

EXHIBIT 12.

Memorandum 97-33

AB 939: Mediation Confidentiality

On April 16, 1997, the Commission's bill on mediation confidentiality (AB 939) (Exhibit pp. 1-16) was passed by the Assembly Judiciary Committee on the consent calendar. The bill is a bipartisan measure, authored by Assembly Member Ortiz and co-authored by Assembly Member Ackerman. Numerous organizations and groups, such as the Judicial Council, the ADR Section of the Los Angeles County Bar Association, and Community Board Program, support the bill. Nonetheless, a number of issues have arisen that warrant the Commission's attention.

PROPOSED SECTION 1115 (DEFINITIONS)

CAOC's concern

Consumer Attorneys of California ("CAOC") opposes the definition of "mediation" in Section 1115. CAOC explains that there "is one absolutely crucial item missing from this general definition: except for statutorily authorized court ordered mediations..., *voluntary participation* is essential to mediation." (Exhibit p. 17 (emphasis in original).) CAOC proposes (Exhibit p. 18) to amend the definition as follows:

1115. For purposes of this chapter:

(a) "Mediation" means a statutorily authorized mediation process or the voluntary submission by parties to a process in which a neutral person facilitates communication between disputants to assist them in reaching a mutually acceptable agreement compromising, settling, or resolving a dispute in whole or in part.

If that amendment were made, however, Section 1115 might (but need not necessarily) be construed to mean that a mediation pursuant to an agreement, such as a contract in which the parties agree to mediation under specified circumstances but one party repudiates that term, would not be within the definition and thus would not be confidential. The amendment might also

deprive parties of confidentiality protections where a court orders parties to mediation but lacks statutory authority.

CAOC's concern about contractual mediation clauses in form contracts between parties of unequal bargaining strength is understandable. In drafting AB 939, however, the Commission did not endorse the enforceability of such contractual clauses. It just sought to ensure that if mediation pursuant to an agreement occurred, the mediation participants would be covered by the confidentiality protections of the Evidence Code.

Similarly, CAOC has expressed concern about parties being ordered into mediation without clear statutory authority. But the Commission's bill is not intended to expand judicial authority to compel mediation. Rather, the bill would afford parties the benefits of confidentiality if a court does require them to mediate.

To make these points more clear, the staff asked CAOC to consider the possibility of adding a new subdivision to Section 1115 stating:

(b) Nothing in this chapter expands a court's authority to order participation in a dispute resolution proceeding. Nothing in this chapter authorizes or affects the enforceability of a contractual clause in which parties agree to use of mediation.

This amendment would seem to address CAOC's concern about contractual clauses, while still ensuring that if mediation pursuant to contract occurs, the mediation is confidential. The amendment would also make clear that AB 939 does not expand a court's authority to order parties to mediation, but does give parties confidentiality protections where a court orders mediation but lacks proper statutory authority. CAOC has not yet expressed its position on this potential amendment.

The staff has also asked CAOC to consider whether its concern could be resolved by replacing the Commission's proposed definition of "mediation" with the definition in Code of Civil Procedure Section 1775.1, which applies to the Los Angeles pilot project on court-ordered mediation of small civil disputes. That provision defines "mediation" as "a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement." CAOC supported this definition when the bill establishing the pilot project was under consideration, so it might be acceptable

to CAOC in the Commission's bill as well, particularly if Section 1115 also includes the proposed new subdivision.

If both of those changes were made, Section 1115 would read:

1115. (a) For purposes of this chapter:

(a) (1) "~~Mediation~~" means a process in which a neutral person ~~facilitates communication between~~ or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement ~~compromising, settling, or resolving a dispute in whole or in part.~~

(b) (2) "~~Mediator~~" means a neutral person who conducts a mediation. "~~Mediator~~" includes any person designated by a mediator either to assist in the mediation or to communicate with the participants in preparation for a mediation.

(c) (3) "~~Mediation consultation~~" means a communication between a person and a mediator for the purpose of initiating or considering a mediation or retaining the mediator.

(b) Nothing in this chapter expands a court's authority to order participation in a dispute resolution proceeding. Nothing in this chapter authorizes or affects the enforceability of a contractual clause in which parties agree to use of mediation.

The Commission should consider whether this is the best means of preserving the Commission's intent while addressing CAOC's concern. The staff will supplement this memorandum if it obtains any further information on CAOC's position before the Commission meets.

CDRC and SCMA comments on reconvening a mediation

While supporting the Commission's bill in principle, California Dispute Resolution Council ("CDRC") comments that AB 939 "is not clear what the parties to the mediation which has been terminated need to do to reinitiate mediation if they think it would be helpful." (Exhibit p. 20.) Southern California Mediation Association ("SCMA") expresses similar concern about protecting the confidentiality of efforts to reconvene a mediation. (Exhibit p. 21.) Amending Section 1115's definition of "mediation consultation" to explicitly include communications for the purpose of reconvening a mediation may resolve those concerns:

1115. For purposes of this chapter:

....

(c) "~~Mediation consultation~~" means a communication between a person and a mediator for the purpose of ~~initiating or considering~~

initiating, considering, or reconvening a mediation or retaining the mediator.

Based on discussions of this issue to date, the staff recommends this approach and seeks the Commission's approval.

CAJ'S CONCERNS

As reported at the Commission's meeting on April 10, 1997, the State Bar Committee on Administration of Justice ("CAJ") wrote a letter to Assembly Member Ortiz stating that CAJ would support AB 939 if amended. The staff responded to CAJ's letter, explaining that some of CAJ's suggestions had previously been considered but others might be acceptable if CAJ would support the Commission's bill. CAJ has not yet sent a reply. We understand, however, that CAJ probably will agree to support AB 939 if amended as outlined in the staff's letter.

