

EXHIBIT 4.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

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 September 20, 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) 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, consolidate mediation confidentiality statutes in that code, and clarify other aspects of mediation confidentiality.

This recommendation was prepared pursuant to Resolution Chapter 130 of the Statutes of 1965, continued in Resolution Chapter 87 of the Statutes of 1995.

MEDIATION CONFIDENTIALITY

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

7 The Commission deliberately drafted the confidentiality provision in a manner
8 that would allow different mediation techniques to flourish.⁴ Since its enactment,
9 courts and disputants have experimented with mediation in many diverse forms.
10 There have also been significant legislative developments.⁵

11 Although the current statutory scheme provides broad protection, it has
12 ambiguities that cause confusion. In particular, there is a significant issue
13 concerning preparation of settlement agreements parties can enforce.⁶ Clarification
14 would benefit disputants and further the use of mediation to resolve disputes.

EXISTING LAW

15
16 Section 1152.5 states the general rules pertaining to mediation confidentiality.
17 The other main statutory protections are Section 703.5, which governs competency
18 of mediators (and other presiding officials) to testify in subsequent proceedings,
19 and Section 1152.6, which restricts a mediator from filing declarations and
20 findings regarding the mediation.

21 General Rules: Section 1152.5

22 Section 1152.5 remains the key provision protecting mediation confidentiality. It
23 currently provides:

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

2. See, e.g., 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; 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) [hereinafter *1985 Recommendation*].

4. *1985 Recommendation*, *supra* note 3, at 245 n.1.

5. In 1993, the Legislature passed a major substantive amendment of Evidence Code Section 1152.5. See 1993 Cal. Stat. ch. 1261, § 6. It also extended Evidence Code Section 703.5 (restricting competency to testify in subsequent proceedings) to mediators. See 1993 Cal. Stat. ch. 1261, § 5. Two years later, the Legislature added Evidence Code Section 1152.6, which generally precludes mediators from filing declarations and findings regarding mediations they conduct. See 1995 Cal. Stat. ch. 576, § 8. All further statutory references are to the Evidence Code, unless otherwise indicated.

6. *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).

1 1152.5. (a) When persons agree to conduct and participate in a mediation for the
2 purpose of compromising, settling, or resolving a dispute in whole or in part:

3 (1) Except as otherwise provided in this section, evidence of anything said or of
4 any admission made in the course of the mediation is not admissible in evidence
5 or subject to discovery, and disclosure of this evidence shall not be compelled, in
6 any civil action or proceeding in which, pursuant to law, testimony can be
7 compelled to be given.

8 (2) Except as otherwise provided in this section, unless the document otherwise
9 provides, no document prepared for the purpose of, or in the course of, or
10 pursuant to, the mediation, or copy thereof, is admissible in evidence or subject to
11 discovery, and disclosure of such a document shall not be compelled, in any civil
12 action or proceeding in which, pursuant to law, testimony can be compelled to be
13 given.

14 (3) When persons agree to conduct or participate in mediation for the sole
15 purpose of compromising, settling, or resolving a dispute, in whole or in part, all
16 communications, negotiations, or settlement discussions by and between
17 participants or mediators in the mediation shall remain confidential.

18 (4) All or part of a communication or document which may be otherwise
19 privileged or confidential may be disclosed if all parties who conduct or otherwise
20 participate in a mediation so consent.

21 (5) A written settlement agreement, or part thereof, is admissible to show fraud,
22 duress, or illegality if relevant to an issue in dispute.

23 (6) Evidence otherwise admissible or subject to discovery outside of mediation
24 shall not be or become inadmissible or protected from disclosure solely by reason
25 of its introduction or use in a mediation.

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

28 (c) Nothing in this section makes admissible evidence that is inadmissible under
29 Section 1152 or any other statutory provision, including, but not limited to, the
30 sections listed in subdivision (d). Nothing in this section limits the confidentiality
31 provided pursuant to Section 65 of the Labor Code.

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

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

39 Notably, Section 1152.5 does not define the term "mediation." This omission
40 was not accidental. When the statute was originally enacted, mediation was just
41 beginning to gain acceptance. The Commission considered it important to allow
42 use of different techniques, without legislative constraints. Thus, instead of
43 imposing a statutory definition of mediation, the Commission crafted Section
44 1152.5 to allow parties to adopt their own definition for purposes of their dispute.⁷
45 This was done by making Section 1152.5 applicable only where the parties

7. See 1985 Recommendation, *supra* note 3, at 245 n.1, 246 n.4.

1 executed a written agreement reciting the statutory text and stating that the statute
2 governed their proceeding.⁸

3 In 1993, Section 1152.5 was amended in a number of ways, including
4 elimination of the requirement of a written agreement.⁹ Apparently, the
5 requirement was considered 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 **Competency of Mediators To Testify: Section 703.5**

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

19 **Mediator Declarations and Findings: Section 1152.6**

20 Section 1152.6, enacted in 1995,¹¹ 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 a meritless argument.¹²
27 Section 1152.5 arguably did not accomplish this, because some courts had local
28 rules stating that a party participating in mediation was 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.¹³

8. 1985 Cal. Stat. ch. 731, § 1.

9. See 1993 Cal. Stat. ch. 1261 (SB 401), § 6. This 1993 amendment of Section 1152.5 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.

10. 1993 Cal. Stat. ch. 1261, § 5.

11. 1995 Cal. Stat. ch. 576, § 8.

12. Kelly, *New Law Takes Effect to Protect Mediation Rights*, N. Cal. Mediation Ass’n Newsl., Spring 1996.

13. 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.¹⁴ Another source of protection is Evidence Code Section 1152, which makes offers to compromise inadmissible to establish liability.¹⁵ Perhaps most importantly, the constitutional right to privacy¹⁶ encompasses communications “tendered under a guaranty of privacy,” and calls for balancing of the interest in mediation confidentiality against competing interests.¹⁷

PROPOSED REFORMS

The Commission proposes to add a new chapter on mediation confidentiality to Division 9 of the Evidence Code. The substance of existing Sections 1152.5 and 1152.6 would be included in the new chapter. The proposal would reform existing law in the following respects:

Definitions

Now that a written agreement is no longer necessary for statutory protection, it is important to define what constitutes a “mediation” within the meaning of the statute. Without such a definition, the extent of the protection is unclear.

For example, it is unclear whether the statutory protection applies in a court-ordered or otherwise mandatory proceeding, as opposed to an entirely voluntary proceeding. Similarly, it is unclear whether a settlement conference is a “mediation” within the meaning of Section 1152.5.

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, a participant needs to be able to assess whether the proceeding qualifies as a “mediation” for purposes of the statutes protecting mediation confidentiality.¹⁸

14. 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. §§ 1297.371 (international commercial disputes), 1775.10 (civil action mediation in participating courts); 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 (land use); Ins. Code § 10089.80 (earthquake insurance); Lab. Code § 65 (labor disputes); Welf. & Inst. Code § 350 (dependency mediation).

15. Section 1152.5(c) expressly provides that the statute does not made 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.” Section 1152.5 Comment.

16. Cal. Const. art. I, § 1.

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

18. 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 Section 1152.5).

This recommendation would add a definition of “mediation” to the Evidence Code. It would be broad, stating simply: “‘Mediation’ means a process in which a mediator facilitates communication between disputants to assist them in reaching a mutually acceptable agreement.”¹⁹ The definition would encompass a purely voluntary mediation, as well as a mediation in which participation is court-ordered or otherwise mandatory. Language in Section 1152.5(a) arguably restricting its protection to voluntary mediations would be deleted.

The proposed definition of “mediator” is also broad. A “mediator” is “a neutral person who conducts a mediation.” An important restriction applies: The mediator must lack authority to compel a result or render a decision. Thus, although parties may be required to participate in a mediation, the mediator cannot force them to accept any particular resolution.

The broad definitions of “mediation” and “mediator” recognize and embrace the variety of existing models of mediation. They allow that variety to continue by ensuring the confidentiality necessary for success.

