

EXHIBIT 3.

Study K-401

May 3, 1996

Memorandum 96-33

Mediation Communications: Draft of Tentative Recommendation

Attached is a staff draft of a tentative recommendation relating to mediation confidentiality. Points for discussion are raised in the staff notes. If other aspects of the proposal warrant discussion, please plan on raising them at the meeting.

Before the draft is circulated for comment, the staff intends to do further work on the conforming revisions. The staff also would consolidate the mediation confidentiality provisions into a single article.

In addition to the matters covered in the draft, the Commission may also wish to consider whether to include any revisions of Government Code Section 11420.30 (the administrative adjudication provision on mediation confidentiality) in its tentative recommendation. The staff is inclined to focus on the Evidence Code provisions and handle any revisions of Section 11420.30 as a separate project after seeing how the Evidence Code reforms fare.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Staff Draft

TENTATIVE RECOMMENDATION

Mediation Confidentiality

May 1996

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN August 31, 1996.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
(415) 494-1335 FAX: (415) 494-1827

SUMMARY OF TENTATIVE RECOMMENDATION

This recommendation would reform evidentiary provisions governing mediation confidentiality (Evidence Code Sections 703.5, 1152.5, 1152.6), so as to eliminate ambiguities. In particular, the recommendation would clarify the application of mediation confidentiality to settlements reached through mediation. Clarification is critical to aid disputants in crafting agreements they can enforce. The recommendation also would add definitions of "mediation" and "mediator" to the Evidence Code, and clarify other aspects of mediation confidentiality.

This recommendation was prepared pursuant to Resolution Chapter 42 of the Statutes of 1956, continued in Resolution Chapter 87 of the Statutes of 1995.

MEDIATION CONFIDENTIALITY

Mediation is an increasingly important means of dispute resolution.¹ There is broad consensus that confidentiality is crucial to effective mediation.² In recognition of the importance of confidentiality, the Legislature added Section 1152.5 to the Evidence Code in 1985, on recommendation of the Law Revision Commission.³ With limitations, Section 1152.5 protects mediation communications from admissibility and disclosure in subsequent proceedings.

The Commission deliberately drafted Section 1152.5 in a manner that would allow different mediation techniques to flourish.⁴ Since the enactment of Section 1152.5, courts and disputants have experimented with mediation in many diverse forms. There have also been significant legislative developments, including a major substantive amendment of Section 1152.5,⁵ extension of Evidence Code Section 703.5 (restricting competency to testify in subsequent proceedings) to mediators,⁶ and addition of Evidence Code Section 1152.6, which generally precludes mediators from filing declarations and findings regarding mediations they conduct.⁷

The current statutory scheme broadly protects mediation confidentiality, but has ambiguities causing confusion, including confusion regarding preparation of settlement agreements parties can enforce.⁸ Clarification of the ambiguities would benefit persons involved in mediations and further the use of mediation to resolve disputes.

EXISTING LAW

Evidence Code Section 1152.5

Evidence Code Section 1152.5 remains the main provision protecting mediation confidentiality. It currently provides:

1. See, e.g., Code Civ. Proc. § 1775; 1996 Cal. Stat. res. ch. 6

2. See, e.g., Alan Kirtleyn, *The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 J. Disp. Resol. 1; Michael A. Perino, *Drafting Mediation Privileges: Lessons from the Civil Justice Reform Act*, 26 Seton Hall L. Rev. 1 (1995).

3. 1985 Cal. Stat. ch. 731; *Recommendation Relating to Protection of Mediation Communications*, 18 Cal. L. Revision Comm'n Reports 241 (1986).

4. *Recommendation*, *supra* note 3, at 245 n.1.

5. 1993 Cal. Stat. ch. 1261, § 6.

6. 1993 Cal. Stat. ch. 1261, § 5.

7. 1995 Cal. Stat. ch. 576, § 8.

8. Compare *Regents of University of California v. Sumner*, ___ Cal. App. 4th ___, 50 Cal. Rptr. 2d 200 (1996) (Section 1152.5 does not protect oral statement of settlement terms) with *Ryan v. Garcia*, 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (1994) (Section 1152.5 protects oral statement of settlement terms).

§ 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 omission not accidental. When the statute was originally enacted, mediation was just beginning to gain acceptance. The Law Revision Commission considered it important to allow use of different techniques, 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.⁹ This was done by making Section 1152.5 applicable only where the parties

9. See Recommendation, *supra* note 3, at 245 n.1, 246 n.4 (1986).

1 executed a written agreement reciting the statutory text and stating that the statute
2 governed their proceeding.¹⁰

3 In 1993, Section 1152.5 was amended in a number of ways, including
4 elimination of the requirement of a written agreement.¹¹ Apparently, the
5 requirement was considered unduly onerous, particularly in disputes involving
6 unsophisticated persons. Although the amendment eliminated the requirement of a
7 written agreement, it left the term “mediation” undefined.

8 **Evidence Code Section 703.5**

9 As amended in 1993,¹² Evidence Code Section 703.5 makes mediators
10 incompetent to testify “in any subsequent civil proceeding” regarding any
11 mediation they conduct. The statute does not apply to mediations under the Family
12 Code. Additionally, it excepts statements and conduct that “could (a) give rise to
13 civil or criminal contempt, (b) constitute a crime, (c) be the subject of
14 investigation by the State Bar or Commission on Judicial Performance, or (d) give
15 rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of
16 Section 170.1 of the Code of Civil Procedure.” Prior to the 1993 amendment
17 extending Section 703.5 to mediators, the statute applied only to arbitrators and
18 persons presiding at judicial and quasi-judicial proceedings.

19 **Evidence Code Section 1152.6**

20 Section 1152.6, enacted in 1995,¹³ provides in significant part: “A mediator may
21 not file, and a court may not consider, any declaration or finding of any kind by
22 the mediator, other than a required statement of agreement or nonagreement,
23 unless all parties in the mediation expressly agree otherwise in writing prior to
24 commencement of the mediation.” Section 1152.6 is intended to prevent a
25 mediator from coercing a party to settle by threatening to inform the assigned
26 judge that the party is being unreasonable or is pressing meritless arguments.¹⁴
27 Section 1152.5 arguably did not accomplish this, because some courts had local
28 rules stating that parties participating in mediation were deemed to have consented
29 in advance to waive Section 1152.5 with regard to having the mediator submit an
30 evaluation to the court.¹⁵

10. 1985 Cal. Stat. ch. 731, § 1.

