EXHIBIT 2.

Study K-401 February 16, 1995

Memorandum 96-17

Mediation Confidentiality

INTRODUCTION

Evidence Code Section 1152.5, enacted in 1985 on recommendation of the Law Revision Commission, protects the confidentiality of mediations. Its purpose is to "encourage this alternative to judicial determination of the action." Evid. Code § 1152.5 Comment (1985). The theory is that uninhibited communication is essential to effective mediation, yet cannot occur without assurance of confidentiality. *See, e.g.*, Ryan v. Garcia, 27 Cal. App. 4th 1006, 1010, 33 Cal. Rptr. 2d 158, 160-61 (1994).

Government Code Section 11420.30 (operative July 1, 1997) is a similar provision for administrative adjudication, which was part of the Commission's administrative adjudication bill (SB 523). In negotiations over SB 523, mediator Ron Kelly and others raised some concerns regarding the provision. These were not fully resolved in the legislative process, but the possibility of follow-up legislation was discussed.

At its November 1995 meeting, the Commission decided to try to work the topic of mediation confidentiality into its agenda on a low priority basis. The staff has since had a number of discussions with Mr. Kelly regarding the topic. He has great familiarity with the issues, having been very active in connection with several recent legislative reforms in the area. He has been extremely helpful, providing much useful information and many valuable suggestions.

Based on Mr. Kelly's input, as well as independent research and analysis, including a partial survey of mediation confidentiality provisions in other states, the staff has come up with a number of possible reforms in the area for the Commission to consider. These are discussed below, following an explanation of the existing statutes governing mediation confidentiality. Although Mr. Kelly brought many of the points to the staff's attention, the proposals are staff proposals, not necessarily supported by Mr. Kelly (except as otherwise noted).

Evidence Code Section 1152.5

Evidence Code Section 1152.5 is the main but not the only provision protecting mediation confidentiality. It currently provides:

> **§ 1152.5. Communications during mediation proceedings**
>
> 1152.5. (a) When persons agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving a dispute in whole or in part:
>
> (1) Except as otherwise provided in this section, evidence of anything said or of any admission made in the course of the mediation is not admissible in evidence or subject to discovery, and disclosure of this evidence shall not be compelled, in any civil action or proceeding in which, pursuant to law, testimony can be compelled to be given.
>
> (2) Except as otherwise provided in this section, unless the document otherwise provides, no document prepared for the purpose of, or in the course of, or pursuant to, the mediation, or copy thereof, is admissible in evidence or subject to discovery, and disclosure of such a document shall not be compelled, in any civil action or proceeding in which, pursuant to law, testimony can be compelled to be given.
>
> (3) When persons agree to conduct or participate in mediation for the sole purpose of compromising, settling, or resolving a dispute, in whole or in part, all communications, negotiations, or settlement discussions by and between participants or mediators in the mediation shall remain confidential.
>
> (4) All or part of a communication or document which may be otherwise privileged or confidential may be disclosed if all parties who conduct or otherwise participate in a mediation so consent.
>
> (5) A written settlement agreement, or part thereof, is admissible to show fraud, duress, or illegality if relevant to an issue in dispute.
>
> (6) Evidence otherwise admissible or subject to discovery outside of mediation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation.
>
> (b) This section does not apply where the admissibility of the evidence is governed by Section 1818 or 3177 of the Family Code.
>
> (c) Nothing in this section makes admissible evidence that is inadmissible under Section 1152 or any other statutory provision, including, but not limited to, the sections listed in subdivision (d). Nothing in this section limits the confidentiality provided pursuant to Section 65 of the Labor Code.

(d) If the testimony of a mediator is sought to be compelled in any action or proceeding as to anything said or any admission made in the course of the mediation that is inadmissible and not subject to disclosure under this section, the court shall award reasonable attorney's fees and costs to the mediator against the person or persons seeking that testimony.

(e) Paragraph (2) of subdivision (a) does not limit the effect of an agreement not to take a default in a pending civil action.