Because family disputes present special considerations, the proposed law does not apply to mediation of custody and visitation issues under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

There would also be a special rule for mediation-arbitration (“Med-Arb”) agreements and other dispute resolution agreements in which mediation, if unsuccessful, is followed by another dispute resolution proceeding conducted by the same person who acted as mediator. A mediator exercising coercive authority in the later proceeding would fall outside the statutory definition of “mediator.” Nonetheless, the mediation confidentiality statutes would protect the mediation phase, unless the dispute resolution agreement expressly provides otherwise.

Consent to Admissibility and Disclosure

Section 1152.5(a)(2) now provides that no mediation document is admissible or subject to discovery “unless the document otherwise provides.” This raises a number of issues that are not resolved by the statute. Is it sufficient to unilaterally specify that a document is exempt from Section 1152.5? Is it necessary to have the mediator’s assent, or the assent of nonparties who attended the mediation (e.g., a spouse or insurance representative)?

Section 1152.5(a)(4) is similarly ambiguous. It provides that “[a]ll or part of a communication or document which may be otherwise privileged or confidential may be disclosed if all *parties* who conduct or otherwise participate in mediation so consent.” (Emphasis added.) Formerly, the statute called for consent of “all *persons* who conducted or otherwise participated in the mediation.”²⁰ The current wording is not clear as to precisely whose consent is necessary for disclosure.

19. The definition of “mediation” is drawn from Code of Civil Procedure Section 1775.10, which pertains to civil action mediation in certain participating courts.

20. 1985 Cal. Stat. ch. 731, § 1.

1 This recommendation resolves these ambiguities by adding a statute specifically
2 addressing consent to disclosure. It would establish a general rule that consent of
3 all mediation participants is necessary to waive the statutory protection for
4 mediation confidentiality. All persons attending a mediation, parties as well as
5 nonparties, should be able to speak frankly, without fear of having their words
6 turned against them.

7 To ensure that a party who unilaterally commissions an expert's analysis or
8 report is not unfairly deprived of the benefits of that work, the proposed statute
9 would apply a special rule. Only the consent of the mediation participants for
10 whom the material was prepared would be required for disclosure of a unilaterally
11 prepared expert's analysis or report, *provided* the material does not disclose
12 anything said or any admission made in the course of the mediation. A report or
13 analysis that necessarily discloses mediation communications could be admitted or
14 disclosed only upon satisfying the general rule requiring consent of all mediation
15 participants.

16 The recommendation would require that consent of mediation participants to
17 disclosure be express, not just implied. This requirement should help ensure the
18 existence of true, uncoerced consent, as opposed to mere acquiescence in a judge's
19 referral to a court's mediation program.²¹

20 Settlements Reached Through Mediation

21 As currently drafted, Section 1152.5 fails to provide clear guidance concerning
22 application of the statute to an oral compromise reached in mediation and a
23 document reducing that compromise to writing. Appellate courts have reached
24 conflicting decisions on whether the confidentiality of Section 1152.5 extends to
25 the process of converting an oral compromise to a definitive written agreement.²²
26 If confidentiality applies, then parties cannot enforce the oral compromise, because
27 evidence of it is inadmissible. If confidentiality does not apply, the oral
28 compromise may be enforceable even if it is never reduced to writing. Resolution
29 of this uncertainty is critical: A disputant must be able to determine when the
30 opponent is effectively bound.

31 In addition, Section 1152.5 fails to highlight a critical requirement concerning
32 written settlement agreements reached through mediation. Under Section
33 1152.5(a)(2), unless it is offered to prove fraud, duress, or illegality, a written
34 settlement agreement is admissible only if it so provides.²³ Parties overlooking this
35 requirement may inadvertently enter into a written settlement agreement that is
36 unenforceable because it is inadmissible.

21. See generally Kelly, *supra* note 12.

22. See *supra* note 6.

23. See Ryan v. Garcia, 27 Cal. App. 4th at 1012, 33 Cal. Rptr. 2d at 162 (Section 1152.5 "provides a simple means by which settlement agreements executed during mediation can be made admissible in later proceedings" — specifically, the "parties may consent, as part of a writing, to subsequent admissibility of the agreement.").

This recommendation would remedy these problems by consolidating in a single statute all the confidentiality requirements applicable to written settlements reached through mediation. This will draw attention to the requirements and decrease the likelihood that disputants will inadvertently enter into an unenforceable agreement. The recommendation would also add a statute specifically covering an oral agreement reached through mediation.

The proposed statute would explicitly make an executed written settlement agreement admissible if it provides that it is "enforceable" or "binding" or words to that effect. Because parties intending to be bound are likely to use words to that effect, rather than stating that their agreement is "admissible," the Commission regards this as an important addition.

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

Finally, the recommendation provides a procedure for preparing an oral agreement that can be enforced without violating the statutory protections for mediation confidentiality. For purposes of mediation confidentiality, the mediation ends upon completion of that procedure. Any subsequent proceedings are not confidential.

Unless the disputants follow the specified procedure, the rule of *Ryan v. Garcia*²⁵ should apply: Confidentiality extends through the process of converting an oral compromise reached in mediation to an executed written settlement agreement. Difficult issues can surface in this process, and confidentiality may promote frankness and creativity in resolving them. The proposed approach should enhance the effectiveness of mediation in promoting durable settlements. It will also spare courts from adjudicating disputes over whether an oral compromise was reached in mediation.

Types of Subsequent Proceedings in Which Confidentiality Applies

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

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

25. 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (1996).

26. 1985 Cal. Stat. ch. 731, § 1.

27. 1993 Cal. Stat. ch. 1261, § 6.

28. 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.

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

4 This recommendation would resolve that ambiguity by making explicit that
5 mediation confidentiality extends to any subsequent “arbitration, administrative
6 adjudication, civil action, or other noncriminal proceeding.” The recommendation
7 also proposes a similar amendment to Section 703.5.

8 As in its original recommendation proposing Section 1152.5,²⁹ the Commission
9 does not recommend extending mediation confidentiality to subsequent criminal
10 cases. Such an extension might unduly hamper the pursuit of justice.

11 **Oral Communications Relating to Mediations**

12 Section 1152.5(a)(1) protects “evidence of anything said or of any admission
13 made *in the course of the mediation.*” (Emphasis added.) Section 1152.5(a)(2) is
14 broader. It protects documents “prepared *for the purpose of, or in the course of, or*
15 *pursuant to, the mediation.*” (Emphasis added.)

16 To encourage frankness in discussions relating to mediation, the Commission
17 proposes to eliminate this distinction and to broaden the coverage of subdivision
18 (a)(1) to conform to that of subdivision (a)(2).

19 **Technological Advances**

20 Section 1152.5(a)(2) protects any mediation “document,” but the term
21 “document” is not defined in the Evidence Code. Due to technological advances
22 such as the increasing use of electronic mail and other electronic communications,
23 issues might arise concerning the extent of coverage.

24 The Commission proposes to address this potential problem by incorporating
25 Section 250’s broad definition of “writing” into the mediation confidentiality
26 statutes.³⁰ Because some persons may mistakenly interpret “writing” more
27 narrowly than “document,” the proposal would retain the latter term in the
28 mediation confidentiality statutes as well.

29 **Intake Communications**

30 It is unclear under Section 1152.5 whether protection extends to intake
31 communications, such as discussions about whether to mediate at all or whether a
32 particular mediator is willing to mediate a dispute. Issues concerning
33 confidentiality of intake communications often occur if one party has consulted a
34 mediator about a dispute and the other party refuses to mediate.

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.

29. 1985 Recommendation, *supra* note 3, at 245 n.1, 246 n.4; see also 1985 Cal. Stat. ch. 731, § 1.

30. Section 250 provides: “‘Writing’ means handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof.”

Protection of intake communications may promote openness in such exchanges and help mediations get off to a good start.³¹ Accordingly, the Commission proposes to make clear that mediation confidentiality “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.”

