EXHIBIT 1.

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).

(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"

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

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)

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

CHAPTER 731

An act to add Section 1152.5 to the Evidence Code, relating to mediation.

[Approved by Governor September 17, 1985. Filed with Secretary of State September 18, 1985.]

The people of the State of California do enact as follows:

SECTION 1. Section 1152.5 is added to the Evidence Code, to read:

1152.5. (a) Subject to the conditions and exceptions provided in this section, when persons agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving a dispute:

(1) Evidence of anything said or of any admission made in the course of the mediation is not admissible in evidence, and disclosure of any such evidence shall not be compelled, in any civil action in which, pursuant to law, testimony can be compelled to be given.

(2) 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, and disclosure of any such document shall not be compelled, in any civil action in which, pursuant to law, testimony can be compelled to be given.

(b) Subdivision (a) does not limit the admissibility of evidence if all persons who conducted or otherwise participated in the mediation consent to its disclosure.

(c) This section does not apply unless, before the mediation begins, the persons who agree to conduct and participate in the mediation execute an agreement in writing that sets out the text of subdivisions (a) and (b) and states that the persons agree that this section shall apply to the mediation.

(d) This section does not apply where the admissibility of the evidence is governed by Section 4351.5 or 4607 of the Civil Code or by Section 1747 of the Code of Civil Procedure.

(e) 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.

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

(1) The admissibility of the agreement referred to in subdivision (c).

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

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 rapped. 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).