11. See 1993 Cal. Stat. ch. 1261 (SB 401), § 6. 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. See 1992 Cal. Stat. ch. 163, § 73; 1993 Cal. Stat. ch. 219, § 77.7; 1994 Cal. Stat. ch. 1269, § 8.

12. 1993 Cal. Stat. ch. 1261, § 5.

13. 1995 Cal. Stat. ch. 576, § 8.

14. R. Kelly, *New Law Takes Effect to Protect Mediation Rights* (1996).

15. See, e.g., Contra Costa Superior Court, Local Rule 207 (1996).

Other Protections

In addition to Evidence Code Sections 703.5, 1152.5, and 1152.6, there are specialized statutes protecting mediation confidentiality to various degrees in differing contexts.¹⁶ Another source of protection is Evidence Code Section 1152, which makes offers to compromise inadmissible to establish liability.¹⁷ Perhaps most importantly, the constitutional right to privacy¹⁸ encompasses communications “tendered under a guaranty of privacy,” and calls for balancing of the interest in mediation confidentiality against competing interests.¹⁹

PROPOSED REFORMS

Definitions

Now that a writing reciting text of Section 1152.5 is no longer necessary to invoke the statutory protection, clarification of what constitutes a “mediation” within the meaning of the statute is in order. Without such a definition, the extent of the protection is unclear.

For example, does Section 1152.5 apply in a proceeding that is court-ordered or otherwise mandatory, or must participation be entirely voluntary to fall within the statute? Likewise, is a settlement conference a “mediation” within the meaning of Section 1152.5? If not, what differentiates a settlement conference from a mediation?

Given the broad array of current dispute resolution techniques, and the importance of confidentiality in promoting candor that may affect the success of those techniques, participants need to be able to assess whether their particular type of proceeding qualifies as a “mediation” for purposes of Section 1152.5.²⁰

This recommendation would add definitions of “mediation” and “mediator” to the Evidence Code. It would be broad, stating simply: “‘Mediation’ means a process in which a mediator facilitates communication between disputants to assist

16. For examples of specialized mediation confidentiality provisions, see Bus. & Prof. Code §§ 467.4-467.5 (community dispute resolution programs), 6200 (attorney-client fee disputes), Code Civ. Proc. §§ 1775.10 (civil action mediation in participating courts), 1297.371 (international commercial disputes), Fam. Code §§ 1818 (family conciliation court), 3177 (child custody), Food & Agric. Code § 54453 (agricultural cooperative bargaining associations), Gov’t Code §§ 11420.20-11420.30 (administrative adjudication), 12984-12985 (housing discrimination), 66032-66033 (landuse), Ins. Code § 10089.80 (earthquake insurance), Labor Code § 65 (labor disputes), Welf. & Inst. Code § 350 (dependency mediation).

17. Evidence Code Section 1152.5(c) expressly provides that the statute 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. Unless otherwise noted, all further statutory references are to the Evidence Code.

18. Cal. Const. art. I, § 1.

19. *Garstang v. Superior Court*, __ Cal. App. 4th __, 46 Cal. Rptr. 2d 84 (1995).

20. For an example of the uncertainty in application, see *id.* (alluding to but not resolving whether sessions before an ombudsperson employed by a private educational institution constitute “mediation” within the meaning of the current version of Section 1152.5).

1 them in reaching a mutually acceptable agreement.”²¹ The definition would
2 encompass purely voluntary mediations, as well as mediations in which
3 participation is court-ordered or otherwise mandatory. Language in Section
4 1152.5(a) arguably restricting its protection to voluntary mediations would be
5 deleted.

6 The proposed definition of “mediator” is also broad. A “mediator” is “a neutral
7 person who conducts a mediation.” Two important restrictions apply: (1) the
8 mediator must lack authority to compel a result or render a decision, and (2) the
9 mediator must not be a judge, commissioner, referee, judge pro tem, or salaried
10 employee of any tribunal in which the mediated dispute is pending. The net effect
11 of these restrictions is to limit the term “mediator” to persons who lack coercive
12 authority — apparent or actual — over the proceedings they conduct. In other
13 words, although parties may be required to participate in a mediation, the mediator
14 cannot force them to accept any particular resolution, either directly or by virtue of
15 association with the adjudicatory tribunal. A settlement conference would thus fall
16 outside the statutory definition of mediation, because a judge conducting a
17 settlement conference would not be a “mediator.”

18 The broad definitions of “mediation” and “mediator” would recognize and
19 embrace the variety of existing models of mediation. They would allow such
20 variety to continue by assuring confidentiality necessary for success.

21 To protect existing expectations, however, the Commission would also extend
22 the protection of Section 1152.5 and other mediation confidentiality statutes to
23 dispute resolution proceedings that fall outside the proposed definition of a
24 “mediation.” So long as the proceedings are conducted by a nondisputant and
25 denominated as “mediations,” they would be protected. Thus, the new definitions
26 would not trap unwary disputants oblivious that their so-called mediation fails to
27 qualify as such.

28 **Settlements Reached Through Mediation**

29 As currently drafted, Section 1152.5 fails to provide clear guidance regarding
30 application of the statute to oral compromises reached in mediation and documents
31 reducing those compromises to writing. Appellate courts have reached conflicting
32 decisions on whether the confidentiality of Section 1152.5 extends to the process
33 of converting such an oral compromise to a definitive written agreement.²² If
34 protection applies, then parties cannot enforce the oral compromise, because
35 evidence of it is inadmissible. If protection does not apply, the oral compromise
36 may be enforceable even if it is never reduced to writing. Resolution of this
37 uncertainty is critical: Mediation participants should know when they and their
38 opponents are effectively bound.

21. The definition of “mediation” is modeled on Code of Civil Procedure Section 1775.10, which pertains to civil action mediation in certain participating courts.

22. See note 8, *supra*.

1 Additionally, Section 1152.5 fails to highlight a critical requirement regarding
2 written settlement agreements reached through mediation. Under Section
3 1152.5(a)(2), unless it is offered to prove fraud, duress, or illegality, a written
4 settlement agreement is admissible only if it so provides.²³ Parties overlooking that
5 requirement may inadvertently enter into a written settlement agreements that is
6 unenforceable.

7 This recommendation would remedy these problems by consolidating in a single
8 statute all of the confidentiality requirements pertaining to settlements reached in
9 mediation. That should draw attention to the requirements and decrease the
10 likelihood that disputants will inadvertently enter into unenforceable agreements.

11 The proposed statute would explicitly make an executed written settlement
12 agreement admissible if it provides that it is “enforceable” or “binding” or words
13 to that effect. It is likely that parties intending to be bound will use words to that
14 effect, rather than saying that their agreement is “admissible,” the Commission
15 regards this as an important addition.

