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To: Chief Justice Cantil-Sakauye and Associate Justices
Supreme Court of California
350 McAllister St., Rm 1295
San Francisco, CA 94102

Re: **S255111, *In re Marriage of Anka & Yeager***
Opposition to Request for Depublication

Date: April 15, 2019

By: Christopher C. Melcher, State Bar No. 170547
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Walzer Melcher LLP ("WM") opposes the request to depublish *In re Marriage of Anka & Yeager* (2019) 31 Cal.App.5th 1115 (the "Opinion"). The Opinion correctly holds that an attorney may be sanctioned for disclosing confidential information in a child custody evaluation report when the "disclosures were made maliciously, recklessly, without substantial justification, and were not in the best interest of the child." (Opinion, *supra*, at p. 1118.)

1. Requestor's interest.

WM is a law firm that practices family law. Its attorneys have served in leadership positions of family law organizations such as the American Academy of Matrimonial Lawyers (AAML), the Association of Certified Family Law Specialists (ACFLS), and the Family Law Section Executive Committee of the California Lawyers Association (FLEXCOM). WM represents no party to this action and has no financial or other stake in the outcome.

2. The Opinion correctly states that sanctions may result from the unwarranted disclosure of confidential information in a child custody evaluation report.

The depublication request states the Opinion "sent shockwaves through the family law bar and bench that continue to reverberate." (Ltr. by Leslie Ellen Shear on behalf of Appellant Lisa Helfend Meyer dtd. 3/5/19, p. 1 ("Depublication Request").) Ms. Meyer claims that reaction occurred because no one could have anticipated sanctions for disclosing the *contents* of a confidential child custody report because the "statutes [protecting confidentiality] have been almost universally construed to refer only to the *written report*." (*Id*., at p. 3, emphasis added.) Ms. Meyer made the same argument below in the Court of Appeal:

> Meyer claims [Family Code] section 3111 protects only the written report itself, not the confidential information contained in the report. Suffice it to say, the argument is absurd. [¶]

> Meyer argues that her questions disclosed no confidential information. It is true that Yeager evaded answering the questions by stating he did not remember. But the nature of Meyer's questions implicitly disclosed confidential information. One would have to be unduly naïve not to know the information contained in the report.

(Opinion, *supra*, at p. 1120.)

As the Court of Appeal explained, "Meyer attempts to parse [Family Code section 3025.5] into meaninglessness" by insisting that sanctions cannot be imposed for revealing the contents of a confidential report. (Opinion, *supra*, at p. 1119.) When the Opinion rejected Ms. Meyer's claim, it was not an earth-shattering conclusion.

3. Depublication will solve none of the problems identified by Ms. Meyer and the other Objectors.

Those who have joined the Depublication Request argue that maintaining the confidentiality of custody evaluation reports will be too difficult to implement, result in higher fees to litigants, and expose every family law attorney and litigant to sanctions for accidental disclosure. (See, Ltr. by Judge Robert Schnider (Ret.) dtd. 4/10/19; Ltr. by John R. Schilling dtd. 4/11/19.) But the burden of compliance will exist even if the Opinion is depublished. That is true because the Opinion did not make new law—it merely stated the law.

The purpose of Family Code section 3025.5 is "to protect the privacy of the child and to encourage candor on the part of those participating in the evaluation." (Opinion, *supra,* at p. 1119.) The Opinion should remain published because it will heighten awareness of the need to maintain confidentiality of child custody evaluation reports. That serves the purpose of the statute. The concerns about the effect of the Opinion are overblown as explained below.

A. Accidental disclosure will not result in sanctions.

The law requires proof of an "unwarranted" disclosure which is "done either recklessly or maliciously, and is not in the best interests of the child." (Fam. Code, § 3111, subd. (f).) Attorneys and litigants should not fear the Opinion because there was a culpable violation of the confidentiality statutes by Ms. Meyer, not an accidental one, that resulted in sanctions.

Substantial evidence supports the trial court's finding of an unwarranted disclosure by Ms. Meyer. (Opinion, *supra*, at pp. 1120-1122.)

> Meyer argues the evidence does not support a finding of malice or recklessness. But Meyer did not inadvertently disclose information in the report. She intentionally asked numerous questions that disclosed the information. Her actions went beyond reckless; they were intentional. [¶] Meyer argues her conduct did not negatively impact the child's best interest. But Meyer's questions disclosed highly personal information about the child and her family. That supports the trial court's finding that the disclosure was not in the best interest of the child. Moreover, Meyer fails to explain how disclosing the information in the Anka action is in the best interest of Yeager's child. [¶¶] As to culpability, Meyer willfully disclosed information that she knew was confidential and protected by statute. The harm is not only to Yeager and his child, it is also to the entire process of child custody evaluation.

(*Ibid.*)

Nevertheless, Ms. Meyer tells this Court that her "conduct could not possibly have been 'reckless' or an 'intentional' violation" of the confidentiality statutes. (Depublication Request, *supra*, p. 3.)