Attorney’s Fees Provision

Section 1152.5(d) was added in 1993 to provide for an award of attorney’s fees and costs to a mediator if the mediator is subpoenaed to testify “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.” (Emphasis added.) The reference to “anything said or any admission made” encompasses communications protected under Section 1152.5(a)(1), but would appear not to cover an improper attempt to compel disclosure of documents protected under Section 1152.5(a)(2).³²

A mediator may, however, incur substantial litigation expenses regardless of which paragraph of the statute a subpoena may violate. Thus, the recommendation conforms the scope of the attorney’s fees provision to the scope of protected communications.

Agreements To Mediate

As originally enacted, Section 1152.5 included an express exception for agreements to mediate a dispute.³³ The exception facilitated enforcement of such agreements, as by a mediator seeking to collect an unpaid fee.

The express exception for agreements to mediate was eliminated in 1993,³⁴ but the change appears to have been inadvertent. The proposed statute would reinstate the earlier provision.

Limited Exception for Research Purposes

Colorado’s mediation confidentiality statute has a limited exception allowing gathering of mediation information for research purposes, provided that mediation participants and their disputes remain unidentifiable. California should add similar language to its statute. This would be consistent with, and in furtherance of, the goal of encouraging experimentation with different mediation techniques.

Reforms of Section 1152.6

Section 1152.6, which generally restricts mediators from filing declarations and findings with courts, would benefit from clarification in a number of respects. In particular, it should be made clear that (1) the restriction applies to all submissions, not just filings, (2) the restriction is not limited to court proceedings,

31. See, e.g., Kirtleyn, *supra* note 2.

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

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

34. 1993 Cal. Stat. ch. 1261, § 6.

but rather applies to all types of adjudications, including arbitrations and administrative adjudications, and (3) the restriction applies to any evaluation or statement of opinion, however denominated. These changes would help ensure that courts interpret the statute in a manner consistent with its goal of preventing coercion by mediators.³⁵

CONCLUSION

Mediation is a valuable and widely used technique in which candor is crucial to success. Sections 703.5, 1152.5, and 1152.6 promote candor by protecting the confidentiality of mediation proceedings, albeit with limitations. To further the effective use of mediation, the rules concerning confidentiality should be unambiguous.

35. See Kelly, *supra* note 12.

PROPOSED LEGISLATION

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

SEC. _____. 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 Section 120 ("civil action" includes civil proceedings). See also Sections 1120-1129 (mediation).

Evid. Code §§ 1120-1129 (added). Mediation

SEC. _____. Chapter 2 (commencing with Section 1120) is added to Division 9 of the Evidence Code, to read:

CHAPTER 2. MEDIATION

§ 1120. "Mediation" and "mediator" defined

1120. (a) For purposes of this chapter,

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

(2) "Mediator" is a neutral person who conducts a mediation. A mediator has no authority to compel a result or render a decision in the dispute.

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

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

Comment. Subdivision (a)(1) and the neutrality requirement of subdivision (a)(2) of Section 1120 are drawn from Code of Civil Procedure Section 1775.1. An attorney or other representative of a party is not neutral and so does not qualify as a "mediator" for purposes of this chapter. A "mediator" may be an individual, group of individuals, or entity. See Section 175 ("person" defined). See also Section 10 (singular includes the plural).

As recognized in subdivision (b), special confidentiality rules apply to mediation of child custody and visitation issues. See Section 1040; Fam. Code §§ 1818, 3177.

Subdivision (c) governs mediation-arbitration (Med-Arb) agreements and similar contractual arrangements in which the person who mediates a dispute serves in another capacity if the mediation is unsuccessful. The protection of this chapter extends to information disclosed in the mediation phase unless the agreement manifests intent to allow subsequent use of such information.

§ 1122. Mediation confidentiality

1122. (a) When persons 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 expressly provided by statute, evidence of anything said or of any admission made for the purpose of, or in the course of, or pursuant to the mediation is not admissible in evidence or subject to discovery, and disclosure of this evidence shall not be compelled, in any 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 expressly provided by statute, no document, or any writing as defined in Section 250, that is 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 the document or writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

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

(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. 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 any communication, document, or any writing as defined in Section 250, that is 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 court shall award reasonable attorney's fees and costs to the mediator against the person or persons seeking that testimony.

(e) Subdivision (a) does not limit 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, documents, and any writings as defined in Section 250, that are 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 and the specific circumstances of the parties' controversy are not identified or identifiable.

Comment. The introductory clause of Section 1122(a) continues without change the introductory clause of former Section 1152.5(a), except that the reference to an agreement to mediate is deleted. The protection of Section 1122 extends to mediations in which participation is court-ordered or otherwise mandatory, as well as purely voluntary mediations.

Subdivision (a)(1) continues without substantive change former Section 1152.5(a)(1), except that its protection explicitly applies in a subsequent arbitration or administrative adjudication, as well as in any civil action or proceeding. See Section 120 ("civil action" includes civil proceedings). In addition, the protection of Section 1122(a)(1) extends to oral communications made for the purpose of or pursuant to a mediation, not just oral communications made in the course of the mediation. Subdivision (a)(1) also reflects the addition of Sections 1127 (consent to disclosure of mediation communications), 1128 (written settlements reached through mediation), and 1129 (oral agreements reached through mediation). To "expressly provide" an exception to subdivision (a)(1), a statute must explicitly be aimed at overriding mediation confidentiality. See, e.g., Section 1127 ("Notwithstanding Section 1122 ...").

Subdivision (a)(2) continues without substantive change former Section 1152.5(a)(2), except that its protection explicitly applies in a subsequent arbitration or administrative adjudication, as well as in any civil action or proceeding. See Section 120 ("civil action" includes civil proceedings). In addition, subdivision (a)(2) expressly encompasses any type of "writing" as defined in Section 250, regardless of whether the representations are on paper or on some other medium. Subdivision (a)(2) also reflects the addition of Sections 1127 (consent to disclosure of mediation communications), 1128 (written settlements reached through mediation), and 1129 (oral agreements reached through mediation). To "expressly provide" an exception to subdivision (a)(2), a statute must explicitly be aimed at overriding mediation confidentiality. See, e.g., Section 1127 ("Notwithstanding Section 1122 ...").

Subdivision (a)(3) continues former Section 1152.5(a)(3) without substantive change. Subdivision (a)(4) continues former Section 1152.5(a)(6) without change.

Subdivision (b) continues former Section 1152.5(b) without change.

Subdivision (c) continues former Section 1152.5(c) without substantive change.

Subdivision (d) continues former Section 1152.5(d) without substantive change, except that its scope is conformed to the scope of subdivisions (a)(1)-(a)(3).

Subdivision (e) continues former Section 1152.5(e) without substantive change, except it makes explicit that Section 1122 does not restrict admissibility of agreements to mediate.

Subdivision (f) is new.

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

See Section 1120 ("mediation" and "mediator" defined). See also Sections 703.5 (competency of judges, arbitrators, and mediators), 1123 (mediator evaluations), 1127 (consent to disclosure of mediation communications), 1128 (written settlements reached through mediation), 1129 (oral agreements reached through mediation). 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. §§ 1297.371 (international commercial disputes), 1775.10 (civil action mediation in participating courts); 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 (land use); Ins. Code § 10089.80 (earthquake insurance); Lab. Code § 65 (labor disputes); Welf. & Inst. Code § 350 (dependency mediation). See also Cal. Const. art. I, § 1 (right to privacy); *Garstang v. Superior Court*, __ Cal. App. 4th __, 46 Cal. Rptr. 2d 84, 88 (1995) (constitutional right of privacy protected communications made during mediation sessions before an ombudsperson).

1 **§ 1123. Mediator evaluations**

2 1123. A mediator may not submit, and a court or other adjudicative body may
3 not consider, any assessment, evaluation, recommendation, or finding of any kind
4 by the mediator concerning a mediation conducted by the mediator, other than a
5 required statement of agreement or nonagreement, unless all parties in the
6 mediation expressly agree otherwise in writing prior to commencement of the
7 mediation. However, this section does not apply to mediation under Chapter 11
8 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

9 **Comment.** Section 1123 continues former Section 1152.6 without substantive change, except it
10 makes clear that (1) the statute applies to all submissions, not just filings, (2) the statute is not
11 limited to court proceedings but rather applies to all types of adjudications, including arbitrations
12 and administrative adjudications, and (3) the statute applies to any evaluation or statement of
13 opinion, however denominated.