16 The proposed statute also would make clear that an executed written settlement
17 agreement is subject to disclosure if all of the signatories expressly consent to its
18 disclosure. To facilitate enforcement of such an agreement, consent of other
19 mediation participants, such as the mediator, would not be necessary. In contrast,
20 existing law is unclear as to precisely whose consent is required.²⁴

21 Finally, the proposed statute would codify the rule of *Ryan v. Garcia*²⁵ that
22 confidentiality extends through the process of converting an oral compromise
23 reached in mediation to an executed written settlement agreement. Difficult issues
24 can surface in that process, and confidentiality may promote frankness and
25 creativity in resolving them. The proposed approach should enhance the
26 effectiveness of mediation in promoting durable settlements. It would also spare
27 courts from adjudicating disputes over whether an oral compromise was reached in
28 mediation.

29 **Consent to Admissibility and Disclosure**

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

23. See *Ryan v. Garcia*, 27 Cal. App. 4th at 162 (Section 1152.5 “provides a simple means by which settlement agreements executed during mediation can be made admissible in later proceedings”: “The parties may consent, as part of a writing, to subsequent admissibility of the agreement”).

24. See Section 1152.5(a)(4).

25. 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 200 (1996).

1 Similarly, Section 1152.5(a)(4) provides that “[a]ll or part of a communication
2 or document which may be otherwise privileged or confidential may be disclosed
3 if all *parties* who conduct or otherwise participate in mediation so consent.”
4 (Emphasis added.) Formerly, the statute called for consent of “all *persons* who
5 conducted or otherwise participated in the mediation.”²⁶ The current wording is
6 arguably ambiguous as to precisely whose consent is necessary for disclosure.

7 This recommendation resolves these ambiguities by adding a statute specifically
8 addressing consent to disclosure. It would establish a general rule that consent of
9 all mediation participants is necessary to waive the protection of Section 1152.5.
10 All persons attending a mediation, parties as well as nonparties, should be able to
11 speak frankly, without fear of having their words turned against them.

12 To ensure that a party unilaterally commissioning an expert’s analysis or report
13 is not unfairly deprived of the benefits of that work, the proposed statute would
14 apply a special rule to such materials. Specifically, disclosure of a unilaterally
15 prepared expert’s analysis or report would require only the consent of the
16 mediation participants for whom the material was prepared, *provided* that the
17 material does not disclose anything said or any admission made in the course of
18 the mediation. A reports or analysis that necessarily disclose mediation
19 communications could be admitted or disclosed only upon satisfying the general
20 rule requiring consent of all mediation participants.

21 The recommendation would require that consent of mediation participants to
22 disclosure be express, not just implied. This requirement should help ensure the
23 existence of true, uncoerced consent, as opposed to mere acquiescence in a judge’s
24 referral to a court’s mediation program.²⁷

25 **Types of Subsequent Proceedings in Which Confidentiality Applies**

26 As originally enacted, the protection of Section 1152.5 applied in “any civil
27 action” in which testimony could be compelled.²⁸ When Section 1152.5 was
28 amended in 1993, the reference to “civil action” was changed to “civil action or
29 proceeding.”²⁹ The meaning of this change is unclear.³⁰

30 It can be argued that the term “civil” modifies “action” and not proceeding, with
31 the result that the protection of Section 1152.5 extends to criminal cases. It is also
32 unclear whether the protection applies to arbitral and administrative matters.

26. 1985 Cal. Stat. ch. 731, § 1.

27. *See generally*, R. Kelly, *supra* note 14.

28. 1985 Cal. Stat. ch. 731, § 1.

29. 1993 Cal. Stat. ch. 1261, § 6.

30. 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.

1 This recommendation would resolve that ambiguity by making explicit that
2 Section 1152.5's confidentiality extends to any subsequent "arbitration,
3 administrative adjudication, civil action, or other noncriminal proceeding." The
4 recommendation also proposes a similar amendment of Section 703.5.

5 As in its original recommendation proposing Section 1152.5,³¹ the Commission
6 does not propose to extend Section 1152.5 to subsequent criminal cases. Such an
7 extension might unduly hamper the pursuit of justice.

8 **Intake Communications**

9 Section 1152.5 is unclear as to how much protection extends to intake
10 communications, such as discussions regarding whether to mediate at all or
11 whether a particular mediator is willing to mediate a dispute. Issues regarding
12 confidentiality of intake communications often occur if one party has consulted a
13 mediator about a dispute and the other party refuses to mediate.

14 Protection of intake communications may promote openness in such exchanges
15 and help mediations get off to a good start.³² Accordingly, the Commission
16 proposes to amend Section 1152.5 to make clear that it "applies to
17 communications and documents made or prepared in the course of attempts to
18 initiate mediation, regardless of whether an agreement to mediate is reached."

19 **Attorneys' Fee Provision**

20 Section 1152.5(d) is an attorneys' fee provision that was added in 1993. It
21 provides for an award of attorneys' fees and costs to a mediator if the mediator is
22 subpoenaed to testify "as to *anything said or any admission made* in the course of
23 the mediation that is inadmissible and not subject to disclosure under this section."
24 (Emphasis added.) The reference to "anything said or any admission made"
25 encompasses communications protected under Section 1152.5(a)(1), but would
26 appear not to cover an improper attempt to compel disclosure of documents
27 protected under Section 1152.5(a)(2).³³

28 A mediator may, however, incur substantial litigation expenses regardless of
29 whether a subpoena violates paragraph (a)(1), (a)(2), or (a)(3). Thus, the
30 recommendation conforms the scope of the attorneys' fee provision to the scope of
31 protected communications.

31. *Recommendation Relating to Protection of Mediation Communications*, 18 Cal. L. Revision Comm'n Reports 241, 245 n.1, 246 n.4 (1986); see also 1985 Cal. Stat. ch. 731, § 1.

32. See, e.g., Alan Kirtleyn, *supra* note 2, at ____.

33. Consider also the protection for "all communications, negotiations, or settlement discussions" in Section 1152.5(a)(3).

1 **Agreements To Mediate**

2 As originally enacted, Section 1152.5 included an express exception for
3 agreements to mediate a dispute.³⁴ The exception facilitated enforcement of such
4 agreements, as by a mediator seeking to collect an unpaid fee.

5 The express exception for agreements to mediate was eliminated in 1993,³⁵ but
6 the change may well have been inadvertent. This recommendation would reinstate
7 the exception.