Notably, Section 1152.5 does not define the term "mediation." This was deliberate. When the statute was originally enacted, mediation was just beginning to gain acceptance. The Commission considered it important to allow different techniques to flourish, without legislative constraints. Thus, instead of imposing a statutory definition of mediation, the Commission crafted Section 1152.5 to allow parties to adopt their own definition for purposes of their dispute. This was done by making Section 1152.5 applicable only where the parties executed a written agreement reciting the statutory text and stating that the statute governed their proceeding. *See Recommendation Relating to Protection of Mediation Communications*, 18 Cal. L. Revision Comm'n Reports 241, 245 n.1, 246 n.4 (1986); 1985 Cal. Stat. ch. 731, § 1 (reproduced at Exhibit p. 1).

In 1993, Section 1152.5 was amended in a number of ways, including elimination of the requirement of a written agreement. *See* 1993 Cal. Stat. ch. 1261 (SB 401), § 6. Reportedly, some groups considered the requirement unduly onerous, particularly in disputes involving numerous unsophisticated persons. Although the amendment eliminated the requirement of a written agreement, it left the term "mediation" undefined. To date, the 1993 amendment of Section 1152.5 by SB 401 remains the only significant amendment of the statute, although there have been other technical changes.

Other Protections

Section 1152.5 and its counterpart for administrative adjudication (Government Code Section 11420.30) are not the only protection for mediation communications. Other significant statutes pertaining specifically to mediation confidentiality include Evidence Code Sections 703.5 and 1152.6. *See also* Bus. & Prof. Code §§ 467.4, 467.5; Gov't Code § 11420.20, 66032; Ins. Code § 10089.80.

• *Evidence Code Section 703.5.* As amended by SB 401 in 1993, Section 703.5 makes mediators incompetent to testify "in any subsequent civil proceeding"

regarding any mediation they conduct. The statute does not apply to mediations under the Family Code. Additionally, it excepts statements and conduct that "could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure." Prior to the 1993 amendment extending Section 703.5 to mediators, the statute applied only to arbitrators and persons presiding at judicial and quasi-judicial proceedings.

• *Evidence Code Section 1152.6.* Section 1152.6 was just enacted in 1995, primarily due to Mr. Kelly's efforts. It provides in significant part: "A mediator may not file, and a court may not consider, any declaration or finding of any kind by the mediator, other than a required statement of agreement or nonagreement, unless all parties in the mediation expressly agree otherwise in writing prior to commencement of the mediation." Section 1152.6 is intended to prevent a mediator from coercing a party to settle by threatening to inform the assigned judge that the party is being unreasonable or is pressing meritless arguments. Section 1152.5 arguably fails to accomplish this, because there are courts with local rules stating that parties participating in mediation are deemed to have consented in advance to waive Section 1152.5 with regard to having the mediator submit an evaluation to the court. See Contra Costa Superior Court, Local Rule 207 (1996). For further background on Section 1152.6, see Mr. Kelly's short descriptive article, attached as Exhibit pp. 2-3.

• *Evidence Code Section 1152.* Mediation communications may also receive protection under Evidence Code Section 1152, which makes offers to compromise inadmissible to establish liability. Section 1152.5 expressly provides that it does not make admissible evidence that is inadmissible under Section 1152 or another statute. "[E]ven though a communication is not made inadmissible by Section 1152.5, the communication is protected if it is protected under Section 1152." Evid. Code § 1152.5 Comment (1985).

• *Constitutional right to privacy.* California's constitutional right to privacy (Cal. Const. art. I, § 1) is a further source of protection for mediation communications. Where communications are "tendered under a guaranty of confidentiality, they are thus manifestly within the Constitution's protected area of privacy." Garstang v. Superior Court, 46 Cal. Rptr. 2d 84, 88 (1995). The right

to privacy is not absolute, but must be balanced against competing interests. *Id.* at 87 (constitutional right of privacy protected communications made during mediation sessions before an ombudsperson).