14 See Section 1120 (“mediation” and “mediator” defined).

15 **§ 1127. Consent to disclosure of mediation communications**

16 1127. Notwithstanding Section 1122, a communication, document, or any
17 writing as defined in Section 250, that is made or prepared for the purpose of, or in
18 the course of, or pursuant to, a mediation, may be admitted or disclosed if any of
19 the following conditions exist:

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

22 (b) The communication, document, or writing is an expert’s analysis or report, it
23 was prepared for the benefit of fewer than all the mediation participants, those
24 participants expressly consent to its disclosure, and the communication, document,
25 or writing does not disclose anything said or any admission made in the course of
26 the mediation.

27 **Comment.** Section 1127 supersedes former Section 1152.5(a)(4) and part of former Section
28 1152.5(a)(2), which were unclear regarding precisely whose consent was required for
29 admissibility or disclosure of mediation communications and documents.

30 Subdivision (a) states the general rule that mediation documents and communications may be
31 admitted or disclosed only upon consent of all participants, including not only parties but also the
32 mediator and other nonparties attending the mediation (e.g., a disputant not involved in litigation,
33 a spouse, an accountant, an insurance representative, or an employee of a corporate affiliate).
34 Consent must be express, not implied. For example, parties cannot be deemed to have consented
35 in advance to disclosure merely because they agreed to participate in a particular dispute
36 resolution program. *Cf. Contra Costa Superior Court, Local Rule 207 (1996).*

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

42 For other special rules, see Sections 1123 (mediator evaluations), 1128 (written settlements
43 reached through mediation), 1129 (oral agreements reached through mediation).

44 See Section 1120 (“mediation” and “mediator” defined). See also Sections 703.5 (competency
45 of judges, arbitrators, and mediators) and 1122 (mediation confidentiality).

1 **§ 1128. Written settlements reached through mediation**

2 1128. Notwithstanding Sections 1122 and 1127, an executed written settlement
3 agreement prepared in the course of, or pursuant to, a mediation, may be admitted
4 or disclosed if any of the following conditions exist:

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

7 (b) The agreement provides that it is enforceable or binding or words to that
8 effect.

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

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

12 **Comment.** Section 1128 is added to consolidate and clarify provisions governing written
13 settlements reached through mediation.

14 As to executed written settlement agreements, subdivision (a) continues part of former Section
15 1152.5(a)(2). See also *Ryan v. Garcia*, 27 Cal. App. 4th 1006, 1012, 33 Cal. Rptr. 2d 158, 162
16 (1994) (Section 1152.5 “provides a simple means by which settlement agreements executed
17 during mediation can be made admissible in later proceedings,” i.e., the “parties may consent, as
18 part of a writing, to subsequent admissibility of the agreement”).

19 Subdivision (b) is new. It is added due to the likelihood that parties intending to be bound will
20 use words to that effect, rather than saying their agreement is intended to be admissible or subject
21 to disclosure.

22 As to fully executed written settlement agreements, subdivision (c) supersedes former Section
23 1152.5(a)(4). To facilitate enforceability of such agreements, disclosure pursuant to subdivision
24 (c) requires only consent of the signatories. Consent of other mediation participants, such as the
25 mediator, is not necessary. Subdivision (c) is thus an exception to the general rule governing
26 consent to disclosure of mediation communications. See Section 1127.

27 Subdivision (d) continues former Section 1152.5(a)(5) without substantive change.

28 See Section 1120 (“mediation” and “mediator” defined). See also Section 1129 (oral
29 agreements reached through mediation).

30 **§ 1129. Oral agreements reached through mediation**

31 1129. (a) Notwithstanding Sections 1122 and 1127, an oral agreement prepared
32 in the course of, or pursuant to, a mediation, may be admitted or disclosed, but
33 only if all of the following conditions are satisfied:

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

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

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

39 (b) Upon recording an oral agreement pursuant to this section, the mediation
40 ends for purposes of this chapter.

41 **Comment.** By following the procedure in Section 1129, mediation participants may create an
42 oral agreement that can be enforced without violating Section 1122 (mediation confidentiality).
43 The mediation is over upon completion of that procedure, and the confidentiality protections of
44 this chapter do not apply to any later proceedings, such as attempts to further refine the content of
45 the agreement.

46 Unless the mediation participants follow the specified procedure, confidentiality extends
47 through the process of converting an oral compromise to a definitive written agreement. Section

1129 thus codifies the rule of *Ryan v. Garcia*, 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (1994) (mediation confidentiality applies to oral statement of settlement terms), and rejects the contrary approach of *Regents of University of California v. Sumner*, ___ Cal. App. 4th ___, 50 Cal. Rptr. 2d 200 (1996) (mediation confidentiality does not protect oral statement of settlement terms).

See Section 1120 ("mediation" and "mediator" defined). See also Section 1128 (written settlements reached through mediation).

Heading of Chapter 2 (commencing with Section 1150) (amended)

SEC. _____. The heading of Chapter 2 (commencing with Section 1150) of Division 9 of the Evidence Code is amended to read:

**CHAPTER 2 3. OTHER EVIDENCE AFFECTED OR
EXCLUDED BY EXTRINSIC POLICIES**

Comment. The chapter heading is renumbered to reflect the addition of new Chapter 2 (Mediation).

Evid. Code § 1152.5 (repealed). Mediation confidentiality

SEC. _____. Section 1152.5 of the Evidence Code is repealed.

~~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.~~

Comment. Except as noted in the Comment to Section 1122, former Section 1152.5(a)(1)-(3) and (b)-(e) are continued without substantive change in Section 1122 (mediation confidentiality). Former Section 1152.5(a)(4) is superseded by Section 1127 (consent to disclosure of mediation communications). See also Sections 1128 (written settlements reached through mediation), 1129 (oral agreements reached through mediation). Former Section 1152.5(a)(5) is continued without substantive change in Section 1128 (written settlements reached through mediation).

Evid. Code § 1152.6 (repealed). Mediator declarations or findings

SEC. _____. Section 1152.6 of the Evidence Code is repealed.

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

Comment. Former Section 1152.6 is continued and broadened in Section 1123 (mediator evaluations). See Section 1123 Comment.

CONFORMING REVISIONS

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

SEC. _____. Section 467.5 of the Business and Professions Code is amended to read:

467.5. Notwithstanding the express application of Section 1152.5 Chapter 2 (commencing with Section 1120) of Division 9 of the Evidence Code to mediations, all proceedings conducted by a program funded pursuant to this chapter, including, but not limited to, arbitrations and conciliations, are subject to Section 1152.5 Chapter 2 (commencing with Section 1120) of Division 9 of the Evidence Code.

Comment. Section 467.5 is amended to reflect the relocation of former Evidence Code Section 1152.5 and 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

SEC. _____. Section 1775.10 of the Code of Civil Procedure is amended to read:

1775.10. All statements made by the parties during the mediation shall be subject to ~~Sections 1152 and 1152.5~~ Section 1152 and Chapter 2 (commencing with Section 1120) of Division 9 of the Evidence Code.

Comment. Section 1775.10 is amended to reflect the relocation of former Evidence Code Section 1152.5 and the addition of new Evidence Code statutes governing mediation confidentiality.

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

SEC. _____. Section 66032 of the Government Code is amended to read:

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, A mediator may not submit, and a court or other adjudicative body may not consider, any assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted 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 Section 703.5 and Chapter 2 (commencing with Section 1120) of Division 9 of the Evidence Code shall apply to any mediation conducted pursuant to this chapter.

Comment. Subdivision (e) of Section 66032 is amended to clarify three points: (1) the statute applies to all submissions, not just filings, (2) the statute is not limited to court proceedings but rather applies to all types of adjudications, including arbitrations and administrative adjudications, and (3) the statute applies to any evaluation or statement of opinion, however denominated.