8 **Limited Exception for Research Purposes**

9 Colorado's mediation confidentiality statute has a limited exception allowing
10 gathering of mediation information for research purposes, provided that mediation
11 participants and their disputes remain unidentifiable. Section 1152.5 should
12 contain similar language. This would be consistent with, and in furtherance of, the
13 goal of encouraging experimentation with different mediation techniques.

14 **Reforms of Section 1152.6**

15 Recently enacted Section 1152.6, which restrict mediators from filing case
16 evaluations with courts, could benefit from clarification in a number of respects. In
17 particular, it should be made clear that (1) the statute applies to all submissions,
18 not just filings, (2) the statute is not limited to court proceedings, but rather applies
19 to all types of adjudications, including arbitrations and administrative
20 adjudications, and (3) the statute applies to any evaluation or statement of opinion,
21 however denominated. These changes would help ensure that courts interpret the
22 statute in a manner consistent with its goal of preventing coercion by mediators.³⁶

23 **COMMISSION RECOMMENDATION**

24 Mediation is a valuable and widely used technique in which candor is often
25 crucial to success. Sections 703.5, 1152.5, and 1152.6 promote candor by
26 protecting the confidentiality of mediation proceedings, albeit with limitations. To
27 further the effective use of mediation, the rules regarding confidentiality should be
28 as unambiguous as possible. The Commission recommendations to that end would
29 be effectuated by enactment of the following measure.

34. See Recommendation, *supra* note 3; 1985 Cal. Stat. ch. 731, § 1.

35. 1993 Cal. Stat. ch. 1261, § 6.

36. See R. Kelly, *supra* note 14.

PROPOSED LEGISLATION

Evid. Code § 162 (added). Mediation

SEC. 1. Section 162 is added to the Evidence Code, to read:

162. "Mediation" means a process in which a mediator facilitates communication between disputants to assist them in reaching a mutually acceptable agreement.

Comment. Section 162 is modeled on Code of Civil Procedure Section 1775.1. "Mediator" is defined in Section 163. See also Section 1152.9 (proceedings referred to as mediations).

Evid. Code § 163 (added). Mediator

SEC. 2. Section 163 is added to the Evidence Code, to read:

163. "Mediator" is a neutral person who conducts a mediation. A mediator has no authority to compel a result or render a decision. A mediator shall not be a judge, commissioner, referee, judge pro tem, or salaried employee of any tribunal in which the mediated dispute is pending.

Comment. Section 163 serves to distinguish mediators from arbitrators, judges, and other persons who rule on the merits of disputes. Pursuant to the third sentence of Section 163, settlement conferences are not mediations. A settlement conference is conducted under the aura of the court, whereas a mediation is not.

"Mediation" is defined in Section 162. See also Sections 10 (singular includes the plural), 75 ("person" defined), 1152.9 (proceedings referred to as mediations).

Staff Note. In recognition that settlement conference participants may feel court pressure to settle, Section 163 attempts to draw a distinction between settlement conferences and mediations. Does the Commission agree with this approach?

Evid. Code § 703.5 (amended). Competency of judges, arbitrators, and mediators

SEC. 3. Section 703.5 of the Evidence Code is amended to read:

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 arbitration, administrative adjudication, civil action, or other noncriminal 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 adjudication, as well as in any civil action or proceeding. See also Section 120 ("civil action" includes civil proceedings).

For purposes of Section 703.5, the term "mediator" includes both a mediator as defined in Section 163, and a nondisputant who conducts a dispute resolution proceeding that is referred to as a mediation. See Section 1152.9. See also Section 162 ("mediation" defined).

Evid. Code § 1152.5 (amended). Communications during mediation

SEC. 4. Section 1152.5 of the Evidence Code is amended to read:

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 expressly provided by statute, 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~~ arbitration, administrative adjudication, civil action, or other noncriminal 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 expressly provided by statute~~, 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~~ the document shall not be compelled, in any ~~civil action or~~ arbitration, administrative adjudication, civil action, or other noncriminal 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~~ 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) ~~(4)~~ 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~~ any communication or document made or prepared for the purpose of, pursuant to, or in the course of the mediation that is inadmissible and not subject to disclosure under this section, the

1 court shall award reasonable attorney's fees and costs to the mediator against the
2 person or persons seeking that testimony.

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

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

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

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

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

13 **Comment.** Subdivision (a) of Section 1152.5 is amended to delete the reference to an
14 agreement to mediate. The protection of Section 1152.5 extends to mediations in which
15 participation is court-ordered or otherwise mandatory, as well as purely voluntary mediations.

16 Subdivisions (a)(1) and (a)(2) are amended to make explicit that their protection applies in a
17 subsequent arbitration or administrative adjudication, as well as in any civil action or proceeding.
18 See also Section 120 ("civil action" includes civil proceedings).

19 Subdivisions (a)(1) and (a)(2) are also amended to reflect the addition of Sections 1152.7
20 (settlements reached through mediation) and 1152.8 (consent to disclosure of mediation
21 communications). To "expressly provide" an exception to subdivisions (a)(1) or (a)(2), a statute
22 must explicitly be aimed at overriding mediation confidentiality. See, e.g., Section 1152.7
23 ("Notwithstanding Section 1152.5 ...").

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

25 Former subdivision (a)(4) is superseded by Section 1152.8 (consent to disclosure of mediation
26 communication).

27 Former subdivision (a)(5) is continued without substantive change in Section 1152.7(d).

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

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

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

31 See also Sections 162 ("mediation" defined), 163 ("mediator" defined), and 1152.9
32 (proceedings referred to as mediations).

33 For examples of specialized mediation confidentiality provisions, see Bus. & Prof. Code §§
34 467.4-467.5 (community dispute resolution programs), 6200 (attorney-client fee disputes), Code
35 Civ. Proc. §§ 1775.10 (civil action mediation in participating courts), 1297.371 (international
36 commercial disputes), Fam. Code §§ 1818 (family conciliation court), 3177 (child custody), Food
37 & Agric. Code § 54453 (agricultural cooperative bargaining associations), Gov't Code §§
38 11420.20-11420.30 (administrative adjudication), 12984-12985 (housing discrimination), 66032-
39 66033 (landuse), Ins. Code § 10089.80 (earthquake insurance), Labor Code § 65 (labor disputes),
40 Welf. & Inst. Code § 350 (dependency mediation). See also Cal. Const. art. I, § 1 (right to
41 privacy); *Garstang v. Superior Court*, __ Cal. App. 4th __, 46 Cal. Rptr. 2d 84, 88 (1995)
42 (constitutional right of privacy protected communications made during mediation sessions before
43 an ombudsperson).

