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California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-4739

**Re: Tentative Recommendation Regarding the Relationship between
Mediation Confidentiality and Attorney Malpractice and Other
Misconduct**

Dear Members of the Law Revision Commission:

I am writing to you on behalf of the Civil and Small Claims Advisory Committee of the Judicial Council of California. The committee membership includes justices, judges, court administrators, lawyers whose primary area of practice is civil law, and persons knowledgeable about court-connected alternative dispute resolution programs for civil and small claims cases. The committee is charged with identifying issues and concerns affecting court administration in civil and small claims proceedings and making recommendations to the Judicial Council for improving the administration of justice in these proceedings. With the Council's permission, the committee is providing comments on the Commission's tentative recommendation regarding the relationship between mediation confidentiality and attorney malpractice and other misconduct.

The committee appreciates all of the work that the Commission has put into the development of this tentative recommendation, including the many staff memoranda and Commission meetings, the efforts to gather and assess information about the law in other states and empirical information relevant to mediation confidentiality and attorney misconduct in mediation, and the attempt to balance the competing policy interests relating to maintaining confidentiality vs. permitting disclosure of mediation information to prove attorney misconduct. In the view of the committee, however, the potential risks of making the statutory changes tentatively recommended by the Commission outweigh the potential benefits.

In the experience of committee members, California's current statutory scheme relating to mediation confidentiality, which the Commission helped craft 20 years ago, provides the benefits articulated on pages 9-16 of the Commission's tentative recommendation: it promotes candid discussion in mediation which, in turn, promotes the resolution of disputes in mediation, and resolution of disputes in this way is beneficial to disputants, the court system, and society. Focusing in narrowly on the benefits to the court system, the committee believes that resolution of civil cases, or disputes that would otherwise become civil cases, through mediation, whether in court-connected mediation programs, community mediation programs, or private mediation, reduces the civil cases pending in the courts and frees up court resources to focus on those cases that are in most need of court attention.

The Committee is concerned that the statutory changes tentatively recommended by the Commission could discourage both participation and candid discussion in mediation, which could, in turn, reduce the number of disputes resolved through mediation. These statutory changes would permit mediation communications to be disclosed in the three additional types of subsequent proceedings identified in the recommendation. Although mediators would still generally be incompetent to testify in most proceedings, other mediation participants would not be protected from being called to testify in the proceedings identified in the recommendation. Thus disputants contemplating participating in mediation will have less assurance in advance that their communications will be confidential and more risk that they will be called to testify in a subsequent proceeding as a result of participating in mediation. They will also not necessarily be in control of what happens; another disputant or mediation participant could trigger the disclosure or requirement to testify by the filing of a malpractice action or State Bar complaint against his or her attorney. The committee is concerned that this uncertainty and risk could make some disputants opt not to participate in mediation. The committee is also concerned that this uncertainty and risk could make some disputants who do participate in mediation less willing open and candid during the process.

The Committee is also concerned that the tentatively recommended statutory changes could discourage individuals from serving as mediators, particularly in court-connected mediation programs. The Committee appreciates the Commission's effort to protect mediators from being called to testify by including language in proposed Evidence Code Section 1120.5(e) making clear that a mediator is incompetent either to testify or to produce documents. The Committee is concerned, however, that despite this effort, the creation of the new exception to mediation confidentiality may result in more mediators being subpoenaed. Currently, the confidentiality of mediation communications serves as a secondary defense against any effort to elicit mediator testimony about what happened at mediation; not only is the mediator incompetent to testify under Evidence Code section 703.5, but sections 1115-1128 prevent a mediator from revealing or reporting on what happened. The Commission's tentative recommendation would remove this