Notice of Rejection of Late Claim Against Public Entity*, 16 Cal. L. Revision Comm'n Reports 2251 (1982)	Enacted. 1983 Cal. Stat. ch. 107 *See 17:824*
157. *Wills and Intestate Succession*, 16 Cal. L. Revision Comm'n Reports 2301 (1982)	Enacted. 1983 Cal. Stat. ch. 842 *See 17:822*
158. *Liability of Marital Property for Debts*, 17 Cal. L. Revision Comm'n Reports 1 (1984)	Enacted. 1984 Cal. Stat. ch. 1671 *See 18:20*
159. *Durable Power of Attorney for Health Care Decisions*, 17 Cal. L. Revision Comm'n Reports 101 (1984)	Enacted. 1983 Cal. Stat. ch. 1204 *See 17:822*
160. *Marital Property Presumptions and Transmutations*, 17 Cal. L. Revision Comm'n Reports 205 (1984)	Enacted in part (transmutations). 1984 Cal. Stat. ch. 1733 *See 18:21*
161. *Reimbursement of Educational Expenses*, 17 Cal. L. Revision Comm'n Reports 229 (1984)	Enacted. 1984 Cal. Stat. ch. 1661 *See 18:22*
162. *Special Appearance in Family Law Proceedings*, 17 Cal. L. Revision Comm'n Reports 243 (1984)	Enacted. 1984 Cal. Stat. ch. 156 *See 18:21*

Recommendation	Action by Legislature
163. *Liability of Stepparent for Child Support*, 17 Cal. L. Revision Comm'n Reports 251 (1984)	Enacted. 1984 Cal. Stat. ch. 249 *See 18:21*
164. *Awarding Temporary Use of Family Home*, 17 Cal. L. Revision Comm'n Reports 261 (1984)	Enacted. 1984 Cal. Stat. ch. 463 *See 18:21*
165. *Disposition of Community Property*, 17 Cal. L. Revision Comm'n Reports 269 (1984)	Not enacted. *See 18:22*
166. *Statutes of Limitation for Felonies*, 17 Cal. L. Revision Comm'n Reports 301 (1984)	Enacted. 1984 Cal. Stat. ch. 1270 *See 18:23; 20:2305*
167. *Independent Administration of Decedent's Estate*, 17 Cal. L. Revision Comm'n Reports 405 (1984)	Enacted. 1984 Cal. Stat. ch. 451 *See 18:19*
168. *Distribution of Estates Without Administration*, 17 Cal. L. Revision Comm'n Reports 421 (1984)	Enacted. 1984 Cal. Stat. ch. 451 *See 18:19*
169. *Simultaneous Deaths*, 17 Cal. L. Revision Comm'n Reports 443 (1984)	Enacted in part. See 1989 Cal. Stat. ch. 544 (intestate succession) (item 227 *infra*); 1990 Cal. Stat. ch. 710 (statutory will) (item 240 *infra*) *See 18:20*
170. *Notice of Will*, 17 Cal. L. Revision Comm'n Reports 461 (1984)	Not enacted. *See 18:20*
171. *Garnishment of Amounts Payable to Trust Beneficiary*, 17 Cal. L. Revision Comm'n Reports 471 (1984)	Enacted. 1984 Cal. Stat. ch. 493 *See 18:19*
172. *Bonds for Personal Representatives*, 17 Cal. L. Revision Comm'n Reports 483 (1984)	Enacted. 1984 Cal. Stat. ch. 451 *See 18:19*
173. *Recording Affidavits of Death*, 17 Cal. L. Revision Comm'n Reports 493 (1984)	Enacted. 1984 Cal. Stat. ch. 527 *See 18:20*
174. *Execution of Witnessed Will*, 17 Cal. L. Revision Comm'n Reports 509 (1984)	Not enacted. *See 18:20*
175. *Revision of Wills and Intestate Succession Law*, 17 Cal. L. Revision Comm'n Reports 537 (1984)	Enacted. 1984 Cal. Stat. ch. 892 *See 18:19*

Recommendation	Action by Legislature
176. *Uniform Transfers to Minors Act*, 17 Cal. L. Revision Comm'n Reports 601 (1984)	Enacted. 1984 Cal. Stat. ch. 243 *See 18:19*
177. *Statutory Forms for Durable Powers of Attorney*, 17 Cal. L. Revision Comm'n Reports 701 (1984)	Enacted. 1984 Cal. Stat. chs. 312 (health care), 602 (general power of attorney) *See 18:18*
178. *Vacation of Streets* (technical change), 17 Cal. L. Revision Comm'n Reports 825 (1984)	Enacted. 1983 Cal. Stat. ch. 52
179. *Effect of Death of Support Obligor*, 17 Cal. L. Revision Comm'n Reports 897 (1984)	Enacted in part. 1984 Cal. Stat. ch. 19. Balance enacted. 1985 Cal. Stat. ch. 362 (item 186 *infra*) *See 18:21*
180. *Dismissal for Lack of Prosecution*, 17 Cal. L. Revision Comm'n Reports 905 (1984)	Enacted. 1984 Cal. Stat. ch. 1705 *See 18:23*
181. *Severance of Joint Tenancy*, 17 Cal. L. Revision Comm'n Reports 941 (1984)	Enacted. 1984 Cal. Stat. ch. 519 *See 18:23*
182. *Quiet Title and Partition Judgments*, 17 Cal. L. Revision Comm'n Reports 947 (1984)	Enacted. 1984 Cal. Stat. ch. 20 *See 18:22*
183. *Dormant Mineral Rights*, 17 Cal. L. Revision Comm'n Reports 957 (1984)	Enacted. 1984 Cal. Stat. ch. 240 *See 18:22*
184. *Creditors' Remedies*, 17 Cal. L. Revision Comm'n Reports 975 (1984)	Enacted. 1984 Cal. Stat. ch. 538 *See 18:23*
185. *Rights Among Cotenants*, 17 Cal. L. Revision Comm'n Reports 1023 (1984)	Enacted. 1984 Cal. Stat. ch. 241 *See 18:23*
186. *Provision for Support if Support Obligor Dies*, 18 Cal. L. Revision Comm'n Reports 119 (1986)	Enacted. 1985 Cal. Stat. ch. 362 *See 18:217*
187. *Transfer of State Registered Property Without Probate*, 18 Cal. L. Revision Comm'n Reports 129 (1986)	Enacted. 1985 Cal. Stat. ch. 982 *See 18:216*
188. *Dividing Jointly Owned Property Upon Marriage Dissolution*, 18 Cal. L. Revision Comm'n Reports 147 (1986)	Enacted. 1985 Cal. Stat. ch. 362 *See 18:217*