POSSIBLE REFORMS OF SECTION 1152.5

Mr. Kelly initially expressed strong reservations about the possibility of making changes in Section 1152.5. In his view, the statute already provides fairly strong protection for mediation communications. He is concerned that reform proposals may lead the Legislature to weaken the statute rather than improve it. His reluctance also stems from dissatisfaction with the legislative process that culminated in the 1993 amendment of Section 1152.5.

Nonetheless, Mr. Kelly believes that there are many ways in which Section 1152.5 could be improved. He is also encouraged by the Commission's thoughtful, deliberative study process.

From the staff's perspective, generalized fear that the Legislature may worsen Section 1152.5 should not at this point inhibit the Commission from studying the statute. If the Commission becomes convinced in the course of its study that there is great reason for concern, it can always revisit the question of whether to proceed.

Assuming that the Commission shares the staff's view on whether to proceed, here are some ideas for improvement of Section 1152.5:

(1) Expressly making the protection of Section 1152.5 applicable to all types of proceedings

As originally enacted, the protection of Section 1152.5 applied "in any civil action" in which testimony could be compelled. (See Exhibit p. 1.) Evidence Code Section 120 defines "civil action" to include civil proceedings. When Section 1152.5 was amended in 1993, the reference to "civil action" was changed to "civil action or proceeding." The meaning of this change is unclear.

Arguably, "civil" modifies "action" but not "proceeding," and the protection of Section 1152.5 now extends to criminal cases as well as civil matters. That argument draws support from Section 120's definition of "civil action." Using that definition, the reference to "proceeding" in Section 1152.5 is redundant unless it encompasses more than just civil proceedings.

If, however, the intent of the 1993 amendment was to encompass criminal cases, it would have been clearer to eliminate the word "civil," instead of adding

the word "proceeding." The failure to follow that approach suggests that Section 1152.5 currently applies only in the civil context.

In sum, it is debatable whether the protection of Section 1152.5 extends to criminal cases. It is not even clear that the protection applies to arbitral and administrative matters.

The Commission may thus wish to consider amending Section 1152.5 to make clear that its protection applies to all types of proceedings in which testimony can be compelled. Many states already follow that approach. See, e.g., Alabama Civ. Ct. Mediation Rules, Rule 11 (1994 Supp.); Ark. Code Ann. § 19-7-106 (1994); Colo. Rev. Stat. § 13-22-307(3) (1995); Del. Superior Ct. Civ. Rules Ann., Rule 16.2(e) (1995). Arguably, it is good policy because mediation is an increasingly important means of dispute resolution, and real assurance of confidentiality, not just a limited promise, is critical to effective mediation. Additionally, such clarification may be helpful because there is increasing interest in using mediation to resolve criminal cases.

The proposed change could be implemented by deleting the word "civil" in subdivisions (a)(1) and (a)(2) of Section 1152.5, and explaining the change in a Comment. (See Exhibit pp. 4-5, which is a synthesis of the staff's suggestions regarding Section 1152.5.) Different language would have to be used if the Commission decides that Section 1152.5 should extend to arbitrations and administrative proceedings, but not criminal cases. That position may be more consistent with the Commission's original approach in drafting Section 1152.5: At that time, the Commission expressly rejected the concept of covering criminal cases. *See Recommendation Relating to Protection of Mediation Communications*, 18 Cal. L. Revision Comm'n Reports 241, 246 (1986).

(2) Consent issues

Section 1152.5(a)(2) provides that no mediation document is admissible or subject to discovery "unless the document otherwise provides." The statute does not spell out what is necessary for a document to "otherwise provide." May a person unilaterally specify that a document is exempt from Section 1152.5? Must all parties agree in writing that the document is exempt? Is the mediator's assent necessary, or that of nonparties who attended the mediation (e.g., a spouse or an insurance representative)?

Similarly, Section 1152.5(a)(4) provides that "[a]ll or part of a communication or document which may be otherwise privileged or confidential may be

disclosed if all *parties* who conduct or otherwise participate in mediation so consent." (Emphasis added.) Formerly, the statute called for consent of "all *persons* who conducted or otherwise participated in the mediation." The current wording is arguably ambiguous as to precisely whose consent is necessary for disclosure.