Subdivision (f) is amended to reflect the relocation of former Evidence Code Section 1152.5 and the addition of new Evidence Code statutes governing mediation confidentiality.

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

SEC. _____. Section 66033 of the Government Code is amended to read:

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 Chapter 2 (commencing with Section 1120) of Division 9 of the Evidence Code, containing each of the following:

(1) The title of the action.

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

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

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

Comment. Section 66033 is amended to reflect the relocation of former Evidence Code Section 1152.5 and the addition of new Evidence Code statutes governing mediation confidentiality.

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

SEC. _____. Section 10089.80 of the Insurance Code is amended to read:

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

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

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

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

5 (b) The mediator shall determine prior to the mediation conference whether the
6 insured will be represented by counsel at the mediation. The mediator shall inform
7 the insurer whether the insured will be represented by counsel at the mediation
8 conference. If the insured is represented by counsel at the mediation conference,
9 the insurer's counsel may be present. If the insured is not represented by counsel at
10 the mediation conference, then no counsel may be present.

11 (c) ~~Sections 703.5 and 1152.5~~ Section 703.5 and Chapter 2 (commencing with
12 Section 1120) of Division 9 of the Evidence Code apply to a mediation conducted
13 under this chapter.

14 ~~(d) A mediator may not file, and a court may not consider, a declaration or~~
15 ~~finding of any kind by the mediator~~ A mediator may not submit, and a court or
16 other adjudicative body may not consider, any assessment, evaluation,
17 recommendation, or finding of any kind by the mediator concerning a mediation
18 conducted by the mediator, other than a required statement of agreement or
19 nonagreement, unless all parties to the mediation expressly agree otherwise in
20 writing.

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

28 **Comment.** Subdivision (c) of Section 10089.80 is amended to reflect the relocation of former
29 Evidence Code Section 1152.5 and the addition of new Evidence Code statutes governing
30 mediation confidentiality.

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

35 **Ins. Code § 10089.82 (amended). Noncompulsory participation; settlement agreement**

36 SEC. _____. Section 10089.82 of the Insurance Code is amended to read:

37 10089.82. (a) An insured may not be required to use the department's mediation
38 process. An insurer may not be required to use the department's mediation process,
39 except as provided in Section 10089.75.

40 (b) Neither the insurer nor the insured is required to accept an agreement
41 proposed during the mediation.

42 (c) If the parties agree to a settlement agreement, the insured will have three
43 business days to rescind the agreement. Notwithstanding Sections 1128 and 1129
44 of the Evidence Code, if the insured rescinds the agreement it may not be admitted

1 or disclosed unless the insured and all other parties to the agreement expressly
2 consent to its disclosure. If the agreement is not rescinded by the insured, it is
3 binding on the insured and the insurer, and acts as a release of all specific claims
4 for damages known at the time of the mediation presented and agreed upon in the
5 mediation conference. If counsel for the insured is present at the mediation
6 conference and a settlement is agreed upon that is signed by the insured's counsel,
7 the agreement is immediately binding on the insured and may not be rescinded.

8 (d) This section does not affect rights under existing law for claims for damage
9 that were undetected at the time of the settlement conference.

10 (e) All settlements reached as a result of department-referred mediation shall
11 address only those issues raised for the purpose of resolution. Settlements and any
12 accompanying releases are not effective to settle or resolve any claim not
13 addressed by the mediator for the purpose of resolution, nor any claim that the
14 insured may have related to the insurer's conduct in handling the claim.

15 Referral to mediation or the pendency of a mediation under this article is not a
16 basis to prevent or stay the filing of civil litigation arising in whole or in part out
17 of the same facts. Any applicable statute of limitations is tolled for the number of
18 days beginning from the referral to mediation until the date on which the
19 mediation is either completed or declined, or the date on which the insured fails to
20 appear for a scheduled mediation for the second time, or, in the event that a
21 settlement is completed, the expiration of any applicable three business day
22 cooling off period.

23 **Comment.** Subdivision (c) of Section 10089.82 is amended to reflect the addition of new
24 Evidence Code statutes governing mediation confidentiality.

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

26 SEC. _____. Section 350 of the Welfare and Institutions Code is amended to read:
27 350. (a)(1) The judge of the juvenile court shall control all proceedings during
28 the hearings with a view to the expeditious and effective ascertainment of the
29 jurisdictional facts and the ascertainment of all information relative to the present
30 condition and future welfare of the person upon whose behalf the petition is
31 brought. Except where there is a contested issue of fact or law, the proceedings
32 shall be conducted in an informal nonadversary atmosphere with a view to
33 obtaining the maximum cooperation of the minor upon whose behalf the petition is
34 brought and all persons interested in his or her welfare with any provisions that the
35 court may make for the disposition and care of the minor.

36 (2) Each juvenile court in Contra Costa, Los Angeles, Orange, Sacramento, San
37 Diego, Santa Clara, and Tulare Counties is encouraged to develop a dependency
38 mediation program to provide a problem-solving forum for all interested persons
39 to develop a plan in the best interests of the child, emphasizing family preservation
40 and strengthening. The Legislature finds that mediation of these matters assists the
41 court in resolving conflict, and helps the court to intervene in a constructive
42 manner in those cases where court intervention is necessary. Notwithstanding any
43 other provision of law, no person, except the mediator, who is required to report

1 suspected child abuse pursuant to the Child Abuse and Neglect Reporting Act
2 (Article 2.5 (commencing with Section 11164) of Chapter 2 of Title 1 of Part 4 of
3 the Penal Code), shall be exempted from those requirements under ~~Section 1152.5~~
4 Chapter 2 (commencing with Section 1120) of Division 9 of the Evidence Code
5 because he or she agreed to participate in a dependency mediation program
6 established in one of these juvenile courts.

7 If a dependency mediation program has been established in one of these juvenile
8 courts, and if mediation is requested by any person who the judge or referee deems
9 to have a direct and legitimate interest in the particular case, or on the court's own
10 motion, the matter may be set for confidential mediation to develop a plan in the
11 best interests of the child, utilizing resources within the family first and within the
12 community if required.

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

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

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

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

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

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

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

36 **Comment.** Subdivision (a)(2) of Section 350 is amended to reflect the relocation of former
37 Evidence Code Section 1152.5 and the addition of new Evidence Code statutes governing
38 mediation confidentiality.

First Supplement to Memorandum 96-70

Mediation Confidentiality: Additional Comments on Tentative Recommendation

Attached are two letters that arrived by fax from the Department of Industrial Relations (DIR) (Exhibit pp. 1-2) and the State Bar Committee on Administration of Justice (CAJ) (Exhibit pp. 3-9), respectively. These letters raise a number of new points for the Commission to consider.

ISSUES RAISED BY DIR

DIR seeks assurance that the protections of the tentative recommendation would extend to mediation services provided by the State Mediation and Conciliation Service (SMCS), a division of DIR. To that end, DIR proposes addition of the following language to Section 1120: "'Mediation' includes actions taken by the Department of Industrial Relations to mediate labor disputes, pursuant to Labor Code section 65."

DIR considers such express language necessary "to avoid the possibility that if the proposed legislation is enacted it may later be argued in a court proceeding in which one party seeks disclosure of events at a mediation session conducted by SMCS that mediation services provided by SMCS were intentionally excluded from the protections provided by the new statutory provisions." (Exhibit p. 2.) Presumably, its concern stems from interplay between proposed Sections 1122-1129 and Labor Code Section 65, which includes a confidentiality provision specifically applicable to SMCS:

65. The department may investigate and mediate labor disputes providing any bona fide party to such dispute requests intervention by the department and the department may proffer its services to both parties when work stoppage is threatened and neither party requests intervention. In the interest of preventing labor disputes the department shall endeavor to promote sound union-employer relationships. The department may arbitrate or arrange for the selection of boards of arbitration on such terms as all of the bona fide parties to such dispute may agree upon. *Records of the department relating to labor disputes are confidential; provided, however,*

that any decision or award arising out of arbitration proceedings shall be a public record.

[Emph. added; see also Lab. Code § 65.]