Recommendation	Action by Legislature
189. *Probate Law* (clarifying revisions), 18 Cal. L. Revision Comm'n Reports 216 (1986)	Enacted. 1985 Cal. Stat. ch. 359
190. *Creditors' Remedies* (technical change), 18 Cal. L. Revision Comm'n Reports 217 (1986)	Enacted. 1985 Cal. Stat. ch. 41
191. *Uniform Transfers to Minors Act* (technical change), 18 Cal. L. Revision Comm'n Reports 218 (1986)	Enacted. 1985 Cal. Stat. ch. 90
192. *Protection of Mediation Communications*, 18 Cal. L. Revision Comm'n Reports 241 (1986)	Enacted. 1985 Cal. Stat. ch. 731 *See 18:218*
193. *Recording Severance of Joint Tenancy*, 18 Cal. L. Revision Comm'n Reports 249 (1986)	Enacted. 1985 Cal. Stat. ch. 157 *See 18:217*
194. *Abandoned Easements*, 18 Cal. L. Revision Comm'n Reports 257 (1986)	Enacted. 1985 Cal. Stat. ch. 157 *See 18:217*
195. *Distribution Under a Will or Trust*, 18 Cal. L. Revision Comm'n Reports 269 (1986)	Enacted. 1985 Cal. Stat. ch. 982 *See 18:216*
196. *Effect of Adoption or Out of Wedlock Birth on Rights at Death*, 18 Cal. L. Revision Comm'n Reports 289 (1986)	Enacted. 1985 Cal. Stat. ch. 982 *See 18:216*
197. *Durable Powers of Attorney*, 18 Cal. L. Revision Comm'n Reports 305 (1986)	Enacted. 1985 Cal. Stat. ch. 403 *See 18:216*
198. *Litigation Expenses in Family Law Proceedings*, 18 Cal. L. Revision Comm'n Reports 351 (1986)	Enacted. 1985 Cal. Stat. ch. 362 *See 18:217*
199. *Civil Code Sections 4800.1 and 4800.2*, 18 Cal. L. Revision Comm'n Reports 383 (1986)	One of two recommended measures enacted (*Application of Civil Code §§ 4800.1 and 4800.2*). 1986 Cal. Stat. ch. 49 *See 18:1717*
200. *The Trust Law*, 18 Cal. L. Revision Comm'n Reports 501 (1986)	Enacted. 1986 Cal. Stat. ch. 820 *See 18:1718*
201. *Disposition of Estate Without Administration*, 18 Cal. L. Revision Comm'n Reports 1005 (1986)	Enacted. 1986 Cal. Stat. ch. 783 *See 18:1717*
202. *Small Estate Set-Aside*, 18 Cal. L. Revision Comm'n Reports 1101 (1986)	Enacted. 1986 Cal. Stat. ch. 783 *See 18:1717*

Recommendation	Action by Legislature
203. *Proration of Estate Taxes*, 18 Cal. L. Revision Comm'n Reports 1127 (1986)	Enacted. 1986 Cal. Stat. ch. 783 *See 18:1717*
204. *Notice in Guardianship and Conservatorship*, 18 Cal. L. Revision Comm'n Reports 1793 (1986)	Enacted. 1987 Cal. Stat. ch. 923 *See 19:516*
205. *Preliminary Provisions and Definitions*, 18 Cal. L. Revision Comm'n Reports 1807 (1986)	Enacted. 1987 Cal. Stat. ch. 923 *See 19:516*
206. *Technical Revisions in the Trust Law*, 18 Cal. L. Revision Comm'n Reports 1823 (1986)	Enacted. 1987 Cal. Stat. ch. 128 *See 19:517*
207. *Supervised Administration*, 19 Cal. L. Revision Comm'n Reports 5 (1988)	Enacted. 1987 Cal. Stat. ch. 923 *See 19:516*
208. *Independent Administration*, 19 Cal. L. Revision Comm'n Reports 205 (1988)	Enacted. 1987 Cal. Stat. ch. 923 *See 19:517*
209. *Creditor Claims Against Decedent's Estate*, 19 Cal. L. Revision Comm'n Reports 299 (1988)	Enacted. 1987 Cal. Stat. ch. 923 *See 19:517*
210. *Notice in Probate Proceedings*, 19 Cal. L. Revision Comm'n Reports 357 (1988)	Enacted. 1987 Cal. Stat. ch. 923 *See 19:517*
211. *Marital Deduction Gifts*, 19 Cal. L. Revision Comm'n Reports 615 (1988)	Enacted. 1987 Cal. Stat. ch. 923 *See 19:517*
212. *Estates of Missing Persons*, 19 Cal. L. Revision Comm'n Reports 637 (1988)	Enacted. 1987 Cal. Stat. ch. 923 *See 19:517*
213. *Public Guardians and Administrators*, 19 Cal. L. Revision Comm'n Reports 707 (1988)	Enacted. 1988 Cal. Stat. ch. 1199 *See 19:1167*
214. *Inventory and Appraisal*, 19 Cal. L. Revision Comm'n Reports 741 (1988)	Enacted. 1988 Cal. Stat. ch. 1199 *See 19:1167*
215. *Opening Estate Administration*, 19 Cal. L. Revision Comm'n Reports 787 (1988)	Enacted. 1988 Cal. Stat. ch. 1199 *See 19:1167*
216. *Abatement*, 19 Cal. L. Revision Comm'n Reports 865 (1988)	Enacted. 1988 Cal. Stat. ch. 1199 *See 19:1167*
217. *Accounts*, 19 Cal. L. Revision Comm'n Reports 877 (1988)	Enacted. 1988 Cal. Stat. ch. 1199 *See 19:1167*

Recommendation	Action by Legislature
218. *Litigation Involving Decedents*, 19 Cal. L. Revision Comm'n Reports 899 (1988)	Enacted. 1988 Cal. Stat. ch. 1199 *See 19:1167*
219. *Rules of Procedure in Probate*, 19 Cal. L. Revision Comm'n Reports 917 (1988)	Enacted. 1988 Cal. Stat. ch. 1199 *See 19:1167*
220. *Distribution and Discharge*, 19 Cal. L. Revision Comm'n Reports 953 (1988)	Enacted. 1988 Cal. Stat. ch. 1199 *See 19:1167*
221. *Nondomiciliary Decedents*, 19 Cal. L. Revision Comm'n Reports 993 (1988)	Enacted. 1988 Cal. Stat. ch. 1199 *See 19:1167*
222. *Interest and Income During Administration*, 19 Cal. L. Revision Comm'n Reports 1019 (1988)	Enacted. 1988 Cal. Stat. ch. 1199 *See 19:1167*
223. *Authority of the Law Revision Commission*, 19 Cal. L. Revision Comm'n Reports 1162 (1988)	Enacted. 1989 Cal. Stat. ch. 152
224. *1988 Probate Cleanup Bill*, see 19 Cal. L. Revision Comm'n Reports 1167, 1191–1200 (1988)	Enacted. 1988 Cal. Stat. ch. 113
225. *Creditors' Remedies*, 19 Cal. L. Revision Comm'n Reports 1251 (1988)	Enacted. 1989 Cal. Stat. ch. 1416 *See 20:201*
226. *No Contest Clauses*, 20 Cal. L. Revision Comm'n Reports 7 (1990)	Enacted. 1989 Cal. Stat. ch. 544 *See 20:201*
227. *120-Hour Survival Requirement*, 20 Cal. L. Revision Comm'n Reports 21 (1990)	Enacted. 1989 Cal. Stat. ch. 544 *See 20:201*
228. *Compensation of Attorneys and Personal Representatives*, 20 Cal. L. Revision Comm'n Reports 31 (1990)	Enacted except for portion relating to compensation of attorneys. 1990 Cal. Stat. ch. 79 *See 20:2218*
229. *Multiple-Party Accounts*, 20 Cal. L. Revision Comm'n Reports 95 (1990)	Enacted. 1989 Cal. Stat. ch. 397 *See 20:202*
230. *Notice to Creditors*, 20 Cal. L. Revision Comm'n Reports 165 (1990); 20 Cal. L. Revision Comm'n Reports 507 (1990)	Enacted in part. 1989 Cal. Stat. ch. 544 Balance enacted. 1990 Cal. Stat. ch. 140 *See 20:201*
231. *1989 Probate Cleanup Bill*, see 20 Cal. L. Revision Comm'n Reports 201, 227 (1990)	Enacted. 1989 Cal. Stat. ch. 21