Thus, the Commission should determine its position on the changes contemplated in that letter, which are:

(1) Amending proposed Evidence Code Section 1119 to read:

1119. An oral agreement is in accordance with Section 1119 if it satisfies all of the following conditions:

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

(b) The terms of the oral agreement are recited on the record in the presence of the parties and the mediator and the parties express on the record that they agree to the terms recited.

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

The proposed additional language for subdivision (b) is implicit in the current version of Section 1119, but making it explicit may be helpful.

(2) Amending proposed Section 1121(b)(2) to provide that the chapter on mediation confidentiality does not limit the "effect of an agreement not to take a default or an agreement to extend the time within which to act or refrain from acting in a pending civil action." As currently drafted, proposed Section 1121(b)(2) would continue existing Section 1152.5(e) without substantive change. CAJ's suggested expansion to encompass extensions of litigation deadlines seems reasonable.

(3) Revising the Comment to Section 1124 (written settlements and oral agreements reached through mediation) to explain that the provision does not affect the use of confidential settlement agreements. Rather, Section 1124 means that the chapter on mediation confidentiality does not prevent admissibility or disclosure of a settlement agreement under the circumstances specified in the provision. It does not mean that other rules, such as the hearsay rule or a confidentiality clause in a settlement agreement, cannot be invoked to bar admissibility or disclosure.

CDRC'S COMMENTS ON SECTIONS 1118 AND 1120

In its letter to Assembly Member Ortiz, CDRC expresses two important concerns:

- Concern relating to Section 1118 (mediation-arbitration) — in particular, concern that a mediator-arbitrator may find it difficult to ignore confidential mediation communications in a subsequent arbitration. (Exhibit p. 19.)
- Concern regarding the meaning of the word “confidential” in Section 1120(c), which continues existing Section 1152.5(a)(3). (Exhibit pp. 19-20.)

The Commission did not overlook these points in drafting its bill, but rather determined that reaching a consensus on the extent to which a mediator may serve as arbitrator, or the degree to which a mediation communication is confidential (as opposed to inadmissible or protected from discovery), is likely to prove challenging, if not impossible. Rather than jeopardizing or delaying its other proposed reforms (in particular, resolution of the conflict between *Ryan v. Garcia*, 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (1994), and *Regents of University of California v. Sumner*, 42 Cal. App. 4th 1209, 50 Cal. Rptr. 2d 200 (1996)), the Commission sought to avoid these issues in drafting its proposal.

The staff explained this history to Lauren Burton (Chair of CDRC's Mediation Committee), commenting that both of the topics raised may be suitable for future study and perhaps future legislation. Because of the complexity and difficulty of the issues involved, the staff continues to recommend against trying to resolve them in AB 939. Although CDRC has not formally responded to the staff's comments, we understand that CDRC is unlikely to press its points in the context of AB 939.

CONFORMING AB 1374 (HERTZBERG)

Assembly Member Hertzberg has introduced a bill (AB 1374) to establish a new pilot project involving court-ordered mediation of civil disputes in which the amount in controversy exceeds \$50,000. As currently drafted, his bill refers to Section 1152.5 of the Evidence Code, which would be repealed by the Commission's bill. He is aware of this situation and has promised to amend his bill to account for the Commission's bill. No Commission action is necessary on this point.

PROPOSED SECTION 1125 (WHEN MEDIATION ENDS)

Proposed Section 1125 (when mediation ends) has raised a number of concerns, including one critical issue and a number of more minor problems. This discussion traces the history of that provision, analyzes the suggestions received, and proposes some amendments.

Original objective

From its inception, a major objective of the Commission's study on mediation confidentiality has been to resolve a conflict between two appellate decisions on whether mediation confidentiality applies to the process of converting an oral compromise reached in mediation to a definitive written agreement. *Compare* *Ryan v. Garcia*, 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (1994) (Section 1152.5 protects oral statement of settlement terms) *with* *Regents of University of California v. Sumner*, 42 Cal. App. 4th 1209, 50 Cal. Rptr. 2d 200 (1996) (Section 1152.5 does not protect oral statement of settlement terms). As explained in the Commission's recommendation, resolution of this uncertainty is critical: "If confidentiality applies, then parties cannot enforce the oral compromise, because evidence of it is inadmissible. If confidentiality does not apply, the oral compromise may be enforceable even if it is never reduced to writing." *Mediation Confidentiality*, 26 Cal. L. Revision Comm'n Reports 407, 422 (1996).

Original approach

In the revised staff draft recommendation attached to Memorandum 97-3, the Commission addressed this issue through the following provision on oral agreements reached in mediation:

1129. (a) Notwithstanding any other provision of this chapter, an oral agreement made in the course of, or pursuant to, a mediation, may be admitted in evidence or disclosed, but only if it is recorded in accordance with Section 1121.1.

(b) On recording, in accordance with Section 1121.1, an oral agreement compromising, settling, or resolving a dispute in whole or in part, the mediation ends for purposes of this chapter.

Comment. By following the procedure in Section 1121.1, mediation participants may create an oral settlement agreement that can be enforced without violating Section 1122 (mediation confidentiality). The mediation is over upon completion of that procedure, and the confidentiality protections of this chapter do not apply to any later proceedings, such as attempts to further refine the content of the agreement.

Unless the mediation participants follow the specified procedure, confidentiality extends 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*, 42 Cal. App. 4th 1209, 50 Cal. Rptr. 2d 200 (1996) (mediation confidentiality does not protect oral statement of settlement terms).

See Section 1120 (definitions). See also Section 1128 (written settlements reached through mediation).

In short, under this provision an oral compromise reached in mediation would be admissible and subject to disclosure only if it were recorded in accordance with the specified statutory procedure, in which case the mediation would end upon completion of the procedure and subsequent communications would not be confidential. Otherwise, the process of converting an oral compromise to a written agreement would be confidential. Prior drafts of the Commission's recommendation were similar.