These issues are especially important with respect to settlement agreements. Unless the agreement effectively provides that Section 1152.5(a)(2) does not apply to it, the agreement may be inadmissible and thus unenforceable. *See* Ryan v. Garcia, 27 Cal. App. 4th 1006, 1011, 33 Cal. Rptr. 2d 158 (1994). There should be clear statutory guidance as to how achieve an enforceable agreement, yet Section 1152.5 is murky.

The staff suggests clarifying these points by deleting subdivision (a)(4) from Section 1152.5, modifying subdivisions (a)(1) and (a)(2) as shown in Exhibit page 4, and adding a new statute specifically addressing the consent issues, perhaps along the following lines:

> **§ 1152.7. Consent to disclosure of mediation communications**
>
> 1152.7. Notwithstanding Section 1152.5, a communication or document made or prepared for the purpose of, or in the course of, or pursuant to, a mediation, may be admitted or disclosed if any of the following conditions exist:
>
> (a) All persons who conduct or otherwise participate in the mediation expressly consent to disclosure of the communication or document.
>
> (b) The document is an executed written settlement agreement, and either of the following conditions is satisfied:
>
> (1) The agreement provides that it is admissible and subject to disclosure.
>
> (2) All signatories to the agreement expressly consent to its disclosure.
>
> (c) The communication or document is an expert's analysis or report, it was prepared for the benefit of fewer than all the mediation participants, those participants expressly consent to its disclosure, and the communication or document does not disclose anything said or any admission made in the course of the mediation.
>
> **Comment.** Section 1152.7 supersedes former Section 1152.5(a)(4) and a portion of Section 1152.5(a)(2), which were unclear regarding precisely whose consent was required for admissibility or disclosure of mediation communications and documents.
>
> Subdivision (a) states the general rule that mediation documents and communications may be admitted or disclosed only upon

the opponent undue control over use of the report, at least if the report reveals no mediation communications.

Lastly, subdivisions (a), (b), and (c) would all require that consent be express, not just implied. The staff is very troubled by so-called advance consent provisions such as the Contra Costa Local Rule referenced in the proposed Comment. An express consent requirement may help ensure the existence of true, uncoerced consent, as opposed to mere acquiescence in a judge's referral to a court's mediation program.

An alternative to the proposed approach would be to require written consent, as is done in some states. See, e.g., Colo. Rev. Stat. § 13-22-307(2)(a) (1995); Del. Superior Ct. Civ. Rules Ann., Rule 16.2(e)(1) (1995). That requirement could prove unduly burdensome, however, and could provide inadequate protection against consent based on acquiescence in a mediation referral.

(3) Intake communications

The protection of Section 1152.5 applies "[w]hen persons agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving a dispute in whole or in part ... ." Evid. Code § 1152.5(a). According to Mr. Kelly, issues frequently arise regarding confidentiality of intake communications, such as discussions regarding whether a mediator is willing to mediate a particular dispute. These issues most often occur if one party has consulted a mediator about a dispute and the other party refuses to mediate.

Protection of intake communications may promote openness in such exchanges and help mediations get off to a good start. Accordingly, it may be useful to clarify that Section 1152.5 applies to such communications. That could be done by adding a new subdivision to Section 1152.5, which would state in substance that the statute "applies to communications and documents made or prepared in the course of attempts to initiate mediation, regardless of whether an agreement to mediate is reached." (See Exhibit p. 5.)

(4) Clarification of Section 1152.5(a)(5)

Section 1152.5(a)(5) currently provides that a "written settlement agreement, or part thereof, is admissible to show fraud, duress, or illegality if relevant to an issue in dispute." The reference to a "written settlement *agreement*" (emphasis added) seems to imply that the document must be fully executed.

(1986); 1985 Cal. Stat. ch. 731, § 1. The exception facilitates enforcement of such agreements, as by a mediator seeking to collect an unpaid fee.