Recommendation	Action by Legislature
232. *Bonds of Guardians and Conservators*, 20 Cal. L. Revision Comm'n Reports 235 (1990)	Enacted. 1989 Cal. Stat. ch. 544
233. *Brokers' Commissions on Probate Sales*, 20 Cal. L. Revision Comm'n Reports 237-42 (1990)	Enacted. 1989 Cal. Stat. ch. 544
234. *Commercial Real Property Leases*, 20 Cal. L. Revision Comm'n Reports 251 (1990)	Enacted. 1989 Cal. Stat. ch. 982 *See 20:202*
235. *Trustees' Fees*, 20 Cal. L. Revision Comm'n Reports 279 (1990)	Enacted. 1990 Cal. Stat. ch. 79 *See 20:2218*
236. *Springing Powers of Attorney*, 20 Cal. L. Revision Comm'n Reports 405 (1990)	Enacted. 1990 Cal. Stat. ch. 986 *See 20:2220*
237. *Uniform Statutory Form Powers of Attorney Act*, 20 Cal. L. Revision Comm'n Reports 415 (1990)	Enacted. 1990 Cal. Stat. ch. 986 *See 20:2220*
238. *Disposition of Small Estate by Public Administrator*, 20 Cal. L. Revision Comm'n Reports 529 (1990)	Enacted. 1990 Cal. Stat. ch. 324 *See 20:2220*
239. *Court-Authorized Medical Treatment*, 20 Cal. L. Revision Comm'n Reports 537 (1990)	Enacted. 1990 Cal. Stat. ch. 710 *See 20:2219*
240. *Survival Requirement for Beneficiary of Statutory Will*, 20 Cal. L. Revision Comm'n Reports 549 (1990)	Enacted. 1990 Cal. Stat. ch. 710 *See 20:2219*
241. *Execution or Modification of Lease Without Court Order*, 20 Cal. L. Revision Comm'n Reports 557 (1990)	Enacted. 1990 Cal. Stat. ch. 710 *See 20:2219*
242. *Limitation Period for Action Against Surety in Guardianship or Conservatorship Proceeding*, 20 Cal. L. Revision Comm'n Reports 565 (1990)	Enacted. 1990 Cal. Stat. ch. 710 *See 20:2219*
243. *Repeal of Probate Code Section 6402.5 (In-Law Inheritance)*, 20 Cal. L. Revision Comm'n Reports 571 (1990)	Not enacted. *See 20:2220*
244. *Access to Decedent's Safe Deposit Box*, 20 Cal. L. Revision Comm'n Reports 597 (1990); 20 Cal. L. Revision Comm'n Reports 2859 (1990)	Enacted. 1991 Cal. Stat. ch. 1055 *See 20:2219; 21:20*

Recommendation	Action by Legislature
245. *Priority of Conservator or Guardian for Appointment as Administrator*, 20 Cal. L. Revision Comm'n Reports 607 (1990)	Enacted. 1990 Cal. Stat. ch. 710 *See 20:2219*
246. *New Probate Code*, 20 Cal. L. Revision Comm'n Reports 1001 (1990)	Enacted. 1990 Cal. Stat. ch. 79 *See 20:2218*
247. *Notice in Probate Where Address Unknown*, 20 Cal. L. Revision Comm'n Reports 2245 (1990)	Enacted. 1990 Cal. Stat. ch. 710 *See 20:2219*
248. *Jurisdiction of Superior Court in Trust Matters*, 20 Cal. L. Revision Comm'n Reports 2253 (1990)	Enacted. 1990 Cal. Stat. ch. 710 *See 20:2219*
249. *Uniform Management of Institutional Funds Act*, 20 Cal. L. Revision Comm'n Reports 2265 (1990)	Enacted. 1990 Cal. Stat. ch. 1307 *See 20:2220*
250. *Remedies for Breach of Assignment or Sublease Covenant*, 20 Cal. L. Revision Comm'n Reports 2405 (1990)	Enacted. 1991 Cal. Stat. ch. 67 *See 21:22*
251. *Use Restrictions*, 20 Cal. L. Revision Comm'n Reports 2421 (1990)	Enacted. 1991 Cal. Stat. ch. 67 *See 21:22*
252. *Uniform Statutory Rule Against Perpetuities*, 20 Cal. L. Revision Comm'n Reports 2501 (1990)	Enacted. 1991 Cal. Stat. ch. 156 *See 21:21*
253. *Elimination of Seven-Year Limit for Durable Power of Attorney for Health Care*, 20 Cal. L. Revision Comm'n Reports 2605 (1990)	Enacted. 1991 Cal. Stat. ch. 896 *See 21:22*
254. *Recognition of Agent's Authority Under Statutory Form Power of Attorney*, 20 Cal. L. Revision Comm'n Reports 2629 (1990); 22 Cal. L. Revision Comm'n Reports 965 (1992)	Enacted. 1992 Cal. Stat. ch. 178 *See 22:852*
255. *Debts That Are Contingent, Disputed, or Not Due*, 20 Cal. L. Revision Comm'n Reports 2707 (1990)	Enacted. 1991 Cal. Stat. ch. 1055 *See 21:20*
256. *Remedies of Creditor Where Personal Representative Fails to Give Notice*, 20 Cal. L. Revision Comm'n Reports 2719 (1990)	Enacted. 1991 Cal. Stat. ch. 1055 *See 21:20*

Recommendation	Action by Legislature
257. *Repeal of Civil Code Section 704 (Passage of Ownership of U.S. Bonds on Death)*, 20 Cal. L. Revision Comm'n Reports 2729 (1990)	Enacted. 1991 Cal. Stat. ch. 1055 *See 21:20*
258. *Disposition of Small Estate Without Probate*, 20 Cal. L. Revision Comm'n Reports 2737 (1990)	Enacted. 1991 Cal. Stat. ch. 1055 *See 21:20*
259. *Right of Surviving Spouse to Dispose of Community Property*, 20 Cal. L. Revision Comm'n Reports 2769 (1990)	Enacted. 1991 Cal. Stat. ch. 1055 *See 21:20*
260. *Litigation Involving Decedents*, 20 Cal. L. Revision Comm'n Reports 2785 (1990); 22 Cal. L. Revision Comm'n Reports 895 (1992)	Enacted. 1992 Cal. Stat. ch. 178 *See 22:852*
261. *Compensation in Guardianship and Conservatorship Proceedings*, 20 Cal. L. Revision Comm'n Reports 2837 (1990); 21 Cal. L. Revision Comm'n Reports 227 (1991)	Enacted. 1992 Cal. Stat. ch. 572 *See 22:853*
262. *Recognition of Trustees' Powers*, 20 Cal. L. Revision Comm'n Reports 2849 (1990)	Enacted. 1992 Cal. Stat. ch. 178 *See 22:852*
263. *Gifts in View of Impending Death*, 20 Cal. L. Revision Comm'n Reports 2869 (1990)	Enacted. 1991 Cal. Stat. ch. 1055 *See 21:20*
264. *TOD Beneficiary Designation for Vehicles and Certain Other State Registered Property*, 20 Cal. L. Revision Comm'n Reports 2883 (1990)	Enacted. 1991 Cal. Stat. ch. 1055 *See 21:20*
265. *1991 General Probate Bill* (miscellaneous provisions), see 20 Cal. L. Revision Comm'n Reports 2907 (1990)	Enacted. 1991 Cal. Stat. ch. 1055 *See 21:20*
266. *1991 Probate Urgency Clean-up Bill*, see 20 Cal. L. Revision Comm'n Reports 2909 (1990)	Enacted. 1991 Cal. Stat. ch. 82 *See 21:21*
267. *Application of Marketable Title Statute to Executory Interests*, 21 Cal. L. Revision Comm'n Reports 53 (1991)	Enacted. 1991 Cal. Stat. ch. 156 *See 21:21*