Revised approach

At its meeting on January 24, 1997, the Commission approved the revised staff draft recommendation, but directed the staff to make certain revisions, including addition of a provision on when mediation ends:

Sections 1128 and 1129 should be reorganized into (1) a statute on written settlements and oral agreements reached through mediation, and (2) a statute on when mediation ends for purposes

of the chapter on mediation. The latter statute should provide that mediation ends when:

- A written settlement fully resolving a dispute is fully executed.
- The mediation participants fully resolve the dispute by an oral agreement in accordance with Section 1121.1.
- The mediator or a disputant submits a declaration stating that the mediation is over.

The statute should also provide that if mediation partially resolves a dispute, mediation as to the issues resolved ends when:

- A written settlement partially resolving a dispute is fully executed.
- Mediation participants partially resolve a dispute by an oral agreement in accordance with Section 1121.1.

[Minutes, 1/24/97, at pp. 7-8.]

The staff implemented these instructions by revising the provisions in question to read:

§ 1124. Written settlements and oral agreements reached through mediation

1124. (a) Notwithstanding any other provision of this chapter, an executed written settlement agreement prepared in the course of, or pursuant to, a mediation, may be admitted in evidence or disclosed if any of the following conditions is satisfied:

- (1) The agreement provides that it is admissible or subject to disclosure, or words to that effect.
- (2) The agreement provides that it is enforceable or binding or words to that effect.
- (3) All signatories to the agreement expressly agree in writing, or orally in accordance with Section 1119, to its disclosure.
- (4) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

(b) Notwithstanding any other provision of this chapter, an oral agreement made in the course of, or pursuant to, a mediation, may be admitted in evidence or disclosed, but only if the agreement is in accordance with Section 1119.

§ 1125. When mediation ends

1125. (a) For purposes of this chapter, a mediation ends when any of the following conditions is satisfied:

- (1) A written settlement fully resolving the mediated dispute is fully executed.
- (2) The mediation participants fully resolve the dispute by an oral agreement in accordance with Section 1119.

(3) The mediator provides the mediation participants with a declaration stating that further mediation would not be worthwhile, or words to that effect.

(4) A disputant provides the mediator and the other mediation participants with a declaration stating that the mediation is terminated, or words to that effect.

(b) For purposes of this chapter, if a mediation partially resolves a dispute, mediation ends as to the issues resolved when either of the following conditions is satisfied:

(1) A written settlement partially resolving the dispute is fully executed.

(2) The mediation participants partially resolve the dispute by an oral agreement in accordance with Section 1119.

Revised objective

As reworked, the provision on when mediation ends goes beyond resolving the conflict between *Regents of University of California v. Sumner* and *Ryan v. Garcia*. It not only specifies when mediation ends if an oral compromise is reached, but also specifies when mediation confidentiality ends in other situations. The intent, and reason for switching to this new approach, was to help mediation participants determine which communications would be considered confidential and which would not.

Minor problems

Minor concerns relating to proposed Section 1125 include:

(1) CAOC observes that if none of the four events described in subdivision (a) occurs, a mediation could go on indefinitely. (Exhibit p. 18.) That problem could be addressed by adding subdivision (a)(5), stating:

1125. (a) For purposes of this chapter, a mediation ends when any of the following conditions is satisfied:

....

(5) For ten court days, there is no communication between the mediator and any of the parties to the mediation relating to the dispute. The mediator and the parties to the mediation may shorten or extend this time by agreement.

(2) CDRC suggests that the term "declaration" in Section 1125(a)(3) and (a)(4) "is too formal and lends itself to a judicial or administrative proceeding." (Exhibit p. 20.) The staff agrees and proposes to substitute "writing signed by the mediator" in subdivision (a)(3) and "writing signed by the disputant" in subdivision (a)(4).

(3) CDRC also points out that mediators may not like saying “further mediation would not be worthwhile,” as required in Section 1125(a)(3). CDRC would replace that phrase with “the mediation is terminated, or words to that effect,” which seems a reasonable solution. (Exhibit p. 20.)

(4) Ron Kelly has pointed out orally that Section 1125(a)(4) could be interpreted to allow one party to unilaterally terminate a multi-party mediation. That defect could be remedied by adding a second sentence to Section 1125(a)(4):

1125. (a) For purposes of this chapter, a mediation ends when any of the following conditions is satisfied:

....

(4) A disputant party to the mediation provides the mediator and the other mediation participants with a declaration stating that the mediation is terminated, or words to that effect. If there are more than two parties to the mediation, the mediation ends only as to the party providing the declaration.

Key issue

The preceding flaws in Section 1125 are relatively easy to address, but the provision also presents a more serious problem, which has become apparent in considering the impact of Assembly Member Hertzberg’s bill to establish a new pilot program. As presently drafted, that bill seems to give courts in the proposed pilot program authority to order disputants to participate in six hours of mediation (or at least to pay for their share of six hours of mediation). Section 1125(a)(4) could be construed to conflict with that aspect of AB 1374, or with any other provision requiring parties to mediate for a certain length of time, to mediate in good faith, or the like. Arguably, Section 1125(a)(4) would authorize a disputant to terminate a mediation, or at least to withdraw from a mediation, at any time. If Section 1125(a)(4) were construed in that manner, then the Commission’s bill would be taking sides on a very controversial issue: Whether, and to what extent, a party can be compelled to mediate.

That was not the Commission’s intent in proposing Section 1125. Rather, the objective was to help mediation participants differentiate between confidential mediation communications and unprotected post-mediation discussions. If Section 1125 were interpreted more narrowly, however, it would still present problems. For example, suppose the provision were construed to mean that confidentiality stops when a party provides the required declaration (or writing signed by the party), but the mediation may continue pursuant to a requirement

such as the six hour mandate in AB 1374. Because Section 1125 expressly applies “[f]or purposes of this chapter” on mediation confidentiality, that construction is entirely possible, but it would present the anomaly of a mediation without mediation confidentiality, which again is inconsistent with the Commission’s intent.