The express exception for agreements to mediate was eliminated in 1993, but Mr. Kelly believes the change was inadvertent. He advocates reinstating the exception. The staff agrees with that proposal and suggests that the Commission consider amending Section 1152.5(e) as shown in Exhibit page 5.

(7) New exceptions to Section 1152.5

The staff has not yet fully researched other states' approaches to mediation confidentiality, but preliminary research shows that the area is rapidly evolving and there is a great variety of approaches. Some states recognize exceptions not recognized in California.

These include in particular exceptions for threats of violence or criminal conduct, *see, e.g.*, Ariz. Rev. Stat. Ann. § 12-2238(D); Colo. Rev. Stat. § 13-22-307(2)(b) (1995), and exceptions for evidence of mediator misconduct or incompetence, *see, e.g.*, Ariz. Rev. Stat. Ann. § 12-2238(B)(2); Colo. Rev. Stat. § 13-22-307(2)(d) (1995); Del. Superior Ct. Civ. Rules Ann., Rule 16.2(e)(2) (1995); Fla. Stat. Ann. § 44.102(4). The staff does not recommend adding such exceptions to Section 1152.5, at least at this time.

Significantly, the Commission already considered the first type of exception when it initially drafted Section 1152.5. The tentative recommendation provided in part: "This section does not limit the admissibility of evidence where there is reasonable cause to believe that admission is necessary to prevent or minimize the danger of injury to any person or damage to any property." *Tentative Recommendation relating to Protection of Mediation Communications*, November 1984. That aspect of the proposal received considerable criticism and was therefore deleted. Memorandum 85-17 at p.2; 1/24/85-1/25/85 Minutes at pp. 5-6. Unless interested parties demonstrate a strong need for such an exception, the staff recommends against revisiting the issue. Notably, Mr. Kelly believes that an exception along these lines would seriously undermine Section 1152.5, because many types of conduct can be characterized as criminal.

Similarly, Mr. Kelly does not see any necessity for an exception relating to mediator misconduct or incompetence. As yet, there are no licensing requirements or standards of conduct for California mediators, although these are under discussion. Thus, an exception for evidence of mediator misconduct or incompetence may be premature, particularly because Section 1152.5(a)(5)

nonagreement, unless all parties in the mediation expressly agree otherwise in writing prior to commencement of the mediation. However, this section shall not apply to mediation under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

Comment. Section 1152.6 is amended to clarify three points: (1) the statute applies to all submissions, not just filings, (2) the statute is not limited to court proceedings but rather applies to all types of adjudications, including arbitrations and administrative adjudications, and (3) the statute applies to any evaluation or statement of opinion, however denominated.

POSSIBLE REFORMS OF SECTION 703.5

Under Evidence Code Section 703.5, judges, arbitrators, and mediators are (with exceptions) incompetent to testify "in any subsequent civil proceeding" regarding any "statement, conduct, decision, or ruling" made at a prior proceeding. In this context, the reference to "civil proceeding" is potentially confusing.

Although Evidence Code Section 120 defines "civil action" to include "civil proceeding," the Code does not define "civil proceeding." It is unclear whether the term is synonymous with "civil action." It is also unclear whether a "civil proceeding" includes arbitral or administrative proceedings.

Clarification of Section 703.5 on this point may be useful. The staff proposes amendment of the statute along the following lines:

703.5. No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil ~~proceeding~~ action, arbitration, or administrative proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure. However, this section does not apply to a mediator with regard to any mediation under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

Comment. Section 703.5 is amended to make explicit that it precludes testimony in a subsequent arbitration or administrative proceeding, as well as in any civil action or proceeding. The

privilege. He thinks that its meaning would be more clear if it referred to the perhaps more concrete concepts of admissibility and protection from disclosure, as in Section 1152.5. The staff has not discussed specific language with him, but believes that his concerns could be addressed by amending subdivision (a) as follows:

> (a) Anything said, any admission made, and any document prepared in the course of, or pursuant to, mediation under this article is a confidential communication, and ~~a party to the mediation has a privilege to refuse to disclose and to prevent another from disclosing the communication, whether~~ is not admissible in evidence or subject to discovery, and disclosure of this evidence shall not be compelled in an adjudicative proceeding, civil action, or other proceeding. This subdivision does not limit the admissibility of evidence if all parties to the proceedings consent.