44 **Staff Note.** (1) Existing Section 1152.5 and the amendment proposed here use the term
45 "document" in a number of places. Is that term sufficiently inclusive to account for recent
46 technological advances? The term is used elsewhere in the Evidence Code but not defined. The
47 Evidence Code does define "writing" in Section 250 to mean "handwriting, typewriting, printing,
48 photostating, photographing, and every other means of recording upon any tangible thing any
49 form of communication or representation, including letters, words, pictures, sounds, or symbols,
50 or combinations thereof." See also Code Civ. Proc. § 2016 (defining "document" to mean

1 “writing” as defined in Evidence Code Section 250). Legislation is pending to change the
2 definition in Section 250. Rather than get into the issue at this point in the context of Section
3 1152.5, the staff recommends addressing it in the future if necessary.

4 (2) Subdivision (a)(2) protects documents prepared for the purpose of a mediation, but
5 subdivision (a)(1) does not expressly protect oral communications made in preparation for a
6 mediation (e.g., a meeting to develop a mediation strategy). Other existing protections, such as
7 the attorney-client privilege and Evidence Code Section 1152 (offers to compromise) may be
8 sufficient to cover this situation. If the Commission thinks that further protection is necessary
9 (e.g., to protect mediation preparation sessions involving some but not all parties in a multi-party
10 dispute), proposed subdivision (f) could be modified to read: “This section applies to
11 communications and documents made or prepared in preparation for a mediation, or in the course
12 of attempts to initiate mediation, regardless of whether an agreement to mediate is reached.”

13 **Evid. Code § 1152.6 (amended). Mediator evaluations**

14 SEC. 5. Section 1152.6 of the Evidence Code is amended to read:

15 1152.6. ~~A mediator may not file, and a court may not consider, any declaration~~
16 ~~or finding of any kind by the mediator, A mediator may not submit, and a court or~~
17 ~~other adjudicative body may not consider, any assessment, evaluation,~~
18 ~~recommendation, or finding of any kind by the mediator concerning a mediation~~
19 ~~conducted by the mediator, other than a required statement of agreement or~~
20 nonagreement, unless all parties in the mediation expressly agree otherwise in
21 writing prior to commencement of the mediation. However, this section shall not
22 apply to mediation under Chapter 11 (commencing with Section 3160) of Part 2 of
23 Division 8 of the Family Code.

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

28 See also Sections 162 (“mediation” defined), 163 (“mediator” defined), and 1152.9
29 (proceedings referred to as mediations).

30 **§ 1152.7 (added). Settlements reached through mediation**

31 SEC. 6. Section 1152.7 is added to the Evidence Code, to read:

32 1152.7. (a) Notwithstanding Section 1152.5, an executed written settlement
33 agreement prepared in the course of, or pursuant to, a mediation, may be admitted
34 or disclosed if any of the following conditions exist:

35 (1) The agreement provides that it is admissible or subject to disclosure, or
36 words to that effect.

37 (2) The agreement provides that it is enforceable or binding or words to that
38 effect.

39 (3) All signatories to the agreement expressly consent to its disclosure.

40 (4) The agreement is used to show fraud, duress, or illegality that is relevant to
41 an issue in dispute.

42 (b) Except as provided in this section, evidence of a compromise reached in
43 mediation may be admitted or disclosed only pursuant to Section 1152.8.

44 **Comment.** Section 1152.7 is added to consolidate and clarify provisions governing settlements
45 reached through mediation.

As to executed written settlement agreements, paragraph (a)(1) continues language formerly found in Section 1152.5(a)(2). See also *Ryan v. Garcia*, 27 Cal. App. 4th 1006, 1012, 33 Cal. Rptr. 2d 158 (1994) (Section 1152.5 “provides a simple means by which settlement agreements executed during mediation can be made admissible in later proceedings,” i.e., the “parties may consent, as part of a writing, to subsequent admissibility of the agreement”).

Paragraph (a)(2) is new. It is added due to the likelihood that parties intending to be bound will use words to that effect, rather than saying their agreement is intended to be admissible or subject to disclosure.

As to fully executed written settlement agreements, paragraph (a)(3) supersedes Section 1152.5(a)(4). To facilitate enforceability of such agreements, disclosure pursuant to paragraph (a)(3) requires only consent of the signatories. Consent of other mediation participants, such as the mediator, is not necessary. Paragraph (a)(3) is thus an exception to the general rule governing consent to disclosure of mediation communications. See Section 1152.8.

Paragraph (a)(4) continues former Section 1152.5(a)(5) without substantive change.

Subdivision (b) codifies the rule of *Ryan v. Garcia*, 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (1994), that confidentiality extends through the process of converting an oral compromise to a definitive written agreement. The contrary approach of *Regents of University of California v. Sumner*, __ Cal. App. 4th __, 50 Cal. Rptr. 2d 200 (1996), is rejected.

Staff Note. To draw attention to the rules regarding settlement agreements, the staff consolidated them in a single statute. The staff also added language explicitly addressing the issue discussed in *Ryan v. Garcia*, 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (1994), and *Regents of University of California v. Sumner*, __ Cal. App. 4th __, 50 Cal. Rptr. 2d 200 (1996): whether confidentiality extends through the process of converting an oral compromise to a definitive written agreement. See First Supplement to Memorandum 96-17 at pages 1-5. Although the Supreme Court might resolve the conflict in appellate decisions before the Commission issues a recommendation, the staff recommends addressing the point in the tentative recommendation, so that the Commission is prepared to act if the Supreme Court does not fully resolve the matter.

Evid. Code § 1152.8 (added). Consent to disclosure of mediation communications

SEC. 7. Section 1152.8 is added to the Evidence Code, to read:

1152.8. 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 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 1152.8 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 consent of all participants, including not only parties but also the mediator and other nonparties attending the mediation (e.g., a disputant not involved in litigation, a spouse, an accountant, an insurance representative, or an employee of a corporate affiliate). Consent must be express, not implied. For example, parties cannot be deemed to have consented in advance to disclosure merely because they agreed to participate in a particular dispute resolution program. Cf. *Contra Costa Superior Court*, Local Rule 207 (1996) (“EASE conferences

1 shall constitute mediations governed by California Evidence Code Section 1152.5 *except that,*
2 *unless prior arrangements have been made with the Court in writing or on the record, by*
3 *agreeing to participate in the EASE Program, the parties are deemed to have consented in*
4 *advance that the evaluator may share any information he or she learns with the assigned judge*
5 *and with other court personnel.”* (emph. in original)).