B. Family Code sections 3025.5 and 3111 only protect confidential information in an evaluation report.

Sanctions are not available under the Opinion for revealing *any* details in a child custody evaluation report, as implied by Ms. Meyer. (Depublication Request, p. 5.) The statutes protect only confidential information. Nothing in the Opinion suggests that sanctions could be imposed for disclosure of non-confidential information in an evaluation report.

The Opinion states that Ms. Meyer disclosed highly-sensitive and private information in the evaluation report:

> Meyer took Yeager's deposition in the Anka action. She asked Yeager numerous questions without objection about what he told Dr. Russ during the custody evaluation; what his child told Russ during the custody evaluation; and what Russ found and concluded. [Fn. 4: We need not add to the invasion of privacy by repeating the questions verbatim.] [¶¶] Statements made to the evaluator and the evaluator's conclusions about parental abuse and the nature of the relationship between parent and child are well within the protection of the statute. The evaluator's conclusions about parental abuse and the relationship between parent and child are at the very heart of every child custody evaluation.

(Opinion, *supra*, at pp. 1118-1119.)

C. Courts exercise discretion in determining whether to sanction.

Even when an unwarranted disclosure has been shown, courts may deny sanctions. In *Herriott v. Herriott* (2019) 33 Cal.App.5th 212 [244 Cal.Rptr.3d 755], an unwarranted disclosure of an evaluation report occurred but the court did not sanction the litigant. The court in *Herriott* contrasted its decision with

the Opinion, and explained why sanctions were not issued against the litigant in *Herriott*:

> Although an unwarranted disclosure of a written confidential report has been made, we do not impose sanctions pursuant to Family Code section 3111 against Alicja as it would 'impose[ ] an unreasonable financial burden' on her….

(*Herriott, supra,* 244 Cal.Rptr.3d at p. 768.)

Ms. Meyer made no claim that the sanctions would impose an undue hardship. "Evidence of her ability to pay is entirely within her control. But she made no effort to introduce such evidence." (Opinion, *supra*, p. 1122.)

The holdings in the Opinion and *Herriott* illustrate how judicial discretion is properly exercised in determining whether to sanction. The claim that family law attorneys and litigants face an increased risk of being sanctioned based on the Opinion is unfounded.

4. Ms. Meyer's Depublication Request is contradicted by her public statements about the sanctions.

Undeterred by the trial court's findings and sanctions, Ms. Meyer published an article claiming the trial judge sanctioned her and her client because the judge was biased against them as women.[1] Ms. Meyer wrote:

> I was recently involved in a very high-conflict custody case in Ventura County. I was representing a mother who had not seen her son for two years. … A Judge in the related case involving the daughter sanctioned my client and me personally $50,000…. [¶] On the day of oral argument, I sensed that the Judge had

[1] Meyer, *Justice is Blind, But Not Always in a Good Way* (4/27/17) HuffPost <https://www.huffpost.com/entry/justice-is-blind-but-not-always-in-a-good-way_b_59024432e4b03b105b44b6c2> (as of 4/12/19).

> already made up his mind as he perfunctorily went through the motions of listening to oral argument with little interest and with no vigorous debate. I had appeared before this Judge just once before, however I could not help but feel that he was prejudiced towards both me and my client in part because we were both strong and outspoken women and were fighting against all odds for her to regain custody of her children. [¶] *I am in the process of appealing the award as I firmly believe that this would not have happened either to me or my client if we were men*. … [¶¶] Justice should be blind, but not blinded. Women should be treated with respect whether they are in the work force or stay-at-home Moms. … There is still sexism in the legal profession and it must change. … It is never too late to open your eyes.

(Meyer, *Justice is Blind, But Not Always in a Good Way* (4/27/17) HuffPost, emphasis added.)

After publicly accusing the trial judge of gender bias in her article, Ms. Meyer decided not to test that allegation in court. The bias claim was not raised at the trial level, the appellate court, or in her Depublication Request. Yet, Ms. Meyer allows her attack on the trial judge's integrity to remain published. WM, therefore, writes in defense of the trial judge, who cannot respond to the allegations. (See, cmt. to Cal. Rules Prof. Conduct, rule 8.2 ["To maintain the fair and independent administration of justice, lawyers should defend judges and courts unjustly criticized"].)

The reason Ms. Meyer wants the Opinion depublished is to clear her name—not to fix family law. She is content, though, with leaving her article published on the Internet to dishonor the judge.

When an attorney is sanctioned for misconduct, some will make amends while others double down. Nowhere in the Depublication Request does Ms. Meyer express remorse for her conduct or the harm it caused. Instead, Ms.

Meyer doubled-down by making an unjustified criticism of the trial judge. She now asks this Court for relief on the pretext it will help other family law attorneys and litigants from being arbitrarily sanctioned.

5. Conclusion.

The Opinion should remained published because it correctly interprets the law and affirms a court's discretion to impose sanctions for an unwarranted disclosure of confidential information in a child custody evaluation report.

Dated: April 15, 2019 WALZER MELCHER LLP

/s/
By: Christopher C. Melcher

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