Is there a way out of this dilemma? The staff has two suggestions, neither of which is wholly satisfactory.

Option #1

A first possibility is to go back to the Commission’s original approach, resolving the conflict between *Regents of University of California v. Sumner* and *Ryan v. Garcia*, but not providing any further guidance on when mediation ends. That could be accomplished by replacing the current version of Sections 1124 and 1125 with the following:

§ 1124. ~~Written settlements and oral agreements reached through mediation~~

1124. (a) Notwithstanding any other provision of this chapter, an executed written settlement agreement prepared in the course of, or pursuant to, a mediation, may be admitted in evidence or disclosed if any of the following conditions is satisfied:

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

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

(3) (c) All signatories to the agreement expressly agree in writing, or orally in accordance with Section 1119, to its disclosure.

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

~~(b) Notwithstanding any other provision of this chapter, an oral agreement made in the course of, or pursuant to, a mediation, may be admitted in evidence or disclosed, but only if the agreement is in accordance with Section 1119.~~

§ 1125. ~~When mediation ends~~ Oral agreements reached through mediation

1125. (a) ~~For purposes of this chapter, a mediation ends when any of the following conditions is satisfied:~~

~~(1) A written settlement fully resolving the mediated dispute is fully executed.~~

~~(2) The mediation participants fully resolve the dispute by an oral agreement in accordance with Section 1119.~~

~~(3) The mediator provides the mediation participants with a declaration stating that further mediation would not be worthwhile, or words to that effect.~~

~~(4) A disputant provides the mediator and the other mediation participants with a declaration stating that the mediation is terminated, or words to that effect.~~

~~(b) For purposes of this chapter, if a mediation partially resolves a dispute, mediation ends as to the issues resolved when either of the following conditions is satisfied:~~

~~(1) A written settlement partially resolving the dispute is fully executed.~~

~~(2) The mediation participants partially resolve the dispute by an oral agreement in accordance with Section 1119. Notwithstanding any other provision of this chapter, an oral agreement made in the course of, or pursuant to, a mediation, may be admitted in evidence or disclosed, but only if the agreement is in accordance with Section 1119.~~

~~(b) When an oral agreement fully resolving a dispute is reached in accordance with Section 1119, the mediation ends for purposes of this chapter.~~

~~(c) When an oral agreement partially resolving a dispute is reached in accordance with Section 1119, the mediation ends as to the issues resolved.~~

This approach avoids the issue of mandatory mediation, which may jeopardize the Commission's bill and its needed reforms. On the downside, however, it would provide only limited guidance on when mediation confidentiality ends.

Option #2

A second possibility would be to amend Section 1125 to: (1) correct the minor flaws as previously discussed, (2) preclude the erroneous interpretation that Section 1125(a)(4) authorizes a disputant to terminate or withdraw from a mediation at any time, and (3) prevent the anomalous result of a mediation without mediation confidentiality. The staff tentatively suggests revising Section 1125 as follows:

§ 1125. When mediation ends

1125. (a) ~~For purposes of this chapter, a~~ A mediation ends when any of the following conditions is satisfied:

(1) A written settlement fully resolving the mediated dispute is fully executed.

(2) The mediation participants fully resolve the dispute by an oral agreement in accordance with Section 1119.

(3) ~~The mediator provides the mediation participants with a declaration stating that further mediation would not be worthwhile~~ writing signed by the mediator stating that the mediation is terminated, or words to that effect.

(4) A disputant party to the mediation provides the mediator and the other mediation participants with a declaration writing signed by the party stating that the mediation is terminated, or words to that effect. If there are more than two parties to the mediation, the mediation ends only as to the party providing the declaration.

(5) For ten court days, there is no communication between the mediator and any of the parties to the mediation relating to the dispute. The mediator and the parties may shorten or extend this time by agreement.

~~(b) For purposes of this chapter, if~~ If a mediation partially resolves a dispute, mediation ends as to the issues resolved when either of the following conditions is satisfied:

(1) A written settlement partially resolving the dispute is fully executed.

(2) The mediation participants partially resolve the dispute by an oral agreement in accordance with Section 1119.

(c) Nothing in this section authorizes termination of a mediation if termination would violate a statute or written agreement.

Under this approach, if one of the specified events occurred, the mediation would clearly end for all purposes, not just for purposes of mediation confidentiality, so the problem of a mediation without confidentiality would disappear. A party to the mediation would be *able* to end the mediation at any time, but subdivision (c) makes clear that just because a party is *able* to end a mediation does not necessarily mean the party is *free to end the mediation without impunity*. By making this amendment, and simultaneously revising Section 1115 to clarify that AB 939 neither expands a court's authority to order participation in a mediation nor authorizes or affects the enforceability of a contractual clause in which parties agree to use of mediation, the Commission may be able to steer clear of the thorny issue of mandatory mediation.

Recommendation

The staff is convinced that Section 1125 must be amended to prevent unintended and troublesome interpretations. Of the two options presented, the first seems most likely to facilitate passage of AB 939. Option #2 would provide greater guidance on when mediation ends, but it may encounter opposition relating to mandatory mediation, despite the staff's efforts to avoid that issue. On balance, the staff is inclined to implement Option #1 and consider the possibility of a future study on when mediation ends. Of course, the Commission or

someone else may be able to suggest a better approach. The staff encourages the Commission and interested persons to think about alternative solutions.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

AMENDED IN ASSEMBLY APRIL 9, 1997

CALIFORNIA LEGISLATURE—1997-98 REGULAR SESSION

ASSEMBLY BILL

No. 939

Introduced by Assembly Member Ortiz
(Principal coauthor: Assembly Member Ackerman)

February 27, 1997

An act to amend Section 467.5 of the Business and Professions Code, to amend Section 1775.10 of the Code of Civil Procedure, to amend Section 703.5 of, to amend and renumber the heading of Chapter 2 (commencing with Section 1150) of Division 9 of, to add Chapter 2 (commencing with Section 1115) to Division 9 of, and to repeal Sections 1152.5 and 1152.6 of, the Evidence Code, to amend Sections 66032 and 66033 of the Government Code, to amend Sections 10089.80 and 10089.82 of the Insurance Code, to amend Section 65 of the Labor Code, and to amend Section 350 of the Welfare and Institutions Code, relating to mediation.

