

September 21, 2012

California Law Revision Commission
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Palo Alto, CA 94303-4739

Re: Study on Mediation Confidentiality

Dear Commission Members and Staff,

Purpose. This letter is intended to assist the Commission in its initial work of deciding the scope of its study and allocation of resources in response to the new topic of mediation confidentiality in the Legislature's regular Commission authorization resolution, ACR 98 of 2012.

History of Referral. This topic was added to ACR 98 by incorporating the language of AB 2025 as amended May 10, 2012. This language in turn was compromise language entirely replacing the original text of AB 2025, which would have added a new exception to mediation confidentiality by amending section 1120 of the Evidence Code. Section 1120 was part of a set of fourteen interrelated Evidence Code sections, 1115-1128, sponsored by the Commission in 1997 to define and govern mediation in California.

These fourteen statutes were adopted unanimously by the Legislature and later upheld unanimously five times in challenges heard by the California Supreme Court. They have been in force unamended since they took effect January 1, 1998. AB 2025 as introduced would have amended them to allow use of mediation communications between attorney and client in later actions against the attorney.

Scope of Referral? A threshold question for the Commission is the scope of its study. ACR 98 begins describing this new topic as "Analysis of the relationship under current law between mediation confidentiality and attorney malpractice and other misconduct...". Given the background of AB 2025, it seems clear that this phrase refers to alleged attorney malpractice and other attorney misconduct, rather than a much wider scope involving possible later allegations of misconduct in mediation against any party, accompanying family member, expert witness, or other participant.

Mediation is now used very widely in California, thanks in part to the protections for candid communication which Evidence Code sections 1115-1128 together provide. If the Commission were to open up the study to cover the much larger scope of whether mediation communications should be admissible in later actions against any and all participants, it would almost certainly require the allocation of a great deal more resources and time. The Commission might be well served to decide this scope question as early as possible so as not to unnecessarily alarm and draw in all those

who currently use, conduct, or benefit from mediations conducted under the current statutory protections.

Resources - Opposition to Amendment. The standard legislative history record for AB 2025 could be misleading. For instance, the Bill Analysis states there was no registered support or opposition to AB 2025 as amended to refer this matter to the Commission. Respectfully submitted for the Commission's study are copies of all statements of support and opposition to the original introduced version of AB 2025 in the Assembly Judiciary Committee files (as supplied by the Committee Secretary, and which includes the bound sampling submitted).

There was a single letter of support from one individual. There were more than sixty statements of opposition to the original bill submitted to the Legislature. These were from the California Employment Lawyers Association, California Lawyers for the Arts, the Southern California Mediation Association, the Association for Dispute Resolution of Northern California, and dozens of lawyers, court personnel, mediators, mediation program directors, and others.

In allocating resources for this study, the Commission could reasonably expect there to be significant opposition to amending the current statutes. Since their enactment all mediation participants, including attorneys, have been free to speak candidly in mediation without fear that their words might be used against them in any later non-criminal proceeding. In the submitted statements, those involved in mediation affirmed that this has been centrally important to the effectiveness of mediation. Echoed in many of the submitted statements, my own view was that proponents had not adequately considered the complexity of this area and the consequences of their proposed amendment.

Evidence? Initial Study. This current system has been operating for fourteen years. Has attorney misconduct now become a significantly large problem in the real world that revision of these statutes is in the public interest?

The Commission might also be well served by an initial investigation. Is there evidence that actual attorney misconduct in California mediations happens significantly often where a remedy is unavailable because of the current statutes? If so, what is the nature of the actual problem? Does it happen often enough that this harm outweighs the public benefit of all participants knowing they're able to talk off the record in mediation? John Blackman's March 15 letter, Richard Collier's March 30 letter, and the April 11 letter from the California Employment Lawyers Association (enclosed) are representative of those with significant relevant experience who believe the problem is very small and the public benefit that will be lost is very large.

Offer. I've been regularly leading discussions of the public policy questions involved in mediation confidentiality for over twenty years. I served as an expert advisor to the Commission in its study and drafting of the current mediation statutes. I was actively involved in nearly all of the drafting meetings for the Uniform Mediation Act. Enclosed is

a 1996 letter from the Commission's Executive Director on my work with the Commission. He states in part: Your assistance in this project has been critical. You have brought problems to our attention, suggested solutions, provided background on issues, and analyzed proposals. You have always been fair and even-handed in this effort.

I hope to again be of assistance to the Commission in its study of this topic.

Respectfully submitted,

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Examples of letters that have been sent to the Commission:

<http://www.clrc.ca.gov/pub/2013/MM13-47s2.pdf>