Existing Evidence Code Section 1152.5 expressly provides that it does not limit "the confidentiality provided pursuant to Section 65 of the Labor Code." The tentative recommendation would preserve that language. See § 1122(c).

From Labor Code Section 65 and the reference to it in proposed Section 1122(c), one could infer that the Evidence Code statutes on mediation confidentiality are inapplicable to an SMCS mediation. It is also possible to conclude, however, that the confidentiality of such a mediation is protected by Labor Code Section 65 *and* the Evidence Code provisions.

Incorporating DIR's suggested language into proposed Section 1120(a) may serve to eliminate that ambiguity:

1120. (a) For purposes of this chapter,

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

(2) "Mediator" is a neutral person who conducts a mediation. A mediator has no authority to compel a result or render a decision in the dispute.

(b) For purposes of this chapter, "mediation" includes actions taken by the Department of Industrial Relations to mediate labor disputes, pursuant to Labor Code section 65.

~~(b)~~ (c) This chapter does not apply to any mediation under

The staff knows little about SMCS mediations and procedures, but is attempting to learn more. Based on the information it has now, it tentatively recommends making the change DIR requests.

ISSUES RAISED BY CAJ

CAJ's letter discusses the tentative recommendation section by section, supporting some of the reforms and opposing others. CAJ does not take a position on the Commission's proposal as a whole. The discussion below focuses on CAJ's suggestions for changes in the proposal:

§ 1120. Definitions of “mediation” and “mediator”

CAJ states that “[e]ither Section 1120 should expressly include court proceedings, or it should expressly exclude them.” (Exhibit p. 4.) It “understand[s] that the Law Revision Staff intends to make it clear that court-supervised proceedings are not within the scope” of “mediation” as defined in Section 1120. (*Id.*) Pointing out that “[e]nforcement and confidentiality of court settlements is governed by a different statute and different standards than is mediation,” it “encourage[s] the Commission to eliminate the present ambiguity.” (*Id.*)

The staff’s recollection is that the Commission deliberately drafted Section 1120 broadly enough to include a judicial settlement conference, provided that the judge conducting the conference “has no authority to compel a result or render a decision in the dispute.” The staff agrees with CAJ that it may be helpful to make that intent more clear, as by adding the following sentence to the end of the first paragraph of the Comment: “A ‘mediator’ may be a judge conducting a settlement conference, provided that the judge ‘has no authority to compel a result or render a decision in the dispute.’”

If Section 1120 encompasses judicial settlement conferences as the staff recollects, proposed Section 1121 (the staff’s redraft of the Med-Arb provision, at page 11 of Memorandum 96-70) may require a new subdivision clarifying that despite the Med-Arb provision, a judge conducting a settlement conference is not a “mediator” for purposes of Sections 1120-1129 unless the judge completely lacks decisionmaking authority in the dispute. The staff will suggest precise language at the Commission’s meeting.

§ 1122(a)(2). Admissibility and discoverability of mediation documents

CAJ suggests that “Section 1122(a)(2) should expressly except documents described in proposed Section 1122(a)(4).” (Exhibit p. 5.) Section 1122(a)(4) would continue existing law and provide: “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.” As CAJ suggests, this requirement should limit the confidentiality afforded by Section 1122(a)(2). But the tentative recommendation already accomplishes as much. Section 1122(a)(2) states:

1122. (a)(2) *Except as otherwise provided by statute, no document, or any writing as defined in Section 250, that is 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 the document or writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

[Emph. added.]

Section 1122(a)(4) is a statutory provision limiting Section 1122(a)(2). It does not seem necessary to restate it directly in Section 1122. But it may be helpful to explain the interrelationship between Section 1122(a)(2) and 1122(a)(4) in the Comment.

§ 1122(d). Attorney's fees

CAJ suggests clarifying that Section 1122(d), the attorney's fee provision, extends to production of documents, as well as attempts to compel a mediator to testify. (Exhibit p. 5.) This is a good point. The proposed revision on pages 14-15 of Memorandum 96-70 should resolve this concern.

§ 1122(g). Research

CAJ opposes proposed Section 1122(g), which provides: "Nothing in this section prevents the gathering of information for research or educational purposes, so long as the parties and the specific circumstances of the parties' controversy are not identified or identifiable." CAJ considers the provision "overbroad." (Exhibit p. 6.) It explains:

For example, would people gathering information about mediation be able to compel parties to mediation or the mediators to disclose details of the communications made during the mediation? Much of the information which is communicated in mediation is intended to be confidential and might be embarrassing if it became public. If the information gatherers may compel disclosure of information the parties do not want disclosed, the parties will not be candid in the mediation, for fear that the information might ultimately be leaked. Conversely, there is nothing in the proposal to require confidentiality on the part of the people who gather information about the mediation. Once confidential information is given to these people, without restrictions and without any protective laws or orders that can be enforced, they will be free to disclose the information, whether the parties or the mediators are hurt by the disclosures or not.

[Exhibit p. 6.]

CAJ is perhaps correct that Section 1122(g) as currently worded is overbroad. The types of activities CAJ describes are not what the staff believes the provision is intended to protect. Rather, there is a need to allow mediators and others to discuss mediations and mediation results to some extent, so that people can learn from their experiences and develop appropriate rules for and uses of mediation. The staff has not yet thought of a good way to redraft Section 1122(g) to account for CAJ's concerns, but will try to come up with some language by the time of the Commission's meeting.

§ 1127. Consent to disclosure of mediation communications

Section 1127 of the tentative recommendation currently provides:

1127. Notwithstanding Section 1122, a communication, document, or any writing as defined in Section 250, that is 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, document, or writing.

(b) The communication, document, or writing 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, document or writing does not disclose anything said or any admission made in the course of the mediation.

CAJ proposes to replace current subdivision (b) with a provision stating: "A written statement otherwise admissible is admissible if it is not precluded by other rules of evidence and as long as it does not include statements solely made in the mediation." (Exhibit p. 7.) CAJ would support proposed Section 1127 with this amendment.

CAJ does not attempt to explain or justify its proposed revision. The staff understands that a CAJ representative will attend the Commission's meeting. Rather than speculate on CAJ's intent and reasoning in this memorandum, it seems wiser to see what CAJ has to say. For the moment, however, the staff has concerns that CAJ's proposed revision would essentially undo Section 1122(a)(2)'s protection of documents prepared for the purpose of mediation (e.g., an outline of an opening statement or a written calculations relating to possible

settlement offers) and substantially undercut protection of other mediation documents (e.g., notes taken in a mediation).

§§ 1128, 1129. Written and oral settlements reached through mediation

CAJ supports proposed Section 1128 (written settlements reached through mediation) "in principle." (Exhibit p. 8.) "However, certain members of the Committee are concerned that satellite litigation, and further costs and time, will be expended in determining whether 'magic incantations' that the agreement is 'admissible or subject to disclosure' or 'enforceable or binding' are present." (*Id.*)

Although CAJ does not propose revision of Section 1128, it does recommend a change in Section 1129. Section 1129 currently reads:

1129. (a) Notwithstanding Sections 1122 and 1127, an oral agreement prepared in the course of, or pursuant to, a mediation, may be admitted or disclosed, but only if all of the following conditions are satisfied:

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

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

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

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

CAJ "endorses § 1120 if subsection (a)(3) is deleted." (Exhibit p. 9.) It explains that "recitations of specific words or 'magic language' are unnecessary in those circumstances, and the requirements of (a)(3) will serve only to bar enforcement of obviously valid agreements."