LEGISLATIVE COUNSEL'S DIGEST

AB 939, as amended, Ortiz. Mediation.

(1) Under existing law, when a person consults a mediator or mediation service for the purpose of retaining mediation services, or when persons agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving a civil dispute, anything said in the course of the mediation is not admissible in evidence nor subject to discovery, and all communications, negotiations, and settlement discussions by and between participants or

mediators are confidential, except as specified. If the testimony of a mediator is sought to be compelled in any civil action or proceeding regarding anything said in the course of a mediation, the court is required to award reasonable attorney's fees and costs to the mediator against the person seeking the testimony. Existing law provides that a mediator may not file, and a court may not consider, any declaration or finding of any kind by the mediator, except as specified.

This bill would, among other things, revise and recast these provisions, as specified, to apply to a mediation ordered by a court or other adjudicative body, and to a mediation consultation, would define the terms "mediation," "mediator," and "mediation consultation" for this purpose and make corresponding changes.

(2) Existing law provides that if an insured party and an insurer reach an agreement proposed during mediation, the insured will have 3 business days to rescind the agreement.

This bill would provide that if such rescission occurs, the agreement may not be admitted in evidence or disclosed unless all the parties to the agreement agree to its disclosure.

(3) Existing law provides that records of the Department of Industrial Relations relating to labor disputes are confidential, except that any decision or award *arising out of* arbitration proceedings shall be a public record.

This bill would apply the provisions of this bill described in (1) above to a mediation conducted by the California State Mediation and Conciliation Service, and any person conducting the mediation. It would provide that all other records relating to labor disputes are confidential, except as specified.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

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

- 1 SECTION 1. Section 467.5 of the Business and
- 2 Professions Code is amended to read:
- 3 467.5. Notwithstanding the express application of
- 4 Chapter 2 (commencing with Section 1115) of Division
- 5 9 of the Evidence Code to mediations, all proceedings

1 conducted by a program funded pursuant to this chapter,
2 including, but not limited to, arbitrations and
3 conciliations, are subject to Chapter 2 (commencing with
4 Section 1115) of Division 9 of the Evidence Code.

5 SEC. 2. Section 1775.10 of the Code of Civil Procedure
6 is amended to read:

7 1775.10. All statements made by the parties during
8 the mediation shall be subject to Sections 703.5 and 1152,
9 and Chapter 2 (commencing with Section 1115) of
10 Division 9, of the Evidence Code.

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

13 703.5. No person presiding at any judicial or
14 quasi-judicial proceeding, and no arbitrator or mediator,
15 shall be competent to testify, in any subsequent
16 arbitration, administrative adjudication, civil action, or
17 other noncriminal proceeding, as to any statement,
18 conduct, decision, or ruling, occurring at or in
19 conjunction with the prior proceeding, except as to a
20 statement or conduct that could (a) give rise to civil or
21 criminal contempt, (b) constitute a crime, (c) be the
22 subject of investigation by the State Bar or Commission
23 on Judicial Performance, or (d) give rise to
24 disqualification proceedings under paragraph (1) or (6)
25 of subdivision (a) of Section 170.1 of the Code of Civil
26 Procedure. However, this section does not apply to a
27 mediator with regard to any mediation under Chapter 11
28 (commencing with Section 3160) of Part 2 of Division 8
29 of the Family Code.

30 SEC. 4. Chapter 2 (commencing with Section 1115)
31 is added to Division 9 of the Evidence Code, to read:

32
33 CHAPTER 2. MEDIATION
34

35 1115. For purposes of this chapter:

36 (a) "Mediation" means a process in which a neutral
37 person facilitates communication between disputants to
38 assist them in reaching a mutually acceptable agreement
39 compromising, settling, or resolving a dispute in whole or
40 in part.

1 (b) “Mediator” means a neutral person who conducts
2 a mediation. “Mediator” includes any person designated
3 by a mediator either to assist in the mediation or to
4 communicate with the participants in preparation for a
5 mediation.

6 (c) “Mediation consultation” means a communication
7 between a person and a mediator for the purpose of
8 initiating or considering a mediation or retaining the
9 mediator.

10 ~~1116. (a) This chapter does not apply to a proceeding~~
11 ~~under Part 1 (commencing with Section 1800) of Division~~
12 ~~5 of the Family Code or a proceeding under Chapter 11~~
13 ~~(commencing with Section 3160) of Part 2 of Division 8~~
14 ~~of the Family Code.~~

15 ~~(b) Nothing in this chapter makes admissible evidence~~
16 ~~that is inadmissible under Section 1152 or any other~~
17 ~~statute.~~

18 ~~1117. (a) This chapter does not apply to a settlement~~
19 ~~conference pursuant to Rule 222 of the California Rules~~
20 ~~of Court.~~

21 ~~(b) This chapter applies to a mediation that is ordered~~
22 ~~by a court or other adjudicative body, unless the~~
23 ~~proceeding is excepted by subdivision (a) of Section 1116.~~
24

25 *1116. (a) Except as provided in subdivision (b), this*
26 *chapter applies to any mediation, regardless of whether*
27 *participation in the mediation is voluntary, pursuant to an*
28 *agreement, pursuant to order of a court or other*
29 *adjudicative body, or otherwise.*

30 *(b) This chapter does not apply to either of the*
31 *following:*

32 *(1) A proceeding under Part 1 (commencing with*
33 *Section 1800) of Division 5 of the Family Code or Chapter*
34 *11 (commencing with Section 3160) of Part 2 of Division*
35 *8 of the Family Code.*

36 *(2) A settlement conference pursuant to Rule 222 of*
37 *the California Rules of Court.*

38 *(c) Nothing in this chapter makes admissible evidence*
39 *that is inadmissible under Section 1152 or any other*
40 *statute.*

1 1118. (a) This chapter does not prohibit either of the
2 following:

3 (1) A premediation agreement that, if mediation does
4 not fully resolve the dispute, the mediator will then act as
5 arbitrator or otherwise render a decision in the dispute.