6 Subdivision (b) facilitates admissibility and disclosure of unilaterally prepared experts' reports,
7 but it only applies so long as those materials may be produced in a manner revealing nothing
8 about the mediation discussion. Reports and analyses that necessarily disclose mediation
9 communications may be admitted or disclosed only upon satisfying the general rule of
10 subdivision (a).

11 For other special rules, see Sections 1152.6 (mediator evaluations) and 1152.7 (settlements
12 reached through mediation).

13 See also Sections 162 (“mediation” defined), 163 (“mediator” defined), and 1152.9
14 (proceedings referred to as mediations).

15 **Evid. Code § 1152.9 (added). Proceedings referred to as mediations**

16 SEC. 8. Section 1152.9 is added to the Evidence Code, to read:

17 1152.9. (a) The protection of Section 703.5 and Sections 1152.5 to 1152.9,
18 inclusive, extends to:

19 (1) A “mediation” as defined in Section 162.

20 (2) A “mediator” as defined in Section 163.

21 (3) A dispute resolution proceeding that satisfies both of the following
22 conditions:

23 (i) A nondisputant assists in resolving the dispute.

24 (ii) The proceeding is referred to as a mediation.

25 (4) A nondisputant who conducts a dispute resolution proceeding that is referred
26 to as a mediation.

27 **Comment.** Section 1152.9 is added in recognition of the fact that the term “mediation” is
28 broadly used. Proceedings may be referred to as mediations even though they do not meet the
29 definition of Section 162. Section 1152.9 upholds expectations of confidentiality that may exist
30 under such circumstances.

31 **Staff Note.** If a statutory definition of “mediation” is adopted, over time it will become
32 increasingly unreasonable to apply the term to proceedings that fail to meet the definition, and
33 (setting aside the effect of proposed Section 1152.9) increasingly unreasonable to expect
34 mediation confidentiality to extend to such proceedings. Perhaps Section 1152.9 should be a
35 temporary provision. That could be accomplished by adding a subdivision stating: “This section
36 shall remain in effect only until January 1, [year], and as of that date is repealed, unless a later
37 enacted statute, which is enacted before January 1, [year], deletes or extends that date.”

38 **CONFORMING REVISIONS**

39 **Bus. & Prof. Code § 467.5 (amended). Communications during funded proceedings**

40 467.5. Notwithstanding the express application of ~~Section 1152.5~~ Sections
41 1152.5 to 1152.9, inclusive, of the Evidence Code to mediations, all proceedings
42 conducted by a program funded pursuant to this chapter, including, but not limited
43 to, arbitrations and conciliations, are subject to ~~Section 1152.5~~ Sections 1152.5 to
44 1152.9, inclusive, of the Evidence Code.

Comment. Section 467.5 is amended to reflect the addition of new Evidence Code statutes governing mediation confidentiality.

Code Civ. Proc. § 1775.10 (amended). Evidence Code provisions applicable to statements made in mediation

1775.10. All statements made by the parties during the mediation shall be subject to Sections 1152 and ~~1152.5~~ to 1152.9, inclusive of the Evidence Code.

Comment. Section 1775.10 is amended to reflect the addition of new Evidence Code statutes governing mediation confidentiality.

Gov't Code § 66032 (amended). Procedures applicable to land use mediations

66032. (a) Notwithstanding any provision of law to the contrary, all time limits with respect to an action shall be tolled while the mediator conducts the mediation, pursuant to this chapter.

(b) Mediations conducted by a mediator pursuant to this chapter that involve less than a quorum of a legislative body or a state body shall not be considered meetings of a legislative body pursuant to the Ralph M. Brown Act (Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5), nor shall they be considered meetings of a state body pursuant to the Bagley-Keene Open Meeting Act (Article 9 (commencing with Section 11120) of Chapter 1 of Part 1 of Division 3 of Title 2).

(c) Any action taken regarding mediation conducted pursuant to this chapter shall be taken in accordance with the provisions of current law.

(d) Ninety days after the commencement of the mediation, and every 90 days thereafter, the action shall be reactivated unless the parties to the action do either of the following:

(1) Arrive at a settlement and implement it in accordance with the provisions of current law.

(2) Agree by written stipulation to extend the mediation for an another 90-day period.

(e) A mediator shall not file, and a court shall 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.

(f) Sections 703.5 and 1152.5 to 1152.9, inclusive, of the Evidence Code shall apply to any mediation conducted pursuant to this chapter.

Comment. Section 66032 is amended to reflect the addition of new Evidence Code statutes governing mediation confidentiality.

Gov't Code § 66033 (amended). Land use mediator's report

66033. (a) At the end of the mediation, the mediator shall file a report with the Office of Permit Assistance, consistent with ~~Section 1152.5~~ Sections 1152.5 to 1152.9, inclusive, of the Evidence Code, containing each of the following:

(1) The title of the action.

1 (2) The names of the parties to the action.

2 (3) An estimate of the costs avoided, if any, because the parties used mediation
3 instead of litigation to resolve their dispute.

4 (b) The sole purpose of the report required by this section is the collection of
5 information needed by the office to prepare its report to the Legislature pursuant to
6 Section 66036.

7 **Comment.** Section 66033 is amended to reflect the addition of new Evidence Code statutes
8 governing mediation confidentiality.

9 **Ins. Code § 10089.80 (amended). Disclosures and communications in earthquake insurance**
10 **mediations**

11 10089.80. (a) The representatives of the insurer shall know the facts of the case
12 and be familiar with the allegations of the complainant. The insurer or the insurer's
13 representative shall produce at the settlement conference a copy of the policy and
14 all documents from the claims file relevant to the degree of loss, value of the
15 claim, and the fact or extent of damage.

16 The insured shall produce, to the extent available, all documents relevant to the
17 degree of loss, value of the claim, and the fact or extent of damage.

18 The mediator may also order production of other documents that the mediator
19 determines to be relevant to the issues under mediation. If a party declines to
20 comply with that order, the mediator may appeal to the commissioner for a
21 determination of whether the documents requested should be produced. The
22 commissioner shall make a determination within 21 days. However, the party
23 ordered to produce the documents shall not be required to produce while the issue
24 is before the commissioner in this 21-day period. If the ruling is in favor of
25 production, any insurer that is subject to an order to participate in mediation issued
26 under subdivision (a) of Section 10089.75 shall comply with the order to produce.
27 Insureds, and those insurers that are not subject to an order to participate in
28 mediation, shall produce the documents or decline to participate further in the
29 mediation after a ruling by the commissioner requiring the production of those
30 other documents. Declination of mediation by the insurer under this section may
31 be considered by the commissioner in exercising authority under subdivision (a) of
32 Section 10089.75.