Arguably, the proposed new language is more precise than the existing language. The staff has not yet fully researched the implications of the change. Both in this context and with regard to Section 1152.5(a)(1), (a)(2), and (a)(3), the staff intends to further explore the different effects of using the terms "privileged," "confidential," "inadmissible," and "protected from disclosure." Because Mr. Kelly has specifically raised this point with regard to Section 11420.30, however, the Commission may wish to consider it to some extent now, even if it defers consideration of other aspects of Section 11420.30.

OTHER POSSIBLE REFORMS

Defining "mediation" in the Evidence Code

Evidence Code Sections 703.5, 1152.5, and 1152.6 all use the term "mediation" without defining it. Mr. Kelly suggests adding a definition of the term to the Evidence Code. He likes the definition now used in Code of Civil Procedure Section 1775.1(a)(2):

> "Mediation" means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement.

On the one hand, the staff agrees that a definition of "mediation" may be useful in some circumstances. For example, in Garstang v. Superior Court, 46 Cal. Rptr. 2d 84, 86-87 (1995), the court posed (but ultimately did not have to

arbitration. Because mediation is an increasingly important dispute resolution tool, it may be a good area for the Commission to study.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

New Law Takes Effect to Protect Mediation Rights

by Ron Kelly , Mediator

"Mediators Help People Agree - They Don't Write Findings Deciding Who's Wrong."

That was the headline of a request circulating last year in California regarding new mediation legislation. Perhaps you saw it and signed it. Over a hundred bar association leaders, mediation program directors, academicians, and others did so. Copies of these were delivered to every legislator authoring a mediation-related bill in the 1995 legislative session, and to numerous ADR interest groups around the state. The outcome of this and related efforts was that new sections were added to several of the state's codes. One of these is a new law chaptered as Evidence Code Section 1152.6. Effective on January 1 of 1996, it reads in full:

> *"1152.6 A mediator may not file, and a court may not consider, any declaration or finding of any kind by the mediator, other than a required statement of agreement or nonagreement, unless all parties in the mediation expressly agree otherwise in writing prior to commencement of the mediation. However, this section shall not apply to mediation under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code."*

Legislative Intent?

A description of the background and intent of the proposed new law was circulated by the Assembly Judiciary Committee. A quote from this part of the legislative history could be useful if you run into questions about the Legislature's intent. It reads:

"It will help insure that parties are free to speak truthfully to the mediator, because their rights cannot be prejudiced by what the mediator might later report or recommend, and because they cannot be coerced into a supposedly 'voluntary' settlement with threats of such reports."

Why Was This New Law Needed?

The protections which already existed in Evidence Code Section 1152.5 say that "all communications...in the mediation shall remain confidential" unless "all parties...in the mediation" agree otherwise. Why a new law requiring prior written consent for a mediator to file a report?

The answer should be clear when you picture yourself in this hypothetical problem. Your local superior court has set up a new civil court program providing for what they call "voluntary mediation". You have a case which you want to bring to court. The same judge who will be hearing your case, and all your pretrial motions, is now conducting your status conference. She tells you her court calender is very crowded and you'd better try the court's "voluntary mediation" program. (Would you have any problem with this, so far?) You don't feel you can really refuse this "voluntary mediation" without it hurting how the judge sees your reasonableness and your case.

You go into "mediation" and the court-approved "mediator" listens to you and to the other side, both in joint sessions and in private individual caucuses. Then he brings you together and gives his evaluation about who should pay how much and why, based partly on what he heard in private. (Do you have any problems with this system, yet?) He strongly recommends that you both accept his proposed "voluntary" settlement. The other side immediately agrees. You believe it's completely unfair to you, and you say so. When you refuse to accept the "mediator's" proposed solution, he tells you that he will write a secret report to the judge presenting his analysis of appropriate liability and damages, and even his recommendations on the motions you've said you want to file. He says the judge is quite busy and usually ends up pretty close to his recommendations anyway, so you'd be wise to accept the deal you're being offered. (Do you have any problems with this system, yet?)