6 (2) A postmediation agreement that the mediator will
7 arbitrate or otherwise decide issues not resolved in the
8 mediation.

9 (b) If a dispute is governed by an agreement described
10 in subdivision (a), in arbitrating or otherwise deciding all
11 or part of the dispute, the person who served as mediator
12 may not consider any information from the mediation
13 that is inadmissible or protected from disclosure under
14 this chapter, unless all of the parties to the mediation
15 expressly agree in writing, or orally in accordance with
16 Section 1119, before or after the mediation that the
17 person may use specific information from the mediation.

18 1119. An oral agreement is in accordance with Section
19 1119 if it satisfies all of the following conditions:

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

23 (b) The terms of the oral agreement are recited on the
24 record.

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

28 1120. (a) Except as otherwise expressly provided by
29 statute, no evidence of anything said or any admission
30 made for the purpose of, in the course of, or pursuant to,
31 a mediation or a mediation consultation is admissible in
32 evidence or subject to discovery, and disclosure of the
33 evidence shall not be compelled, in any arbitration,
34 administrative adjudication, civil action, or other
35 noncriminal proceeding in which, pursuant to law,
36 testimony can be compelled to be given.

37 (b) Except as otherwise expressly provided by statute,
38 no document, or writing as defined in Section 250, or copy
39 of a document or writing, that is prepared for the purpose
40 of, in the course of, or pursuant to, a mediation or a

1 mediation consultation, is admissible in evidence or
2 subject to discovery, and disclosure of the document or
3 writing shall not be compelled, in any arbitration,
4 administrative adjudication, civil action, or other
5 noncriminal proceeding in which, pursuant to law,
6 testimony can be compelled to be given.

7 (c) All communications, negotiations, or settlement
8 discussions by and between participants in the course of
9 a mediation or a mediation consultation shall remain
10 confidential.

11 1121. (a) Notwithstanding any other provision of this
12 chapter, evidence otherwise admissible or subject to
13 discovery outside of a mediation or a mediation
14 consultation shall not be or become inadmissible or
15 protected from disclosure solely by reason of its
16 introduction or use in a mediation or a mediation
17 consultation.

18 (b) This chapter does not limit any of the following:

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

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

23 (3) Disclosure of the mere fact that a mediator has
24 served, is serving, will serve, or was contacted about
25 serving as a mediator in a dispute.

26 1122. Neither a mediator nor anyone else may submit
27 to a court or other adjudicative body, and a court or other
28 adjudicative body may not consider, any report,
29 assessment, evaluation, recommendation, or finding of
30 any kind by the mediator concerning a mediation
31 conducted by the mediator, other than a report that is
32 mandated by court rule or other law and that states only
33 whether an agreement was reached, unless all parties to
34 the mediation expressly agree otherwise in writing, or
35 orally in accordance with Section 1119.

36 1123. (a) Notwithstanding any other provision of this
37 chapter, a communication, document, or any writing as
38 defined in Section 250, that is made or prepared for the
39 purpose of, or in the course of, or pursuant to, a mediation
40 or a mediation consultation, may be admitted in evidence

1 or disclosed if either of the following conditions is
2 satisfied:

3 (1) All persons who conduct or otherwise participate in
4 the mediation expressly agree in writing, or orally in
5 accordance with Section 1119, to disclosure of the
6 communication, document, or writing.

7 (2) The communication, document, or writing was
8 prepared by or on behalf of fewer than all the mediation
9 participants, those participants expressly agree in
10 writing, or orally in accordance with Section 1119, to its
11 disclosure, and the communication, document, or writing
12 does not disclose anything said or done or any admission
13 made in the course of the mediation.

14 (b) For purposes of subdivision (a), if the neutral
15 person who conducts a mediation expressly agrees to
16 disclosure, that agreement also binds any other person
17 described in subdivision (b) of Section 1115.

18 1124. (a) Notwithstanding any other provision of this
19 chapter, an executed written settlement agreement
20 prepared in the course of, or pursuant to, a mediation,
21 may be admitted in evidence or disclosed if any of the
22 following conditions is satisfied:

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

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

27 (3) All signatories to the agreement expressly agree in
28 writing, or orally in accordance with Section 1119, to its
29 disclosure.

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

32 (b) Notwithstanding any other provision of this
33 chapter, an oral agreement made in the course of, or
34 pursuant to, a mediation, may be admitted in evidence or
35 disclosed, but only if the agreement is in accordance with
36 Section 1119.

37 1125. (a) For purposes of this chapter, a mediation
38 ends when any of the following conditions is satisfied:

39 (1) A written settlement fully resolving the mediated
40 dispute is fully executed.

1 (2) The mediation participants fully resolve the
2 dispute by an oral agreement in accordance with Section
3 1119.

4 (3) The mediator provides the mediation participants
5 with a declaration stating that further mediation would
6 not be worthwhile, or words to that effect.

7 (4) A disputant provides the mediator and the other
8 mediation participants with a declaration stating that the
9 mediation is terminated, or words to that effect.

10 (b) For purposes of this chapter, if a mediation
11 partially resolves a dispute, mediation ends as to the issues
12 resolved when either of the following conditions is
13 satisfied:

14 (1) A written settlement partially resolving the
15 dispute is fully executed.