This is much like Mr. Holtzman's suggestion that an agreement reached through mediation should be exempt from the confidentiality provision not only if it states that it is "enforceable or binding or words to that effect," but also if the agreement and the circumstances of its preparation otherwise show that the parties intended it to be enforceable and binding. See Memorandum 96-70 at pp. 18-19 & Exhibit pp. 10-11. For essentially the same reasons set forth in

Memorandum 96-70, the staff recommends against deleting subdivision (a)(3) from Section 1129.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

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STATE OF CALIFORNIA

PETE WILSON, GOVERNOR

DEPARTMENT OF INDUSTRIAL RELATIONS

OFFICE OF THE DIRECTOR - LEGAL UNIT
45 Fremont Street, Suite 450
San Francisco, CA 94105



ADDRESS REPLY TO:
Office of the Director - Legal Unit
P.O. Box 420803
San Francisco, CA 94142
(415) 972-8900
FAX No.: (415) 972-8928

October 3, 1996

Barbara Gaal
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303

Law Revision Commission
RECEIVED

OCT 03 1996

File: K-401

Sent by FAX to (415) 494-1827

Re: Proposed Legislation- Mediation Confidentiality

Dear Ms. Gaal,

The Department of Industrial Relations suggests the following addition to the proposed legislation. The purpose of this addition is to assure that mediation services provided by the State Mediation and Conciliation Service, a division of the Department of Industrial Relations, receive the same protection as that which would be provided to other mediators and mediation processes.

We suggest adding to section 1120(a) of the proposed legislation an additional paragraph, as follows:

(3) "Mediation" includes actions taken by the Department of Industrial Relations to mediate labor disputes, pursuant to Labor Code section 65.

As alternatives, the same or similar language could be added to paragraph (a)(1), or to subdivision (b) or could be added as subdivision (d).

Labor Code section 65 includes references to arbitration proceedings as well as to mediation; for that reason, any reference to Labor Code section 65 without a specific reference to "mediate" could be taken to refer to both arbitration procedures and mediation procedures. To avoid that result, it appears to be necessary to include the word "mediate" in the new language.

The State Mediation and Conciliation Service (SMCS) of the Department of Industrial Relations includes a staff of 15 mediators, in San Francisco, Los Angeles, Fresno and San Diego. We frequently provide mediation services to assist collective bargaining between public agencies - cities, counties, school districts, transit districts and special purpose districts - and unions of their employees. From time to time we provide mediators in collective bargaining disputes involving small private employers and their employees; some of these disputes concern

Robert Murphy
April 10, 1996
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procedures for elections to determine whether employees of a particular employer are to be represented by a union.

We urge addition of the sentences suggested here to avoid the possibility that if the proposed legislation is enacted it may later be argued in a court proceeding in which one party seeks disclosure of events at a mediation session conducted by SMCS that mediation services provided by SMCS were intentionally excluded from the protections provided by the new statutory provisions.

Very truly yours,



Martin Fassler
Counsel for Director of Industrial Relations



THE COMMITTEE ON ADMINISTRATION OF JUSTICE
THE STATE BAR OF CALIFORNIA

555 FRANKLIN STREET
SAN FRANCISCO, CA 94102-4498
(415) 561-8200

October 8, 1996

Law Revision Commission
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OCT 08 1996

File: K-401

VIA FACSIMILE (415) 494 1827

California Law Revision Commission
Attention: Nat Sterling, Executive Secretary
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303

Re: **CALIFORNIA LAW REVISION COMMISSION'S TENTATIVE
RECOMMENDATION ON MEDIATION CONFIDENTIALITY
(MAY, 1996) ("RECOMMENDATIONS")**

Dear Ladies and Gentlemen:

The Committee on Administration of Justice ("CAJ" or "the Committee") has considered the recommendations at several meetings. The following are CAJ's views:

Brief Description of What the Bill is Intended to Accomplish.

The California Law Revision Commission is recommending a substantial amendment to Evidence Code sections 703.5, 1152.5, and 1152.6 dealing with mediation confidentiality, and conforming revisions in Business and Professions Code section 467.5, Code of Civil Procedure section 1775.10., Government Code sections 66032 and 66033, Insurance Code sections 10089.80 and 10089.82, and Welfare and Institutions Code section 350. The purpose of the amendments is to clarify definitions, make it clear that a mediator may not be forced to testify regarding events that took place during the mediation, to protect the confidentiality of mediation proceedings, and to add protections for the mediator.

Amendment to Evidence Code § 703.5

Section 703.5 prohibits a person presiding at a judicial or quasi-judicial proceeding, arbitrator, or mediator from testifying in any subsequent civil proceeding about any statement, conduct, decision, or ruling at or in conjunction with the prior proceeding, with

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some limited exceptions. This amendment would expand the prohibition from testimony in any subsequent civil proceeding to any subsequent ". . . arbitration, administrative adjudication, civil action, or other non-criminal proceeding." The Committee supports the proposal.

Evidence Code § 1120

Proposed Evidence Code section 1120 would define "mediation" and "mediator." "Mediation" would mean "a process in which a mediator facilitates communication between disputants to assist them in reaching a mutually acceptable agreement."

These definitions are reasonable. However, they are broad enough that they apply to more than traditional mediation. For example, the definition of mediation and of mediator are broad enough to cover settlement conferences in pretrial, trial, and post-trial court proceedings. Enforcement and confidentiality of court settlements is governed by a different statute and different standards than is mediation. See, e.g., Code Civ. Proc. § 664.6 and Evid. C. § 1152. Courts have broad powers to enforce court-supervised settlement agreements which powers are not available in the usual mediation. Either Section 1120 should expressly include court proceedings, or it should expressly exclude them. We understand that the Law Revision Staff intends to make it clear that court-supervised proceedings are not within the scope of "mediation" as defined here. We encourage the Commission to eliminate the present ambiguity.

Evidence Code § 1122

Proposed Evidence Code section 1122 would revise some aspects of mediation confidentiality. If persons "conduct and participate" in mediation ". . . for the purpose of compromising, settling, or resolving a dispute in whole or in part . . .," in substance:

- a. Anything said or any admission made during the mediation is not admissible in evidence or subject to discovery, and disclosure shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding. This is substantially the same as existing law. Note, however, that this precludes an action for rescission of the settlement which results from mediation if the ground for rescission is fraud committed by means of statements made during the mediation that induced the agreement.

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- b. No document or writing as defined in Evidence Code section 250 which is prepared for the purpose of, in the course of, or pursuant to the mediation, or copy thereof, would be admissible in evidence or subject to discovery, and disclosure of it could not be compelled. Under the new proposal, the writing prepared for or during the mediation could not be used in evidence later unless all of the parties to the mediation agree. But a document otherwise admissible should not become inadmissible only because it was prepared for or used in a mediation. Proposed Section 1122(a)(2) should expressly except documents described in proposed Section 1122(a)(4).
- c. All communications, negotiations, or settlement discussions by and between participants or mediators during the mediation shall remain confidential. This is broader than existing Section 1152.5(a)(3). That section now provides that confidentiality only applies 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" The Committee supports this change. The parties to mediation should feel free to be candid.
- d. Evidence otherwise admissible or subject to discovery outside a mediation does not become inadmissible or protected from disclosure merely by being used in the mediation. This is substantially the same as current Evidence Code section 1152.5(a)(6).

Proposed Section 1122(c) provides that this section does not make admissible evidence that is inadmissible under Evidence Code section 1152 or any other statutory provision and does not limit the confidentiality provisions of Labor Code section 65. This is substantially the same as current Section 1152.5(C).

Proposed Section 1122(d) provides that, if a mediator is forced to testify with respect to any communication, document, or writing in the mediation that is inadmissible and not subject to disclosure under Section 1122, the court must award reasonable fees and costs to the mediator against the person or persons seeking that testimony. This is substantially the same as existing Section 1152.5(d). For clarity's sake and to be complete, the Committee recommends adding "or the production of documents" on line 32 following "testimony."

Proposed Section 1122(e)(1) provides that this section does not limit the admissibility of an agreement to mediate a dispute. This provision is new and is reasonable.

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Proposed Section 1122(e)(2) provides that the section does not limit the effect of an agreement not to take a default in a pending civil action. This is identical with existing law.

Proposed Section 1122(f) would make this confidentiality section applicable to communications, documents, and any writings (as defined in Evidence Code section 250) that are made or prepared in the course of attempts to initiate mediation, regardless of whether an agreement to mediate is reached. This is new. It would protect from discovery discussions about whether or not to mediate, contacts with potential mediators to see whether they would be willing to act as mediators, and the like, even if no agreement to mediate results from those discussions. Since this will promote frankness in discussions about potential mediation, the provision is reasonable, and the Committee supports it.

