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**APPROVED** MINUTES OF MEETING  
CALIFORNIA LAW REVISION COMMISSION  
APRIL 13, 2017  
OAKLAND

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A meeting of the California Law Revision Commission was held in Oakland on April 13, 2017.

**Commission:**

*Present:* Susan Duncan Lee, Chairperson  
Thomas Hallinan, Vice Chairperson  
Diane F. Boyer-Vine, Legislative Counsel  
Damian Capozzola  
Victor King  
Jane McAllister  
Crystal Miller-O'Brien

*Absent:* Assembly Member Ed Chau  
Senator Richard D. Roth  
Taras Kihiczak

**Staff:** Brian Hebert, Executive Director  
Barbara Gaal, Chief Deputy Counsel  
Kristin Burford, Staff Counsel  
Steve Cohen, Staff Counsel  
Victoria Matias, Secretary  
Greg Gonzalez, Law Student Extern  
Elisa Shieh, Law Student Extern

**Other Persons:**

Heather Anderson, Judicial Council of California  
Robert Flack  
Ron Kelly  
Hon. David W. Long (ret.), California Judges Association  
Phyllis G. Pollack, PGP Mediation  
Lorraine Walsh, State Bar Mandatory Fee Arbitration Committee  
John S. Warnlof, California Dispute Resolution Council





1 **Format of Tentative Recommendation**

2 The three-part format used in the draft attached to Memorandum 2017-19 is  
3 acceptable.

4 **Placement of *Lee v. Hanley* Quotations in Proposed Comment**

5 The revisions of the Comment to proposed Evidence Code Section 1120.5 that  
6 are shown at the top of page 3 of Memorandum 2017-20 (inserting quotations  
7 from *Lee v. Hanley*, 61 Cal. 4th 1225, 34 P.3d 334, 191 Cal. Rptr. 3d 536 (2015)) are  
8 acceptable.

9 **Types of Disputes in Which the New Exception Would Apply**

10 Proposed Evidence Code Section 1120.5 should be revised as follows:

11 **Evid. Code § 1120.5 (added). Alleged misconduct of lawyer when**  
12 **representing client in mediation context**

13 SEC. \_\_\_\_. Section 1120.5 is added to the Evidence Code, to read:

14 1120.5. (a) A communication or a writing that is made or  
15 prepared for the purpose of, or in the course of, or pursuant to, a  
16 mediation or a mediation consultation, is not made inadmissible, or  
17 protected from disclosure, by provisions of this chapter if both of  
18 the following requirements are satisfied:

19 (1) The evidence is relevant to prove or disprove an allegation  
20 that a lawyer breached a professional requirement when  
21 representing a client in the context of a mediation or a mediation  
22 consultation.

23 (2) The evidence is sought or proffered in connection with, and  
24 is used solely in resolving, one of the following:

25 (A) A complaint against the lawyer under the State Bar Act,  
26 Chapter 4 (commencing with Section 6000) of the Business and  
27 Professions Code, or a rule or regulation promulgated pursuant to  
28 the State Bar Act.

29 (B) A cause of action for damages against the lawyer based  
30 upon alleged malpractice.

31 (C) A dispute between a lawyer and client concerning fees,  
32 costs, or both including a proceeding under the State Bar Act,  
33 Chapter 4, Article 13-Arbitration of Attorneys' Fees, Business &  
34 Professions Code Sections 6200-6206.

35 (b) ....

36 The staff should make conforming revisions in the corresponding Comment and  
37 the preliminary part.

38 (*Commissioners King, McAllister, and Miller-O'Brien voted against this decision.*)

1 **Notice Provision**

2 The notice provision in proposed Evidence Code Section 1120.5 (new  
3 subdivision (d)) and the corresponding portion of the Comment (shown on page  
4 8 of Memorandum 2017-19) are acceptable.

5 **Mediator Testimony and Other Requests for Evidence From a Mediator**

6 Proposed Evidence Code Section 1120.5 should be revised to expressly state  
7 how it applies to a request for evidence from a mediator.

8 Under that section, a request for written evidence from a mediator should be  
9 treated the same way as a request for oral testimony from a mediator. Both types  
10 of requests should be subject to the same general rule and exceptions as in  
11 Evidence Code Section 703.5.

12 Proposed Section 1120.5 should expressly state that it does not alter or affect  
13 Section 703.5.

14 The staff should draft language to implement this approach and present it for  
15 the Commission's approval at the June meeting.

16 In a cover memorandum, the staff should discuss how to handle an attempt  
17 to obtain evidence of a mediator's communications from a source other than the  
18 mediator, such as another mediation participant or an Internet service provider.

19 **Ron Kelly's Proposed Warning**

20 The draft tentative recommendation should not include a warning  
21 requirement like the one proposed by Ron Kelly (shown on page 11 of  
22 Memorandum 2017-19).

23 The staff should revise the preliminary part and Comment to proposed  
24 Evidence Code Section 1120.5 to emphasize that the discovery standard under  
25 that provision is stricter than the usual standard for obtaining discovery.

26 **STUDY L-3032.1 — REVOCABLE TRANSFER ON DEATH DEED: FOLLOW-UP STUDY**

27 The Commission considered Memorandum 2017-12 and its First and Second  
28 Supplements, presenting a draft tentative recommendation addressing the  
29 statutory requirement that a revocable transfer on death deed be recorded, in  
30 order to be valid. The Commission approved the draft as its final  
31 recommendation, in order to facilitate the possible introduction of implementing  
32 legislation this year. The staff will exercise discretion to make minor technical