Recommendation	Action by Legislature
268. *Relocation of Powers of Appointment Statute*, 21 Cal. L. Revision Comm'n Reports 91 (1991)	Enacted. 1992 Cal. Stat. ch. 30 *See 22:853*
269. *Miscellaneous Creditors' Remedies*, 21 Cal. L. Revision Comm'n Reports 135 (1991)	Enacted. 1992 Cal. Stat. ch. 283 *See 22:853*
270. *Nonprobate Transfers of Community Property*, 21 Cal. L. Revision Comm'n Reports 163 (1991)	Enacted. 1992 Cal. Stat. ch. 51 *See 22:852*
271. *Notice of Trustees' Fees*, 21 Cal. L. Revision Comm'n Reports 191 (1991)	Enacted. 1992 Cal. Stat. ch. 178 *See 22:852*
272. *Nonprobate Transfer to Trustee Named in Will*, 21 Cal. L. Revision Comm'n Reports 201 (1991)	Enacted. 1992 Cal. Stat. ch. 178 *See 22:852*
273. *Preliminary Distribution Without Court Supervision*, 21 Cal. L. Revision Comm'n Reports 209 (1991)	Enacted. 1992 Cal. Stat. ch. 178 *See 22:852*
274. *Transfer of Conservatorship Property to Trust*, 21 Cal. L. Revision Comm'n Reports 227 (1991)	Enacted. 1992 Cal. Stat. ch. 572 *See 22:853*
275. *Family Code*, 22 Cal. L. Revision Comm'n Reports 1 (1992)	Enacted. 1992 Cal. Stat. chs. 162, 163 *See 22:851*
276. *Standing To Sue for Wrongful Death*, 22 Cal. L. Revision Comm'n Reports 955 (1992)	Enacted. 1992 Cal. Stat. ch. 178 *See 22:852*
277. *1992 General Probate Bill* (miscellaneous provisions), see 22 Cal. L. Revision Comm'n Reports 977 (1990)	Enacted. 1992 Cal. Stat. ch. 178 *See 22:852*
278. *Special Needs Trust for Disabled Minor or Incompetent Person*, 22 Cal. L. Revision Comm'n Reports 989 (1992)	Enacted. 1992 Cal. Stat. ch. 355 *See 22:853*
279. *1994 Family Code*, 23 Cal. L. Revision Comm'n Reports 1, 5 (1993)	Enacted. 1993 Cal. Stat. ch. 219 *See 23:922*
280. *Family Code: Child Custody*, 23 Cal. L. Revision Comm'n Reports 1, 15 (1993)	Enacted. 1993 Cal. Stat. ch. 219 *See 23:922*

Recommendation	Action by Legislature
281. *Family Code: Reorganization of Domestic Violence Provisions*, 23 Cal. L. Revision Comm'n Reports 1, 23 (1993)	Enacted. 1993 Cal. Stat. ch. 219 *See 23:922*
282. *Deposit of Estate Planning Documents with Attorney*, 23 Cal. L. Revision Comm'n Reports 965 (1993)	Enacted. 1993 Cal. Stat. ch. 519 *See 23:923*
283. *Parent and Child Relationship for Intestate Succession*, 23 Cal. L. Revision Comm'n Reports 991 (1993)	Enacted. 1993 Cal. Stat. ch. 529 *See 23:923*
284. *Effect of Joint Tenancy Title on Marital Property*, 23 Cal. L. Revision Comm'n Reports 1013 (1993)	Not enacted. *See 24:568*
285. *Trial Court Unification: Constitutional Revision (SCA 3)*, 24 Cal. L. Revision Comm'n Reports 1 (1994); *Trial Court Unification: Transitional Provisions for SCA 3*, 24 Cal. L. Revision Comm'n Reports 627 (1994)	Not enacted; Commission recommendations adopted in SCA 3 (1993-94), but SCA 3 not approved by Assembly. Commission recommendations largely enacted in SCA 4 (1996 Cal. Stat. res. ch. 36). *See 24:568; 28:707*
286. *Comprehensive Power of Attorney Law*, 24 Cal. L. Revision Comm'n Reports 111 (1994); *1995 Comprehensive Power of Attorney Law*, 24 Cal. L. Revision Comm'n Reports 323 (1994)	Enacted. 1994 Cal. Stat. ch. 307 *See 24:567*
287. *Orders To Show Cause and Temporary Restraining Orders*, 24 Cal. L. Revision Comm'n Reports 603 (1994)	Enacted. 1994 Cal. Stat. ch. 587 *See 24:567*
288. *Family Code Technical Amendments*. See 24 Cal. L. Revision Comm'n Reports 621 (1994); 26 Cal. L. Revision Comm'n Reports 175 (1996)	Enacted. 1994 Cal. Stat. ch. 1269; 1996 Cal. Stat. ch. 1061 *See 24:567; 26:132*
289. *Debtor-Creditor Relations*, 25 Cal. L. Revision Comm'n Reports 1 (1995)	Enacted in part. 1995 Cal. Stat. ch. 196 *See 25:636, 707*
290. *Administrative Adjudication by State Agencies*, 25 Cal. L. Revision Comm'n Reports 55 (1995)	Enacted. 1995 Cal. Stat. ch. 938 *See 25:636, 711*

Recommendation	Action by Legislature
291. *Uniform Prudent Investor Act*, 25 Cal. L. Revision Comm'n Reports 543 (1995). See also 25 Cal. L. Revision Comm'n Reports 673 (1995)	Enacted. 1995 Cal. Stat. ch. 63 *See 25:636, 673*
292. *Power of Attorney Law Technical Amendments*. See 25 Cal. L. Revision Comm'n Reports 709 (1995)	Enacted. 1995 Cal. Stat. ch. 300 *See 25:637*
293. *Statute of Limitations in Trust Matters: Probate Code Section 16460*, 26 Cal. L. Revision Comm'n Reports 1 (1996)	Enacted. 1996 Cal. Stat. ch. 862 *See 26:132*
294. *Inheritance From or Through Child Born Out of Wedlock*, 26 Cal. L. Revision Comm'n Reports 13 (1996)	Enacted. 1996 Cal. Stat. ch. 862 *See 26:132*
295. *Collecting Small Estate Without Administration*, 26 Cal. L. Revision Comm'n Reports 21 (1996)	Enacted. 1996 Cal. Stat. ch. 563 *See 26:132*
296. *Repeal of Civil Code Section 1464: The First Rule in Spencer's Case*, 26 Cal. L. Revision Comm'n Reports 29 (1996)	Enacted. 1998 Cal. Stat. ch. 14 *See 28:706*
297. *Homestead Exemption*, 26 Cal. L. Revision Comm'n Reports 37 (1996)	Not enacted. *See 26:133*
298. *Tolling Statute of Limitations When Defendant Is Out of State*, 26 Cal. L. Revision Comm'n Reports 83 (1996)	Enacted in part (technical amendments). 1997 Cal. Stat. ch. 1012, §§ 13, 14 *See 27:555, 623*
299. *Administrative Adjudication Technical Amendments*, 26 Cal. L. Revision Comm'n Reports 171 (1996)	Enacted. 1996 Cal. Stat. ch. 390 *See 26:132*
300. *Unfair Competition Litigation*, 26 Cal. L. Revision Comm'n Reports 191 (1996)	Not enacted. *See 27:555*
301. *Administrative Adjudication by Quasi-Public Entities*, 26 Cal. L. Revision Comm'n Reports 277 (1996)	Enacted. 1997 Cal. Stat. ch. 220 *See 27:554, 593*
302. *Marketable Title: Enforceability of Land Use Restrictions*, 26 Cal. L. Revision Comm'n Reports 289 (1996)	Enacted in part. 1998 Cal. Stat. ch. 14 *See 28:706*
303. *Attachment by Undersecured Creditors*, 26 Cal. L. Revision Comm'n Reports 307 (1996)	Enacted. 1997 Cal. Stat. ch. 222 *See 27:554*