16 (2) The mediation participants partially resolve the
17 dispute by an oral agreement in accordance with Section
18 1119.

19 1126. If a person subpoenas or otherwise seeks to
20 compel a mediator to testify or produce a document, and
21 the court or other adjudicative body determines that the
22 testimony or document is inadmissible or protected from
23 disclosure under Section 703.5 or this chapter, the court
24 or adjudicative body making the determination shall
25 award reasonable attorney's fees and costs to the
26 mediator against the person seeking the testimony or
27 document.

28 1127. Any reference to a mediation, or a declaration
29 under Section 1125, during any subsequent trial is an
30 irregularity in the proceedings of the trial for the
31 purposes of Section 657 of the Code of Civil Procedure.
32 Any reference to a mediation, or a declaration under
33 Section 1125, during any other subsequent noncriminal
34 proceeding is grounds for vacating or modifying the
35 decision in that proceeding, in whole or in part, and
36 granting a new or further hearing on all or part of the
37 issues, if the reference materially affected the substantial
38 rights of the party requesting relief.

1 SEC. 5. The heading of Chapter 2 (commencing with
2 Section 1150) of Division 9 of the Evidence Code is
3 amended and renumbered to read:

4

5 CHAPTER 3. OTHER EVIDENCE AFFECTED OR EXCLUDED
6 BY EXTRINSIC POLICIES
7

8 SEC. 6. Section 1152.5 of the Evidence Code is
9 repealed.

10 SEC. 7. Section 1152.6 of the Evidence Code is
11 repealed.

12 SEC. 8. Section 66032 of the Government Code is
13 amended to read:

14 66032. (a) Notwithstanding any provision of law to
15 the contrary, all time limits with respect to an action shall
16 be tolled while the mediator conducts the mediation,
17 pursuant to this chapter.

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

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

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

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

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

1 (e) Section 703.5 and Chapter 2 (commencing with
2 Section 1115) of Division 9 of the Evidence Code apply to
3 any mediation conducted pursuant to this chapter.

4 SEC. 9. Section 66033 of the Government Code is
5 amended to read:

6 66033. (a) At the end of the mediation, the mediator
7 shall file a report with the Office of Permit Assistance,
8 consistent with Chapter 2 (commencing with Section
9 1115) of Division 9 of the Evidence Code, containing each
10 of the following:

11 (1) The title of the action.

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

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

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

20 SEC. 10. Section 10089.80 of the Insurance Code is
21 amended to read:

22 10089.80. (a) The representatives of the insurer shall
23 know the facts of the case and be familiar with the
24 allegations of the complainant. The insurer or the
25 insurer's representative shall produce at the settlement
26 conference a copy of the policy and all documents from
27 the claims file relevant to the degree of loss, value of the
28 claim, and the fact or extent of damage.

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

32 The mediator may also order production of other
33 documents that the mediator determines to be relevant
34 to the issues under mediation. If a party declines to
35 comply with that order, the mediator may appeal to the
36 commissioner for a determination of whether the
37 documents requested should be produced. The
38 commissioner shall make a determination within 21 days.
39 However, the party ordered to produce the documents
40 shall not be required to produce while the issue is before

1 the commissioner in this 21-day period. If the ruling is in
2 favor of production, any insurer that is subject to an order
3 to participate in mediation issued under subdivision (a)
4 of Section 10089.75 shall comply with the order to
5 produce. Insureds, and those insurers that are not subject
6 to an order to participate in mediation, shall produce the
7 documents or decline to participate further in the
8 mediation after a ruling by the commissioner requiring
9 the production of those other documents. Declination of
10 mediation by the insurer under this section may be
11 considered by the commissioner in exercising authority
12 under subdivision (a) of Section 10089.75.

13 The mediator shall have the authority to protect from
14 disclosure information that the mediator determines to
15 be privileged, including, but not limited to, information
16 protected by the attorney-client or work-product
17 privileges, or to be otherwise confidential.

18 (b) The mediator shall determine prior to the
19 mediation conference whether the insured will be
20 represented by counsel at the mediation. The mediator
21 shall inform the insurer whether the insured will be
22 represented by counsel at the mediation conference. If
23 the insured is represented by counsel at the mediation
24 conference, the insurer's counsel may be present. If the
25 insured is not represented by counsel at the mediation
26 conference, then no counsel may be present.

27 (c) Section 703.5 and Chapter 2 (commencing with
28 Section 1115) of Division 9 of the Evidence Code apply to
29 a mediation conducted under this chapter.

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

39 SEC. 11. Section 10089.82 of the Insurance Code is
40 amended to read:

1 10089.82. (a) An insured may not be required to use
2 the department's mediation process. An insurer may not
3 be required to use the department's mediation process,
4 except as provided in Section 10089.75.

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

7 (c) If the parties agree to a settlement agreement, the
8 insured will have three business days to rescind the
9 agreement. Notwithstanding Chapter 2 (commencing
10 with Section 1115) of Division 9 of the Evidence Code, if
11 the insured rescinds the agreement, it may not be
12 admitted in evidence or disclosed unless the insured and
13 all other parties to the agreement expressly agree to its
14 disclosure. If the agreement is not rescinded by the
15 insured, it is binding on the insured and the insurer, and
16 acts as a release of all specific claims for damages known
17 at the time of the mediation presented and agreed upon
18 in the mediation conference. If counsel for the insured is
19 present at the mediation conference and a settlement is
20 agreed upon that is signed by the insured's counsel, the
21 agreement is immediately binding on the insured and
22 may not be rescinded.

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

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

34 Referral to mediation or the pendency of a mediation
35 under this article is not a basis to prevent or stay the filing
36 of civil litigation arising in whole or in part out of the same
37 facts. Any applicable statute of limitations is tolled for the
38 number of days beginning from the referral to mediation
39 until the date on which the mediation is either completed
40 or declined, or the date on which the insured fails to

1 appear for a scheduled mediation for the second time, or,
2 in the event that a settlement is completed, the expiration
3 of any applicable three business day cooling off period.