Proposed Section 1122(g) provides that nothing in proposed Section 1122 prevents gathering information for research or educational purposes, so long as the parties and the specific circumstances of the controversy are not identified or identifiable. This has no counterpart in existing law. The Law Revision Commission states that it is copied from a Colorado statute which allows gathering of information about mediation for research purposes.

The Committee opposes this provision. The Law Revision Commission offers no evidence it is needed. The proposal is overbroad. For example, would people gathering information about mediation be able to compel parties to mediation or the mediators to disclose details of the communications made during the mediation? Much of the information which is communicated in mediation is intended to be confidential and might be embarrassing if it became public. If the information gatherers may compel disclosure of information the parties do not want disclosed, the parties will not be candid in the mediation, for fear that the information might ultimately be leaked. Conversely, there is nothing in the proposal to require confidentiality on the part of the people who gather information about the mediation. Once confidential information is given to these people, without restrictions and without any protective laws or orders that can be enforced, they will be free to disclose the information, whether the parties or the mediators are hurt by the disclosures or not.

Proposed Section 1123

Existing Evidence Code section 1152.6 provides, in substance, that a mediator may not file, and a court may not consider, any declaration or finding of any kind by the mediator, other than a required statement of agreement or non-agreement, unless all parties expressly agree otherwise in writing before the mediation commenced. This prevents a mediator from coercing a party to settle by threatening to inform the assigned judge that the party is being

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unreasonable or presents meritless arguments. The existing law has been diluted because some courts have adopted local rules stating that a party participating in mediation is deemed to have consented in advance to waive Section 1152.5. The Law Revision commission cites Contra costa superior Court Local Rule 207 (1996).

Proposed new Section 1123 expands the protection in Section 1152.6 and prohibits a mediator from submitting, or a court or other adjudicative body from considering, any assessment, evaluation, recommendation, or a finding "of any kind" by the mediator other than a required statement of agreement or non-agreement, unless all parties in the mediation expressly agree otherwise in writing prior to the commencement of the mediation. (It exempts from this section mediation under Family Code sections 3160, et seq.)

The Committee supports this proposal.

Proposed Evidence Code § 1127

Existing Evidence Code section 1152.5(a)(4) and part of Section 1152.5(a) contain provisions regarding disclosure of mediation communications. The proposed new Section 1127 would provide that communications, documents, or any writings prepared for the purpose of or in the course of a mediation may be admitted or disclosed if (a) all persons who conduct or otherwise participate in the mediation expressly consent; or (b) the communication, document, or writing is an expert's analysis or a report prepared for the benefit of less than all of the participants in the mediation, and those participants expressly consent to the disclosure, and the communication, document, or writing does not disclose anything said or any admission made in the course of the mediation.

However, § 1127(b) should be changed to read:

A written statement otherwise admissible is admissible if it is not precluded by other rules of evidence and as long as it does not include statements solely made in the meditation.

The proposed new section is more precise than its predecessor, and the Committee would support it with this amendment.

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Proposed Sections 1128 and 1129

Existing decisional law under current Section 1152.5 is inconsistent. Regents of the University of California v. Summer, 50 Cal. Rptr. 2d 200 (1996), held that Section 1152.5 does not protect an oral statement of settlement terms. Ryan v. Garcia, 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (1994), held that Section 1152.5 protects an oral statement of settlement terms. If the parties reach an oral compromise in a mediation session and thereafter try to reduce it to writing, and the confidentiality rules apply, the parties cannot enforce the oral compromise, because evidence of the oral compromise is inadmissible under existing law.

The current proposals provide that an executed written agreement resulting from mediation would be admissible if it expressly provides that it is admissible or subject to disclosure, or words to that effect (proposed Section 1128(a)); or if it provides that it is "enforceable" or "binding" or words to that effect (proposed Section 1128(b)); or if all signatories to the agreement expressly consent to disclosure (proposed Section 1128(c)); or if the agreement is used to show fraud, duress, or illegality that is relevant to any issue in dispute (proposed Section 1128(d)).

The Committee supports these proposals in principle. However, certain members of the Committee are concerned that satellite litigation, and further costs and time, will be expended in determining whether "magic incantations" that the agreement is "admissible or subject to disclosure" or "enforceable or binding" are present.

Proposed Section 1129(b) also provides that, upon recording an oral agreement pursuant to section 1129, the mediation ends for the purpose of this chapter. This is appropriate because the parties may thereafter get into disputes when they attempt to memorialize an oral agreement in written form. The conduct of the parties after the oral agreement is recited should not be protected from disclosure in proceedings either to enforce, to seek damages for breach, or to rescind. Otherwise, the parties will not be able to offer evidence which would provide courts with the basis for enforcing or terminating the rights and duties under the oral agreement.

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The Committee endorses § 1129 if subsection (a)(3) is deleted. The recitations of specific words or "magic language" are unnecessary in those circumstances, and the requirements of (a)(3) will serve only to bar enforcement of obviously valid agreements.

Very truly yours,



Curtis E.A. Karnow
For The Committee on Administration of Justice

cc: Denis T. Rice
Robert C. Vanderet
Monroe Baer
David C. Long

Government Code Sections 11420.10-11420.30

§ 11420.10. Referral of proceedings

Operative July 1, 1997.

(a) An agency, with the consent of all the parties, may refer a dispute that is the subject of an adjudicative proceeding for resolution by any of the following means:

(1) Mediation by a neutral mediator.

(2) Binding arbitration by a neutral arbitrator. An award in a binding arbitration is subject to judicial review in the manner provided in Chapter 4 (commencing with Section 1285) of Title 9 of Part 3 of the Code of Civil Procedure.

(3) Nonbinding arbitration by a neutral arbitrator. The arbitrator's decision in a nonbinding arbitration is final unless within 30 days after the arbitrator delivers the award to the agency head a party requests that the agency conduct a de novo adjudicative proceeding. If the decision in the de novo proceeding is not more favorable to the party electing the de novo proceeding, the party shall pay the costs and fees specified in Section 1141.21 of the Code of Civil Procedure insofar as applicable in the adjudicative proceeding.

(b) If another statute requires mediation or arbitration in an adjudicative proceeding, that statute prevails over this section.

(c) This section does not apply in an adjudicative proceeding to the extent an agency by regulation provides that this section is not applicable in a proceeding of the agency.

(Added by Stats.1995, c. 938 (S.B.523), § 21, operative July 1, 1997.)

§ 11420.20. Model regulations; contents

Operative July 1, 1997.

(a) The Office of Administrative Hearings shall adopt and promulgate model regulations for alternative dispute resolution under this article. The model regulations govern alternative dispute resolution by an agency under this article, except to the extent the agency by regulation provides inconsistent rules or provides that the model regulations are not applicable in a proceeding of the agency.

(b) The model regulations shall include provisions for selection and compensation of a mediator or arbitrator, qualifications of a mediator or arbitrator, and confidentiality of the mediation or arbitration proceeding.

(Added by Stats.1995, c. 938 (S.B.523), § 21, operative July 1, 1997.)

§ 11420.30. Confidentiality of communications

Operative July 1, 1997.

Notwithstanding any other provision of law, a communication made in alternative dispute resolution under this article is protected to the following extent:

(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 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.

(b) No reference to nonbinding arbitration proceedings, a decision of the arbitrator that is rejected by a party's request for a de novo adjudicative proceeding, the evidence produced, or any other aspect of the arbitration may be made in an adjudicative proceeding or civil action, whether as affirmative evidence, by way of impeachment, or for any other purpose.

(c) No mediator or arbitrator is competent to testify in a subsequent administrative or civil proceeding as to any statement, conduct, decision, or order occurring at, or in conjunction with, the alternative dispute resolution.

(d) Evidence otherwise admissible outside of alternative dispute resolution under this article is not inadmissible or protected from disclosure solely by reason of its introduction or use in alternative dispute resolution under this article.

(Added by Stats.1995, c. 938 (S.B.523), § 21, operative July 1, 1997.)