Recommendation	Action by Legislature
304. *Ethical Standards for Administrative Law Judges*, 26 Cal. L. Revision Comm'n Reports 335 (1996)	Enacted. 1998 Cal. Stat. ch. 95 *See 28:706*
305. *Best Evidence Rule*, 26 Cal. L. Revision Comm'n Reports 369 (1996)	Enacted. 1998 Cal. Stat. ch. 100 *See 28:706*
306. *Mediation Confidentiality*, 26 Cal. L. Revision Comm'n Reports 407 (1996)	Enacted. 1997 Cal. Stat. ch. 772 *See 27:554, 595*
307. *Judicial Review of Agency Action*, 27 Cal. L. Revision Comm'n Reports 1 (1997)	Not enacted. *See 28:708*
308. *Inheritance by Foster Child or Stepchild*, 27 Cal. L. Revision Comm'n Reports 625 (1997)	Not enacted. *See 28:721*
309. *Business Judgment Rule*, 28 Cal. L. Revision Comm'n Reports 1 (1998)	Not enacted. *See 28:708*
310. *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm'n Reports 51 (1998)	Enacted. 1998 Cal. Stat. ch. 931 *See 28:707*
311. *Response to Demand for Production of Documents in Discovery*, 28 Cal. L. Revision Comm'n Reports 561 (1998)	Enacted. 1998 Cal. Stat. ch. 932 *See 28:708*
312. *Uniform TOD Security Registration Act*, 28 Cal. L. Revision Comm'n Reports 577 (1998)	Enacted. 1998 Cal. Stat. ch. 242 *See 28:707*
313. *Effect of Dissolution of Marriage on Nonprobate Transfers*, 28 Cal. L. Revision Comm'n Reports 599 (1998)	Enacted. 2001 Cal. Stat. ch. 417 *See 31:26*
314. *Administrative Rulemaking: Consent Regulations and Other Noncontroversial Regulations*, 28 Cal. L. Revision Comm'n Reports 625 (1998)	Vetoed. *See 29:605*
315. *Administrative Rulemaking: Advisory Interpretations*, 28 Cal. L. Revision Comm'n Reports 657 (1998)	Vetoed. *See 29:605*
316. *Health Care Decisions for Adults Without Decisionmaking Capacity*, 29 Cal. L. Revision Comm'n Reports 1 (1999)	Enacted. 1999 Cal. Stat. ch. 658 *See 29:604*

Recommendation	Action by Legislature
317. *Uniform Principal and Income Act*, 29 Cal. L. Revision Comm'n Reports 245 (1999)	Enacted. 1999 Cal. Stat. ch. 145 *See 29:604*
318. *Admissibility, Discoverability, and Confidentiality of Settlement Negotiations*, 29 Cal. L. Revision Comm'n Reports 345 (1999)	Not enacted. *See 30:676*
319. *Air Resources Technical Revisions*, 29 Cal. L. Revision Comm'n Reports 409 (1999)	Enacted. 2000 Cal. Stat. ch. 890 *See 30:676*
320. *Administrative Rulemaking*, 29 Cal. L. Revision Comm'n Reports 459 (1999)	Enacted. 2000 Cal. Stat. ch. 1060 *See 30:676*
321. *Trial Court Unification Follow-Up*, 29 Cal. L. Revision Comm'n Reports 657 (1999)	Enacted. 1999 Cal. Stat. ch. 344 *See 29:604*
322. *Enforcement of Judgments Under the Family Code: Technical Revisions*, 29 Cal. L. Revision Comm'n Reports 695 (1999)	Enacted. 2000 Cal. Stat. ch. 808 *See 30:675*
323. *Eminent Domain Valuation Evidence: Clarification of Evidence Code Section 822*, 29 Cal. L. Revision Comm'n Reports 733 (1999)	Enacted. 2000 Cal. Stat. ch. 948 *See 30:676*
324. *Alternate Distributee for Unclaimed Distribution*, 29 Cal. L. Revision Comm'n Reports 743 (1999)	Enacted. 2000 Cal. Stat. ch. 17 *See 30:675*
325. *Jurisdictional Classification of Good Faith Improver Claims*, 30 Cal. L. Revision Comm'n Reports 281 (2000)	Enacted. 2000 Cal. Stat. ch. 688 *See 30:675*
326. *Authority to Appoint Receivers*, 30 Cal. L. Revision Comm'n Reports 291 (2000)	Enacted. 2001 Cal. Stat. ch. 44 *See 31:25*
327. *Stay of Mechanic's Lien Enforcement Pending Arbitration*, 30 Cal. L. Revision Comm'n Reports 307 (2000); 31 Cal. L. Revision Comm'n Reports 333 (2002)	2000 Recommendation enacted. 2003 Cal. Stat. ch. 113 *See 33:641*
328. *Trout Affidavit*, 30 Cal. L. Revision Comm'n Reports 319 (2000)	Enacted. 2000 Cal. Stat. ch. 167 *See 30:675*
329. *Expired Pilot Projects*, 30 Cal. L. Revision Comm'n Reports 327 (2000)	Enacted. 2001 Cal. Stat. ch. 115 *See 31:25*

Recommendation	Action by Legislature
330. *Law Library Board of Trustees*, 30 Cal. L. Revision Comm'n Reports 429 (2000)	Enacted. 2001 Cal. Stat. ch. 52 *See 31:25*
331. *Unnecessary Procedural Differences Between Limited and Unlimited Civil Cases*, 30 Cal. L. Revision Comm'n Reports 443 (2000)	Enacted. 2001 Cal. Stat. ch. 812 *See 31:27*
332. *Civil Procedure: Technical Corrections*, 30 Cal. L. Revision Comm'n Reports 479 (2000)	Enacted. 2001 Cal. Stat. ch. 44 *See 31:25*
333. *Improving Access to Rulemaking Information Under the Administrative Procedure Act*, 30 Cal. L. Revision Comm'n Reports 517 (2000)	Enacted. 2000 Cal. Stat. ch. 1060 *See 30:676*
334. *Administrative Rulemaking Cleanup*, 30 Cal. L. Revision Comm'n Reports 533 (2000)	Enacted. 2001 Cal. Stat. ch. 59 *See 31:25*
335. *Rulemaking Under Penal Code Section 5058*, 30 Cal. L. Revision Comm'n Reports 545 (2000)	Enacted. 2001 Cal. Stat. ch. 141 *See 31:26*
336. *Early Disclosure of Valuation Data and Resolution of Issues in Eminent Domain*, 30 Cal. L. Revision Comm'n Reports 567 (2000)	Enacted. 2001 Cal. Stat. ch. 428 *See 31:26*
337. *Estate Planning During Marital Dissolution*, 30 Cal. L. Revision Comm'n Reports 603 (2000)	Enacted. 2001 Cal. Stat. ch. 417 *See 31:26*
338. *Health Care Decisions Law: Miscellaneous Revisions*, 30 Cal. L. Revision Comm'n Reports 621 (2000)	Enacted. 2001 Cal. Stat. ch. 230 *See 31:26*
339. *Evidence of Prejudgment Deposit Appraisal in Eminent Domain*, 31 Cal. L. Revision Comm'n Reports 109 (2001)	Enacted. 2002 Cal. Stat. ch. 293 *See 32:601*
340. *Debtor-Creditor Law: Technical Revisions*, 31 Cal. L. Revision Comm'n Reports 123 (2001)	Enacted. 2002 Cal. Stat. ch. 68 *See 32:600*
341. *Municipal Bankruptcy*, 31 Cal. L. Revision Comm'n Reports 143 (2001)	Enacted. 2002 Cal. Stat. ch. 94 *See 32:600*