New Law Takes Effect to Protect Mediation Rights

by Ron Kelly , Mediator

"Mediators Help People Agree - They Don't Write Findings Deciding Who's Wrong."

That was the headline of a request circulating last year in California regarding new mediation legislation. Perhaps you saw it and signed it. Over a hundred bar association leaders, mediation program directors, academicians, and others did so. Copies of these were delivered to every legislator authoring a mediation-related bill in the 1995 legislative session, and to numerous ADR interest groups around the state. The outcome of this and related efforts was that new sections were added to several of the state's codes. One of these is a new law chaptered as Evidence Code Section 1152.6. Effective on January 1 of 1996, it reads in full:

> *"1152.6 A mediator may not file, and a court may not consider, any declaration or finding of any kind by the mediator, other than a required statement of agreement or nonagreement, unless all parties in the mediation expressly agree otherwise in writing prior to commencement of the mediation. However, this section shall not apply to mediation under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code."*

Legislative Intent?

A description of the background and intent of the proposed new law was circulated by the Assembly Judiciary Committee. A quote from this part of the legislative history could be useful if you run into questions about the Legislature's intent. It reads:

"It will help insure that parties are free to speak truthfully to the mediator, because their rights cannot be prejudiced by what the mediator might later report or recommend, and because they cannot be coerced into a supposedly 'voluntary' settlement with threats of such reports."

Why Was This New Law Needed?

The protections which already existed in Evidence Code Section 1152.5 say that "all communications...in the mediation shall remain confidential" unless "all parties...in the mediation" agree otherwise. Why a new law requiring prior written consent for a mediator to file a report?

The answer should be clear when you picture yourself in this hypothetical problem. Your local superior court has set up a new civil court program providing for what they call "voluntary mediation". You have a case which you want to bring to court. The same judge who will be hearing your case, and all your pretrial motions, is now conducting your status conference. She tells you her court calender is very crowded and you'd better try the court's "voluntary mediation" program. (Would you have any problem with this, so far?) You don't feel you can really refuse this "voluntary mediation" without it hurting how the judge sees your reasonableness and your case.

You go into "mediation" and the court-approved "mediator" listens to you and to the other side, both in joint sessions and in private individual caucuses. Then he brings you together and gives his evaluation about who should pay how much and why, based partly on what he heard in private. (Do you have any problems with this system, yet?) He strongly recommends that you both accept his proposed "voluntary" settlement. The other side immediately agrees. You believe it's completely unfair to you, and you say so. When you refuse to accept the "mediator's" proposed solution, he tells you that he will write a secret report to the judge presenting his analysis of appropriate liability and damages, and even his recommendations on the motions you've said you want to file. He says the judge is quite busy and usually ends up pretty close to his recommendations anyway, so you'd be wise to accept the deal you're being offered. (Do you have any problems with this system, yet?)

When you still refuse, he caucuses privately with you. He intimates that in his secret report to the judge he intends to really slam one of the parties in this case. He suggests you'd really be taking a big chance going to court. You object rongly, saying you felt pressured into something you were told was a "voluntary mediation", and now you're being coerced into a "voluntary" settlement that you believe is absolutely unfair. You say you don't think this is really mediation.

The "mediator" smiles. He tells you he's very proud of his track record of settling cases for this court. He explains that the local court rules call what he's doing a mediation. He points out that this means that Evidence Code Section 1152.5 will prevent you from entering any of this into evidence. He explains that Section 703.5 will prevent you from calling him as a witness to question him about what the other side told him in private caucus. He also tells you that you must have overlooked the fine print in the local court rules. He points out where they say you are automatically deemed to have authorized the secret report he will write to the judge and to have waived your protections under 1152.5 to hold any such ediation documents confidential. You feel ..apped. When he says it's your last chance to sign a memorandum accepting his proposed "voluntary" settlement, you reluctantly do so. You wonder what happened to your rights.

