

# **AGENDA ITEM**

**162 MARCH 2017**

**DATE:** February 15, 2017

**TO:** Members, Stakeholders, Access to Justice, and Appointments Committee  
Members, Board of Trustees

**FROM:** Douglass Hull, Director

**SUBJECT:** Committee on Mandatory Fee Arbitration Proposed letter to California Law  
Revision Commission Regarding Mediation Confidentiality

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## **EXECUTIVE SUMMARY**

The Committee on Mandatory Fee Arbitration seeks authorization to submit a comment to the California Law Revision Commission on the issue of mediation confidentiality.

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## **BACKGROUND**

The Committee on Mandatory Fee Arbitration is charged with reviewing, evaluating and proposing legislation affecting the state wide fee arbitration program. (Board Book, Section 5, Tab 5.1, Article 4, Section 14(d))

The California Law Revision Commission is an independent state agency created by statute. It assists the Legislature and Governor by examining California law and recommending needed reforms. The Commission is given responsibility for the continuing substantive review of California statutory and decisional law. The Commission studies the law in order to discover defects and anachronisms and recommends legislation to make needed reforms.

In 2012, the Legislature directed the Commission to analyze:

“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, as well as any other issues the commission deems relevant.”

The Commission has completed the background work (Study K-402) and is seeking input on the tentative recommendation (found at: <http://www.clrc.ca.gov/pub/2016/MM16-58.pdf>). The recommendation includes the following addition to the Evidence Code:

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

SEC. \_\_\_\_\_. 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 both of the following requirements are satisfied:

- (1) The evidence is relevant to prove or disprove an allegation that a lawyer breached a professional requirement 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 solely in resolving, one of the following:
  - (A) A complaint against the lawyer under the State Bar Act, Chapter 4 (commencing with Section 6000) 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.

At page 25 of the memorandum, the CLRC seeks input related to attorney-client fee disputes:

How the Commission resolves the issues relating to “legal malpractice” (discussed above) might shed light on how to handle claims involving attorney client fee disputes. The staff therefore suggests that the Commission **resolve the “legal malpractice” issues first, and then have the staff provide additional analysis regarding attorney-client fee disputes, as appears appropriate.** In making that suggestion, the staff wants to make clear that **comments on the proper treatment of attorney-client fee disputes would be much-appreciated at any time.**

(emphasis in original)

## DISCUSSION

At meetings on December 16, 2016 and January 27, 2017, the Committee on Mandatory Fee Arbitration determined that a comment should be made to address the proposal. During the discussion of the submission of comment, the CMFA determined that any comment should not speak to the merits of overall proposal, but to recommend that if the CLRC does carve out exceptions to mediation confidentiality that would apply in State Bar disciplinary or civil malpractice cases, then the same exception should apply to attorney-client fee disputes. The comment, drafted and approved by the CMFA, is attached (Attachment A).

The CMFA voted 13-1 in favor of submitting the attached letter and now seeks Board authorization to submit the attached comment to the Law Revision Commission before its next meeting April 13, 2017.

**FISCAL/PERSONNEL IMPACT**

None.

**RULE AMENDMENTS**

None.

**BOARD BOOK IMPACT**

None.

**BOARD GOALS & OBJECTIVES**

**BOARD COMMITTEE RECOMMENDATIONS**

If this committee agrees with the request of the CMFA, it is requested that the Stakeholders, Access to Justice, and Appointments Committee recommends that the Board of Trustees approve the following resolution:

**RESOLVED**, that the Board of Trustees approves submission of the attached letter from the Committee on Mandatory Fee Arbitration to the California Law Revision Commission as a response to its request for input on Study K-402.

**ATTACHMENT(S) LIST**

- A. Letter to California Law Revision Commission from the Committee on Mandatory Fee Arbitration