Recommendation	Action by Legislature
342. *Rules of Construction for Trusts and Other Instruments*, 31 Cal. L. Revision Comm'n Reports 167 (2001)	Enacted. 2002 Cal. Stat. ch. 138 *See 32:601*
343. *Cases in Which Court Reporter Is Required*, 31 Cal. L. Revision Comm'n Reports 223 (2001)	Enacted. 2002 Cal. Stat. ch. 71 *See 32:600*
344. *Electronic Communications and Evidentiary Privileges*, 31 Cal. L. Revision Comm'n Reports 245 (2001)	Enacted. 2002 Cal. Stat. ch. 72 *See 32:600*
345. *Administrative Rulemaking Refinements*, 31 Cal. L. Revision Comm'n Reports 259 (2001)	Enacted. 2002 Cal. Stat. ch. 389 *See 32:601*
346. *The Double Liability Problem in Home Improvement Contracts*, 31 Cal. L. Revision Comm'n Reports 281 (2001)	Not enacted. *See 32:602*.
347. *Statutes Made Obsolete by Trial Court Restructuring: Part 1*, 32 Cal. L. Revision Comm'n Reports 1 (2002)	Enacted. 2002 Cal. Stat. ch. 784 (statutory revision); 2002 Cal. Stat. res. ch. 88 (proposed constitutional amendment) *See 32:601*
348. *Common Interest Developments: Organization of Davis-Stirling Common Interest Development Act,* 33 Cal. L. Revision Comm'n Reports 1 (2003).	Enacted. 2003 Cal. Stat. ch. 557 *See 33:645*
349. *Common Interest Developments: Association Rulemaking and Decisionmaking,* 33 Cal. L. Revision Comm'n Reports 81 (2003).	Enacted in part. 2003 Cal. Stat. ch. 557 *See 33:645*
350. *Exemptions from Enforcement of Money Judgments: Second Decennial Review,* 33 Cal. L. Revision Comm'n Reports 113 (2003).	Enacted. 2003 Cal. Stat. ch. 379
351. *Probate Code Technical Corrections,* 33 Cal. L. Revision Comm'n Reports 145 (2003).	Enacted. 2003 Cal. Stat. ch. 32
352. *Statutes Made Obsolete by Trial Court Restructuring: Part 2,* 33 Cal. L. Revision Comm'n Reports 169 (2003).	Enacted. 2003 Cal. Stat. ch. 149 *See 33:643*
353. *Obsolete Reporting Requirements,* 33 Cal. L. Revision Comm'n Reports 267 (2003)	Enacted. 2004 Cal. Stat. ch. 193

Recommendation	Action by Legislature
354. *Authority of Court Commissioner,* 33 Cal. L. Revision Comm'n Reports 673 (2003)	Enacted. 2004 Cal. Stat. ch. 49
355. *Alternative Dispute Resolution in Common Interest Developments*, 33 Cal. L. Revision Comm'n Reports 689 (2003)	Enacted. 2004 Cal. Stat. ch. 754 *See 34:81*
356. *Unincorporated Associations*, 33 Cal. L. Revision Comm'n Reports 729 (2003)	Enacted. 2004 Cal. Stat. ch. 178 *See 34:71*
357. *Civil Discovery: Nonsubstantive Reform*, 33 Cal. L. Revision Comm'n Reports 789 (2003)	Enacted. 2004 Cal. Stat. ch. 182 *See 34:75*
358. *Common Interest Development Law: Architectural Review and Decisionmaking*, 34 Cal. L. Revision Comm'n Reports 107 (2004)	Enacted. 2004 Cal. Stat. ch. 346 *See 34:77*
359. *Preemption of CID Architectural Restrictions*, 34 Cal. L. Revision Comm'n Reports 117 (2004)	Enacted. 2005 Cal. Stat. ch. 37 *See 35:30*
360. *Obsolete Cross-References to Former Code of Civil Procedure Section 383*, 34 Cal. L. Revision Comm'n Reports 127 (2004)	Enacted. 2005 Cal. Stat. ch. 37 *See 35:30*
361. *Civil Discovery: Statutory Clarification and Minor Substantive Improvements*, 34 Cal. L. Revision Comm'n Reports 137 (2004)	Enacted. 2005 Cal. Stat. ch. 294 *See 35:77*
362. *Civil Discovery: Correction of Obsolete Cross-References*, 34 Cal. L. Revision Comm'n Reports 161 (2004)	Enacted. 2005 Cal. Stat. ch. 294 *See 35:77*
363. *Ownership of Amounts Withdrawn from Joint Account*, 34 Cal. L. Revision Comm'n Reports 199 (2004)	Enacted. 2012 Cal. Stat. ch. 235 *See 42:361*
364. *Emergency Rulemaking Under the Administrative Procedure Act*, 34 Cal. L. Revision Comm'n Reports 221 (2004)	Enacted. 2006 Cal. Stat. ch. 713 *See 36:31*
365. *Unincorporated Association Governance*, 34 Cal. L. Revision Comm'n Reports 231 (2004)	Enacted. 2005 Cal. Stat. ch. 116 *See 35:73*

Recommendation	Action by Legislature
366. *Nonprofit Association Tort Liability*, 34 Cal. L. Revision Comm'n Reports 257 (2004)	Enacted. 2005 Cal. Stat. ch. 116 *See 35:73*
367. *Waiver of Privilege by Disclosure*, 34 Cal. L. Revision Comm'n Reports 265 (2004)	Not enacted. *See 36:31 n. 62*
368. *Financial Privacy*, 34 Cal. L. Revision Comm'n Reports 401 (2004)	Not enacted. *See 36:31 n. 62*
369. *Common Interest Development Ombudsperson*, 35 Cal. L. Revision Comm'n Reports 123 (2005)	Vetoed. *See 36:31 n. 62*
370. *Enforcement of Judgments Under the Family Code*, 35 Cal. L. Revision Comm'n Reports 161 (2005)	Enacted. 2006 Cal. Stat. ch. 86 *See 36:31*
371. *Oral Argument in Civil Procedure*, 35 Cal. L. Revision Comm'n Reports 181 (2005)	No legislation recommended.
372. *Technical and Minor Substantive Statutory Corrections*, 35 Cal. L. Revision Comm'n Reports 219 (2006)	Enacted. 2007 Cal. Stat. ch. 263 *See 37:28, 37:71*
373. *Time Limits for Discovery in an Unlawful Detainer Case*, 36 Cal. L. Revision Comm'n Reports 271 (2006).	Enacted. 2007 Cal. Stat. ch. 113 *See 37:28*
374. *Statutes Made Obsolete by Trial Court Restructuring: Part 3*, 36 Cal. L. Revision Comm'n Reports 341 (2006).	Enacted. 2007 Cal. Stat. ch. 43 *See 37:29*
375. *Revocable Transfer on Death (TOD) Deed, 36 Cal. L. Revision Comm'n Reports 103 (2006).*	Not enacted. *See 38:28, n. 66*
376. *Deposition in Out-of-State Litigation*, 37 Cal. L. Revision Comm'n Reports 99 (2007).	Enacted. 2008 Cal. Stat. ch. 231 *See 38:29, 38:77*
377. *Trial Court Restructuring: Appellate Jurisdiction of Bail Forfeiture*, 37 Cal. L. Revision Comm'n Reports 149 (2007).	Not enacted. But see 2012 Cal. Stat. ch. 470 (item 395 *infra*) *See 38:28 n. 66*
378. *Statutes Made Obsolete by Trial Court Restructuring: Part 4*, 37 Cal. L. Revision Comm'n Reports 171 (2007).	Enacted. 2008 Cal. Stat. ch. 56 *See 38:29*