33 The mediator shall have the authority to protect from disclosure information that
34 the mediator determines to be privileged, including, but not limited to, information
35 protected by the attorney-client or work-product privileges, or to be otherwise
36 confidential.

37 (b) The mediator shall determine prior to the mediation conference whether the
38 insured will be represented by counsel at the mediation. The mediator shall inform
39 the insurer whether the insured will be represented by counsel at the mediation
40 conference. If the insured is represented by counsel at the mediation conference,
41 the insurer's counsel may be present. If the insured is not represented by counsel at
42 the mediation conference, then no counsel may be present.

(c) Sections 703.5 and 1152.5 to 1152.9, inclusive, of the Evidence Code apply to a mediation conducted under this chapter.

(d) A mediator may not file, and a court may not consider, a declaration or finding of any kind by the mediator other than a required statement of agreement or nonagreement, unless all parties to the mediation expressly agree otherwise in writing.

(e) The statements made by the parties, negotiations between the parties, and documents produced at the mediation are confidential. However, this confidentiality shall not restrict the access of the department to documents or other information the department seeks in order to evaluate the mediation program or to comply with reporting requirements. This subdivision does not affect the discoverability or admissibility of documents that are otherwise discoverable or admissible.

Comment. Section 10089.80 is amended to reflect the addition of new Evidence Code statutes governing mediation confidentiality.

Welf. & Inst. Code § 350 (amended). Conduct of proceedings

350. (a)(1) The judge of the juvenile court shall control all proceedings during the hearings with a view to the expeditious and effective ascertainment of the jurisdictional facts and the ascertainment of all information relative to the present condition and future welfare of the person upon whose behalf the petition is brought. Except where there is a contested issue of fact or law, the proceedings shall be conducted in an informal nonadversary atmosphere with a view to obtaining the maximum cooperation of the minor upon whose behalf the petition is brought and all persons interested in his or her welfare with any provisions that the court may make for the disposition and care of the minor.

(2) Each juvenile court in Contra Costa, Los Angeles, Orange, Sacramento, San Diego, Santa Clara, and Tulare Counties is encouraged to develop a dependency mediation program to provide a problem-solving forum for all interested persons to develop a plan in the best interests of the child, emphasizing family preservation and strengthening. The Legislature finds that mediation of these matters assists the court in resolving conflict, and helps the court to intervene in a constructive manner in those cases where court intervention is necessary. Notwithstanding any other provision of law, no person, except the mediator, who is required to report suspected child abuse pursuant to the Child Abuse and Neglect Reporting Act (Article 2.5 (commencing with Section 11164) of Chapter 2 of Title 1 of Part 4 of the Penal Code), shall be exempted from those requirements under Section 1152.5 Sections 1152.5 to 1152.9, inclusive, because he or she agreed to participate in a dependency mediation program established in one of these juvenile courts.

If a dependency mediation program has been established in one of these juvenile courts, and if mediation is requested by any person who the judge or referee deems to have a direct and legitimate interest in the particular case, or on the court's own motion, the matter may be set for confidential mediation to develop a plan in the

1 best interests of the child, utilizing resources within the family first and within the
2 community if required.

3 (b) The testimony of a minor may be taken in chambers and outside the presence
4 of the minor's parent or parents, if the minor's parent or parents are represented by
5 counsel, the counsel is present and any of the following circumstances exist:

6 (1) The court determines that testimony in chambers is necessary to ensure
7 truthful testimony.

8 (2) The minor is likely to be intimidated by a formal courtroom setting.

9 (3) The minor is afraid to testify in front of his or her parent or parents.

10 After testimony in chambers, the parent or parents of the minor may elect to
11 have the court reporter read back the testimony or have the testimony summarized
12 by counsel for the parent or parents.

13 The testimony of a minor also may be taken in chambers and outside the
14 presence of the guardian or guardians of a minor under the circumstances specified
15 in this subdivision.

16 (c) At any hearing in which the probation department bears the burden of proof,
17 after the presentation of evidence on behalf of the probation department and the
18 minor has been closed, the court, on motion of the minor, parent, or guardian, or
19 on its own motion, shall order whatever action the law requires of it if the court,
20 upon weighing all of the evidence then before it, finds that the burden of proof has
21 not been met. That action includes, but is not limited to, the dismissal of the
22 petition and release of the minor at a jurisdictional hearing, the return of the minor
23 at an out-of-home review held prior to the permanency planning hearing, or the
24 termination of jurisdiction at an in-home review. If the motion is not granted, the
25 parent or guardian may offer evidence without first having reserved that right.

26 **Comment.** Section 350 is amended to reflect the addition of new Evidence Code statutes
27 governing mediation confidentiality.

~~§ 17311. Attorney's fees~~

This section is superseded by subdivision (d) added to Section 17310.

§ 17319. Application of chapter to pending cases

The general rule under this section that the new statute applies to all pending actions, unless the court determines that it would be unfair to do so, should not apply to Sections 17301-17303. In other words, the provisions concerning the requirements for pleading a representative cause of action and the conflict of interest and adequacy of counsel rules would apply only to actions filed after the operative date.

STUDY K-401 – MEDIATION COMMUNICATIONS

The Commission considered Memorandum 96-33 and the attached draft of the tentative recommendation relating to the confidentiality of mediation communications. It was agreed that the mediation confidentiality provisions would be consolidated in a single article in the Evidence Code. The Commission decided not to try to deal with issues relating to mediation in administrative adjudication in this tentative recommendation. Issues relating to settlement negotiation confidentiality should be made the subject of a separate study, and possibly consolidated with the mediation confidentiality proposals when they are submitted to the Legislature.

The Commission approved the tentative recommendation to be distributed for comment, subject to the specific revisions set out in the draft attached to these Minutes as Exhibit pp. 3-5, a copy of which was provided to Commission members before the meeting on May 15. This decision was ratified by the Commission on May 15 by a 6-0 roll call vote, the following Commission members voting aye: Ackerman, Byrd, Cooper, Fink, Kopp, Wied.

~~STUDY L-4000 – HEALTH CARE DECISIONS~~

The Commission considered Memorandum 96-34, and the First Supplement thereto, relating to commencement of the study on health care decisionmaking. The Commission approved the approach outlined in the memorandum, focusing on the durable power of attorney for health care and the Uniform Health-Care Decisions Act, but considering the law of other jurisdictions as relevant.