Do you see any problems with this hypothetical court program? If so, the biggest problem you may have is that it's not a hypothetical program. This is a description of the court rules and procedures in a real "voluntary mediation" program set up recently in one of the superior courts in California. The new statute was intended to steer such programs away from settlement coercion in any process called mediation. Overworked court systems are under a lot of pressure to set up coercive "mediations" like this, and new programs are being set up all over the state.

A Legal Definition of Mediation?

In 1993, the Legislature provided a clear finition of civil mediation, enacting SB 401 by ockyer. "Mediation means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement." (CCP 1775.1). Under SB 401, the Judicial Council was charged with writing state-wide court rules for civil mediation. It declined requests to limit mediators reporting findings. There is a very strong pressure between an overworked court and a mediator focused on her track record. This pressure will continue to drive the system to have "mediators" reporting their findings and maybe even passing on to judges false information they got in a private caucus with one side.

What's Our Responsibility?

In California we've set up a strong law providing parties the right to protect sensitive information they give to the mediator, through Evidence Code 1152.5. We've established that mediators can't later testify as witnesses against any party, through 703.5. Those of us who believe strongly in the voluntary resolution of conflict have a responsibility to be active guardians of the integrity of this confidential process. We have a responsibility to assure that mediation doesn't become another name for efficiently cheating people out of their rights with coerced settlements written in secret back room proceedings. The new law is intended as a step in this direction. It aims to prevent mediators from filing findings of any kind unless the parties want this and expressly agree to it in writing before the mediation starts.

"Mediators Help People Agree - They Don't Write Findings Deciding Who's Wrong." Now it's the law.

Ron Kelly *was the drafter and sponsor of the new Evidence Code Section 1152.6. He has played a central role in drafting and enacting many of the current state laws protecting the integrity of mediation and arbitration, including key sections of the California Evidence Code, Insurance Code, Government Code, Business and Professions Code, and others.*

Ron is a full-time professional mediator and arbitrator, specializing in construction and real property. His office is in Berkeley (510-843-6074).

inadmissible and not subject to disclosure under this section, the court shall award reasonable attorney's fees and costs to the mediator against the person or persons seeking that testimony.

(e) Paragraph (2) of subdivision (a) does not limit ~~the~~ either of the following:

(1) The admissibility of an agreement to mediate a dispute.

(2) The effect of an agreement not to take a default in a pending civil action.

(f) This section applies to communications and documents made or prepared in the course of attempts to initiate mediation, regardless of whether an agreement to mediate is reached.

(g) Nothing in this section prevents the gathering of information for research or educational purposes, so long as the parties or the specific circumstances of the parties' controversy are not identified or identifiable.

Comment. Subdivisions (a)(1) and (a)(2) are amended to make clear that their protection is not limited to civil actions and proceedings, but also extends to other contexts, such as arbitral, administrative, and criminal adjudications. Subdivisions (a)(1) and (a)(2) are also amended to reflect the addition of Section 1152.7 (consent to disclosure of mediation communication) and to make a technical change.

Subdivision (a)(3) is amended to achieve internal consistency and delete surplus language.

Former subdivision (a)(4) is superseded by Section 1152.7 (consent to disclosure of mediation communication).

Former subdivision (a)(5), now subdivision (a)(4), is amended to make clear that it applies only to fully executed written settlement agreements, not drafts or unsigned documents.

Subdivision (c) is amended to eliminate an erroneous cross-reference.

Subdivision (d) is amended to conform its scope with the scope of subdivisions (a)(1)-(a)(3).

To facilitate enforcement of payment terms and other aspects of agreements to mediate, subdivision (e) is amended to make explicit that Section 1152.5 does not restrict admissibility or disclosure of such agreements.

Subdivision (f) is added to make clear that the protection of this section applies to intake notes and other documents and communications relating to bilateral or unilateral attempts to initiate mediation, regardless of whether those attempts are successful.

Subdivision (g) is new. It is modeled on Colo. Rev. Stats. § 13-22-307(5) (Supp. 1995).