Recommendation	Action by Legislature
379. *Trial Court Restructuring: Transfer of Case Based on Lack of Jurisdiction, 37 Cal. L. Revision Comm'n Reports 195 (2007).*	Enacted. 2008 Cal. Stat. ch. 56 *See 38:29*
380. *Technical and Minor Substantive Statutory Corrections: References to Recording Technology*, 37 Cal. L. Revision Comm'n Reports 211 (2007).	Enacted. 2009 Cal. Stat. ch. 88 *See 39:27, 39:71*
381. *Revision of No Contest Clause Statute*, 37 Cal. L. Revision Comm'n Reports 359 (2007).	Enacted. 2008 Cal. Stat. ch. 174 *See 38:29, 38:75*
382. *Miscellaneous Hearsay Exceptions: Present Sense Impression*, 37 Cal. L. Revision Comm'n Reports 407 (2007).	No legislation introduced.
383. *Miscellaneous Hearsay Exceptions: Forfeiture by Wrongdoing*, 37 Cal. L. Revision Comm'n Reports 443 (2007).	No legislation introduced; but see 2010 Cal. Stat. ch. 537, enacting a similar amendment of Evid. C. § 240.
384. *Mechanics Lien Law*, 37 Cal. L. Revision Comm'n Reports 527 (2007).	Enacted. 2010 Cal. Stat. ch. 697 *See 39:27, 40:28, 40:49*
385. *Donative Transfer Restrictions*, 38 Cal. L. Revision Comm'n Reports 107 (2007).	Enacted. 2009 Cal. Stat. ch. 348, 2010 Cal. Stat. ch. 620 *See 39:27, 40:28, 40:45*
386. *Attorney-Client Privilege After Client's Death*, 38 Cal. L. Revision Comm'n Reports 163 (2008).	Enacted. 2009 Cal. Stat. ch. 8 *See 39:27*
387. *Revision of No Contest Clause Statute: Conforming Revisions*, 38 Cal. L. Revision Comm'n Reports 203 (2008).	Enacted. 2009 Cal. Stat. ch. 348 *See 39:27*
388. *Nonsubstantive Reorganization of Deadly Weapon Statutes*, 38 Cal. L. Revision Comm'n Reports 217 (2009).	Enacted. 2010 Cal. Stat. ch. 178, 2010 Cal. Stat. ch. 711 *See 40:27, 40:43, 40:107*
389. *Marketable Record Title: Notice of Option,* 39 Cal. L. Revision Comm'n Reports 99 (2009).	Enacted. 2011 Cal. Stat. ch. 46 *See 41:28*
390. *Statutes Made Obsolete by Trial Court Restructuring: Part 5,* 39 Cal. L. Revision Comm'n Reports 109 (2009).	Enacted. 2010 Cal. Stat. ch. 212 *See 40:28, 42:360*

Recommendation	Action by Legislature
391. *Trial Court Restructuring: Rights and Responsibilities of the County as Compared to the Superior Court (Part 1),* 39 Cal. L. Revision Comm'n Reports 157 (2009).	Enacted. 2012 Cal. Stat. ch. 470 *See 42:360*
392. *Obsolete Cross-References to Former Code of Civil Procedure Section 116.780(d),* 39 Cal. L. Revision Comm'n Reports 223 (2009).	Enacted. 2011 Cal. Stat. ch. 308 *See 41:28*
393. *Statutory Clarification and Simplification of CID Law*, 40 Cal. L. Revision Comm'n Reports 235 (2010).	Enacted. 2012 Cal. Stat. ch. 180 *See 42:360*
394. *Mechanics Lien Law: Clean-Up Legislation*, 41 Cal. L. Revision Comm'n Reports 103 (2011).	Enacted. 2011 Cal. Stat. ch. 44 *See 41:28*
395. *Nonsubstantive Reorganization of Deadly Weapon Statutes: Clean-Up Legislation*, 41 Cal. L. Revision Comm'n Reports 135 (2011).	Enacted. 2011 Cal. Stat. ch. 285; see also 2012 Cal. Stat. ch. 162, §§ 12-14, 203, 207; 2013 Cal. Stat. ch. 76, §§ 145.5, 145.7, 147.3, 147.5, 153.5; 2013 Cal. Stat. ch. 291, § 2 *See 41:28, 43:279*
396. *Trial Court Restructuring: Appellate Jurisdiction of Bail Forfeiture*, 41 Cal. L. Revision Comm'n Reports 265 (2011).	Enacted. 2012 Cal. Stat. ch. 470 *See 42:360*
397. *Statutory Cross-References to "Tort Claims Act,"* 41 Cal. L. Revision Comm'n Reports 285 (2011).	Enacted. 2012 Cal. Stat. ch. 759 *See 42:360-61*
398. *Trial Court Restructuring: Writ Jurisdiction in a Small Claims Case*, 41 Cal. L. Revision Comm'n Reports 315 (2011).	Enacted. 2012 Cal. Stat. ch. 470 *See 42:360*
399. *Commercial and Industrial Common Interest Developments*, 42 Cal. L. Revision Comm'n Reports 1 (2012).	Enacted. 2013 Cal. Stat. ch. 605 *See 43:279-80*
400. *Charter Schools and the Government Claims Act*, 42 Cal. L. Revision Comm'n Reports 225 (2012).	No legislation recommended.

Recommendation	Action by Legislature
401. *Third Decennial Review of Exemptions from Enforcement of Money Judgments*, 42 Cal. L. Revision Comm'n Reports 297 (2012).	Enacted. 2013 Cal. Stat. ch. 15 *See 43:279*
402. *Statutory Clarification and Simplification of CID Law: Clean-Up Legislation*, 42 Cal. L. Revision Comm'n Reports 311 (2012).	Enacted. 2013 Cal. Stat. ch. 183 *See 43:279*
403. *Commercial and Industrial Subdivisions*, 43 Cal. L. Revision Comm'n Reports 1 (2013).	Enacted. 2013 Cal. Stat. ch. 605 *See 43:279-80*
404. *Statutory Clarification and Simplification of CID Law: Further Clean-Up Legislation*, 43 Cal. L. Revision Comm'n Reports 23 (2013).	Enacted. 2013 Cal. Stat. ch. 183 *See 43:279*
405. *Technical and Minor Substantive Statutory Corrections*, 43 Cal. L. Revision Comm'n Reports 35 (2013).	Enacted. 2014 Cal. Stat. ch. 913 *See 44:27*
406. *Deadly Weapons: Minor Clean-Up Issues*, 43 Cal. L. Revision Comm'n Reports 63 (2013).	Enacted. 2014 Cal. Stat. ch. 103 *See 44:27*
407. *Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act*, 43 Cal. L. Revision Comm'n Reports 93 (2013).	Enacted. 2014 Cal. Stat. ch. 553 *See 44:27, 44:77*
408. *Fish and Game Law: Technical Revisions and Minor Substantive Improvements (Part 1)*, 44 Cal. L. Revision Comm'n Reports 115 (2015).	Enacted. 2015 Cal. Stat. ch. 154 *See 44:522; 44:571*
409. *State and Local Agency Access to Electronic Communications: Constitutional and Statutory Requirements*, 44 Cal. L. Revision Comm'n Reports 229 (2015).	No legislation recommended.
410. *Fish and Game Law: Technical Revisions and Minor Substantive Improvements (Part 2)*, 44 Cal. L. Revision Comm'n Reports 349 (2015).	Enacted. 2016 Cal. Stat. ch. 546 *See 44:782*
411. *Trial Court Unification: Publication of Legal Notice*, 44 Cal. L. Revision Comm'n Reports 385 (2015).	Enacted. 2016 Cal. Stat. ch. 703 *See 44:782*