1 **MEDIATION CONFIDENTIALITY: 5/14/96 REDRAFT**

2 **Staff Note.** In this redraft of the tentative recommendation, strike-out (~~strike-out~~) and
3 underscore (underscore) show changes from the draft attached to Memorandum 96-33. At the
4 Commission's 5/9/96 meeting, it was agreed that the mediation confidentiality provisions would
5 be consolidated in a single article in the Evidence Code. This will be done before the tentative
6 recommendation is circulated for comment.

7 **Evid. Code § 162 (added). Mediation and mediator defined**

8 162. (a) For purposes of this article,

9 (1) "Mediation" means a process in which a mediator facilitates communication
10 between disputants to assist them in reaching a mutually acceptable agreement.

11 **Evid. Code § 163 (added). Mediator**

12 163. (2) "Mediator" is a neutral person who conducts a mediation. A mediator
13 has no authority to compel a result or render a decision in the dispute. A mediator
14 shall not be a judge, commissioner, referee, judge pro tem, or salaried employee of
15 any tribunal in which the mediated dispute is pending.

16 (b) This article does not apply to any mediation under Chapter 11 (commencing
17 with Section 3160) of Part 2 of Division 8 of the Family Code.

18 (c) Notwithstanding subdivision (a), if mediation is unsuccessful and by
19 agreement the mediator then conducts a further dispute resolution proceeding, [this
20 article] applies to the mediation unless the agreement expressly provides that
21 confidentiality does not apply.

22 **Evid. Code § 1152.5 (amended). Communications during mediation**

23 1152.5. (a) When persons conduct and participate in a mediation for the purpose
24 of compromising, settling, or resolving a dispute in whole or in part:

25 (1) Except as otherwise expressly provided by statute, evidence of anything said
26 or of any admission made for the purpose of, or in the course of, or pursuant to in
27 ~~the course of~~ the mediation is not admissible in evidence or subject to discovery,
28 and disclosure of this evidence shall not be compelled, in any arbitration,
29 administrative adjudication, civil action, or other noncriminal proceeding in which,
30 pursuant to law, testimony can be compelled to be given.

31 (2) Except as otherwise expressly provided by statute, no document, or any
32 writing as defined in Section 250, that is prepared for the purpose of, or in the
33 course of, or pursuant to, the mediation, or copy thereof, is admissible in evidence
34 or subject to discovery, and disclosure of the document or writing shall not be
35 compelled, in any arbitration, administrative adjudication, civil action, or other
36 noncriminal proceeding in which, pursuant to law, testimony can be compelled to
37 be given.

38 (3) All communications, negotiations, or settlement discussions by and between
39 participants or mediators in the mediation shall remain confidential.

1 (4) Evidence otherwise admissible or subject to discovery outside of mediation
2 shall not be or become inadmissible or protected from disclosure solely by reason
3 of its introduction or use in a mediation.

4 (b) This section does not apply where the admissibility of the evidence is
5 governed by Section 1818 or 3177 of the Family Code.

6 (c) Nothing in this section makes admissible evidence that is inadmissible under
7 Section 1152 or any other statutory provision. Nothing in this section limits the
8 confidentiality provided pursuant to Section 65 of the Labor Code.

9 (d) If the testimony of a mediator is sought to be compelled in any action or
10 proceeding as to any communication, document, or any writing as defined in
11 Section 250, that is ~~or document~~ made or prepared for the purpose of, pursuant to,
12 or in the course of the mediation that is inadmissible and not subject to disclosure
13 under this section, the court shall award reasonable attorney's fees and costs to the
14 mediator against the person or persons seeking that testimony.

15 (e) Subdivision (a) does not limit either of the following:

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

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

18 (f) This section applies to communications, documents, and any writings as
19 defined in Section 250, that are ~~and documents~~ made or prepared in the course of
20 attempts to initiate mediation, regardless of whether an agreement to mediate is
21 reached.

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

25 **Evid. Code § 1152.8 (added). Consent to disclosure of mediation communications**

26 1152.8. Notwithstanding Section 1152.5, a communication, document, or any
27 writing as defined in Section 250, that is ~~or document~~ made or prepared for the
28 purpose of, or in the course of, or pursuant to, a mediation, may be admitted or
29 disclosed if any of the following conditions exist:

30 (a) All persons who conduct or otherwise participate in the mediation expressly
31 consent to disclosure of the communication, document, or writing ~~or document~~.

32 (b) The communication, document, or writing ~~or document~~ is an expert's
33 analysis or report, it was prepared for the benefit of fewer than all the mediation
34 participants, those participants expressly consent to its disclosure, and the
35 communication, document, or writing ~~or document~~ does not disclose anything said
36 or any admission made in the course of the mediation.

37 **§ 1152.7 (added). Written settlements Settlements reached through mediation**

38 1152.7. (a) Notwithstanding Section ~~1152.5~~ Sections 1152.5 and 1152.8, an
39 executed written settlement agreement prepared in the course of, or pursuant to, a
40 mediation, may be admitted or disclosed if any of the following conditions exist:

1 (1) (a) The agreement provides that it is admissible or subject to disclosure, or
2 words to that effect.

3 (2) (b) The agreement provides that it is enforceable or binding or words to that
4 effect.

5 (3) (c) All signatories to the agreement expressly consent to its disclosure.

6 (4) (d) The agreement is used to show fraud, duress, or illegality that is relevant
7 to an issue in dispute.

8 § 1152.75 (added). Oral agreements reached through mediation

9 1152.75. (a) Notwithstanding Sections 1152.5 and 1152.8, an oral agreement
10 prepared in the course of, or pursuant to, a mediation, may be admitted or
11 disclosed, but only if all of the following conditions are satisfied:

12 (1) The oral agreement is recorded by a court reporter, tape recorder, or other
13 reliable means of sound recording.

14 (2) The mediator recites the terms of the oral agreement on the record.

15 (3) The parties to the oral agreement expressly state on the record that the
16 agreement is enforceable or binding or words to that effect.

17 (b) Upon recording an oral agreement pursuant to this section, the mediation
18 ends for purposes of this article.

19 Evid. Code § 1152.9 (added). Proceedings referred to as mediations

20 1152.9. (a) The protection of Section 703.5 and Sections 1152.5 to 1152.9,
21 inclusive, extends to:

22 (1) A "mediation" as defined in Section 162.

23 (2) A "mediator" as defined in Section 163.

24 (3) A dispute resolution proceeding that satisfies both of the following
25 conditions:

26 (i) A nondisputant assists in resolving the dispute.

27 (ii) The proceeding is referred to as a mediation.

28 (4) A nondisputant who conducts a dispute resolution proceeding that is referred
29 to as a mediation.