Recommendation	Action by Legislature
412. *Deadly Weapons: Minor Clean-Up Issues (Part 2)*, 44 Cal. L. Revision Comm'n Reports 471 (2015).	Enacted. 2018 Cal. Stat. ch. 185 *See 45:526*
413. *Recognition of Tribal and Foreign Court Money Judgments*, 44 Cal. L. Revision Comm'n Reports 611 (2016).	Enacted. 2017 Cal. Stat. ch. 168 *See 45:310*
414. *Government Interruption of Communication Service*, 44 Cal. L. Revision Comm'n Reports 681 (2016).	Enacted. 2017 Cal. Stat. ch. 322 *See 45:310*
415. *Mechanics Liens in Common Interest Developments,* 44 Cal. L. Revision Comm'n Reports 739 (2016).	Enacted. 2017 Cal. Stat. ch. 144 *See 45:310*
416. *Revocable Transfer on Death Deed: Recordation,* 45 Cal. L. Revision Comm'n Reports 1 (2017).	Enacted. 2018 Cal. Stat. ch. 65 *See 45:526*
417. *Homestead Exemption: Dwelling,* 45 Cal. L. Revision Comm'n Reports 11 (2017).	No legislation introduced.
418. *Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct,* 45 Cal. L. Revision Comm'n Reports 19 (2017).	No legislation introduced.
419. *Disposition of Estate Without Administration: Dollar Amounts,* 45 Cal. L. Revision Comm'n Reports 413 (2018).	Legislation pending.
420. *Disposition of Estate Without Administration: Interest Rate,* 45 Cal. L. Revision Comm'n Reports 445 (2018).	Legislation pending.
421. *Trial Court Restructuring Clean-Up: Obsolete "Constable" References,* 45 Cal. L. Revision Comm'n Reports 467 (2018).	No legislation introduced.

APPENDIX 4

BIOGRAPHIES OF 2018 COMMISSIONERS

Jane McAllister, of Hilmar, serves as the Chairperson of the Commission, and has been a partner with McAllister & McAllister since 1996. She was previously an associate attorney with Damrell, Nelson, Schrimp, Pallios, Pacher & Silva from 1988 to 1996. Commissioner McAllister received a Juris Doctor degree from Humphreys College School of Law.

Victor King, of La Crescenta, serves as the Vice-Chairperson of the Commission, and has been university legal counsel for California State University, Los Angeles since 2002. He was previously a partner with the law firm of Lewis Brisbois Bisgaard and Smith LLP from 2001 to 2002, an associate with the law firm of Lewis Brisbois Bisgaard and Smith LLP from 1999 to 2001, an associate with the law firm of Bottum & Feliton from 1996 to 1999, and an associate with the law firm of Ochoa & Sillas from 1991 to 1995. He was also a trustee of the Glendale Community College District from 1997 to 2009. Commissioner King received a Juris Doctor degree from the University of Michigan Law School.

Diane Boyer-Vine, of Sacramento, has been Legislative Counsel for the State of California since 2002. She was previously a deputy and thereafter a chief deputy in the Legislative Counsel's office from 1988 to 2002, and before that an associate with the law firm of Martorana & Stockman. She also serves as a member of the California Commission on Uniform State Laws. Commissioner Boyer-Vine received a Juris Doctor degree from the University of California, Davis School of Law.

Assembly Member Ed Chau, of Monterey Park, has been a member of the Assembly since 2012. He was previously a general law practitioner in the Law Office of Edwin Chau, a small business owner for over 20 years, an engineer for IBM, and a programmer for Unisys Corporation. He has also previously served as a board member of the Montebello Unified School District, where he acted as Board President three times, and has served as Judge Pro Tem

for the Los Angeles Superior Court. Commissioner Chau received a Juris Doctor degree from Southwestern University.

Tom Hallinan, of Ceres, has been a partner with Churchwell White LLP since 2012. He was previously a partner with Bush, Ackley, Milich & Hallinan from 1994 to 2012, a law clerk at the United States Attorney's Office from 1991 to 1993, and a law clerk at the Judicial Council of California from 1990 to 1992. He has also served on the 38th District Agricultural Association, Stanislaus County Fair Board of Directors. Commissioner Hallinan received a Juris Doctor degree from Lincoln Law School.

Susan Duncan Lee, of Tiburon, has been a deputy attorney general and thereafter a supervising deputy attorney general with the California Department of Justice since 1989. Commissioner Lee received a Juris Doctor degree from the University of California, Hastings College of the Law.

Olga Mack, of Dublin, has been Vice President of Strategy for Quantstamp since 2018. She was previously general counsel for ClearSlide from 2015 to 2017, assistant general counsel at Zoosk Inc. from 2014 to 2015, associate counsel at Visa Inc. from 2011 to 2014, general counsel for Pacific Art League from 2009 to 2011, and an associate with the law firm of Wilson Sonsini Goodrich & Rosati from 2006 to 2009. She is a founder of SunLaw, Women In-House Support Equality, and Women Serve on Boards, and a member of the Women's Club of Silicon Valley and the Association of Corporate Counsel. Commissioner Mack received a Juris Doctor degree from the University of California, Berkeley School of Law.

Crystal Miller-O'Brien, of Los Angeles, has been general counsel for Medical Management Consultants, Inc., since 2006. She was previously an associate with the law firm of Anderson, McPharlin & Conners LLP from 2005 to 2006, an associate with the law firm of Robie & Matthai from 2003 to 2004, an associate with the law firm of Bullivant Houser Bailey PC from 2002 to 2003, and a judicial clerk for the Washington State Supreme Court from 2001 to 2002. She has served as a judge pro tempore of the

Los Angeles Superior Court since 2016. She also served on the board of directors of the Conference of California Bar Associations from 2009 to 2012, and is a member of Corporate Counsel Women of Color, the Black Women Lawyers Association of Los Angeles, and the National Association of Women Business Owners. Commissioner Miller-O'Brien received a Juris Doctor degree and a Joint Certificate in Alternative Dispute Resolution from Willamette University College of Law.

Senator Richard Roth, of Riverside, has been a member of the Senate since 2012. He previously was a managing partner in the law firm of Roth Carney APC, engaged in the practice of labor and employment law with other Riverside-based firms for over 30 years, an attorney with the National Labor Relations Board, an adjunct instructor at the University of California at Riverside's Anderson School of Management and in the University's extension division, a Legal Advisor to the Airlift/Tanker Association, and a Lawyer Representative to the Ninth Circuit Court of Appeals Judicial Conference. He has also served in the United States Air Force, and was a member of the JAG Corps, including service in the Pentagon as Mobilization Assistant to the Judge Advocate General of the U.S. Air Force, retiring with the rank of major general. He has also previously served as Chairman of the Board for the Greater Riverside Chambers of Commerce, president of the Monday Morning Group, vice-chairperson of the Parkview Community Hospital Board, and trustee of the March Field Museum. He is a member of the Raincross Club, the Riverside Community Hospital Advisory Board, the Thomas W. Wathen Foundation Board (Flabob Airport), the Riverside County Bar Association Board of Directors, the Path of Life Ministries Advisory Board, the Air Force Judge Advocate General's School Foundation Board, and the La Sierra University Foundation Board, and a past member of the Riverside Public Library Foundation Board, and the Riverside Art Museum Board. Commissioner Roth received a Juris Doctor degree from Emory University.

APPENDIX 5

COMMISSION PUBLICATIONS

From 1955 until 2009, the California Law Revision Commission's annual reports, recommendations, and studies were published in separate pamphlets, which were later bound in a small edition of hard-cover volumes. Beginning with the Commission's 2009-2010 Annual Report, the printing of separate pamphlets was generally discontinued. As a general rule, only the hard-cover volumes are now published. (The Commission may occasionally publish a separate report for ease of reference.)

All Commission publications may be downloaded from the Commission's website at *www.clrc.ca.gov*.