4 ~~SEC. 12. Section 65 of the Labor Code is amended to~~
5 ~~read:~~

6 ~~65. The department may investigate and mediate~~
7 ~~labor disputes providing any bona fide party to such~~
8 ~~dispute requests intervention by the department and the~~
9 ~~department may proffer its services to both parties when~~
10 ~~work stoppage is threatened and neither party requests~~
11 ~~intervention. In the interest of preventing labor disputes~~
12 ~~the department shall endeavor to promote sound~~
13 ~~union-employer relationships. The department may~~
14 ~~arbitrate or arrange for the selection of boards of~~
15 ~~arbitration on such terms as all of the bona fide parties to~~
16 ~~such dispute may agree upon. Any decision or award~~
17 ~~arising out of an arbitration conducted pursuant to this~~
18 ~~section is a public record. Section 703.5 and Chapter 2~~
19 ~~(commencing with Section 1115) of Division 9 of the~~
20 ~~Evidence Code apply to a mediation conducted by the~~
21 ~~California State Mediation and Conciliation Service, and~~
22 ~~any person conducting the mediation. All other records~~
23 ~~of the department relating to labor disputes are~~
24 ~~confidential.~~

25 *SEC. 12. Section 65 of the Labor Code is amended to*
26 *read:*

27 *65. The department may investigate and mediate*
28 *labor disputes providing any bona fide party to such this*
29 *type of dispute requests intervention by the department*
30 *and the department may proffer its services to both*
31 *parties when work stoppage is threatened and neither*
32 *party requests intervention. In the interest of preventing*
33 *labor disputes the department shall endeavor to promote*
34 *sound union-employer relationships. The department*
35 *may arbitrate or arrange for the selection of boards of*
36 *arbitration on such terms as all of the bona fide parties to*
37 *such the dispute may agree upon. Any decision*
38 *or award arising out of an arbitration conducted pursuant*
39 *to this section is a public record. Section 703.5 and*
40 *Chapter 2 (commencing with Section 1115) of Division*

1 9 of the Evidence Code apply to a mediation conducted
2 by the California State Mediation and Conciliation
3 Service, and any person conducting the mediation. All
4 other records of the department relating to labor disputes
5 are confidential; ~~provided, however, that any decision or~~
6 ~~award arising out of arbitration proceedings shall be a~~
7 ~~public record.~~

8 SEC. 13. Section 350 of the Welfare and Institutions
9 Code is amended to read:

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

23 (2) Each juvenile court is encouraged to develop a
24 dependency mediation program to provide a
25 problem-solving forum for all interested persons to
26 develop a plan in the best interests of the child,
27 emphasizing family preservation and strengthening. The
28 Legislature finds that mediation of these matters assists
29 the court in resolving conflict, and helps the court to
30 intervene in a constructive manner in those cases where
31 court intervention is necessary. Notwithstanding any
32 other provision of law, no person, except the mediator,
33 who is required to report suspected child abuse pursuant
34 to the Child Abuse and Neglect Reporting Act (Article 2.5
35 commencing with Section 11164) of Chapter 2 of Title
36 1 of Part 4 of the Penal Code), shall be exempted from
37 those requirements under Chapter 2 (commencing with
38 Section 1115) of Division 9 of the Evidence Code because
39 he or she agreed to participate in a dependency
40 mediation program established in the juvenile court.

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

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

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

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

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

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

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

28 (c) At any hearing in which the probation department
29 bears the burden of proof, after the presentation of
30 evidence on behalf of the probation department and the
31 minor has been closed, the court, on motion of the minor,
32 parent, or guardian, or on its own motion, shall order
33 whatever action the law requires of it if the court, upon
34 weighing all of the evidence then before it, finds that the
35 burden of proof has not been met. That action includes,
36 but is not limited to, the dismissal of the petition and
37 release of the minor at a jurisdictional hearing, the return
38 of the minor at an out-of-home review held prior to the
39 permanency planning hearing, or the termination of
40 jurisdiction at an in-home review. If the motion is not

1 granted, the parent or guardian may offer evidence
2 without first having reserved that right.

3 reported by any person who has knowledge of the facts.
4 to have a direct and legitimate interest in the proceedings.
5 case or on the court's own motion, the court may be authorized
6 for confidential protection to develop a plan in the best
7 interests of the child, including removing the child
8 first and within the community if required.
9 (b) The testimony of a minor may be taken in
10 chambers and outside the presence of the minor's parent
11 or guardian, if the minor's parent or guardian is
12 represented by counsel, the court is present and any of
13 the following circumstances exist:
14 (1) The court determines that testimony in chambers
15 is necessary to ensure truthful testimony.
16 (2) The minor is likely to be intimidated by a formal
17 courtroom setting.
18 (3) The minor is afraid to testify in front of his or her
19 parents or guardian.
20 After testimony in chambers, the parent or guardian of
21 the minor may elect to have the court reporter read back
22 the testimony or have the testimony summarized by
23 counsel for the parent or guardian.
24 The testimony of a minor also may be taken in
25 chambers and outside the presence of the guardian or
26 guardian of a minor under the circumstances specified
27 in this subdivision.
28 (c) At any hearing in which the probation department
29 bears the burden of proof, after the presentation of
30 evidence on behalf of the probation department and the
31 minor has been closed, the court, on motion of the minor,
32 parent, or guardian, or on its own motion, shall order
33 whatever action the law requires if it is the court, upon
34 weighing all of the evidence then before it, finds that the
35 burden of proof has not been met. The action includes,
36 but is not limited to, the dismissal of the petition and
37 release of the minor at a judicial hearing, the return
38 of the minor at an out-of-home review held prior to the
39 permanent planning hearing, or the termination of
40 jurisdiction at an in-home review. If the motion is not

o

CONSUMER ATTORNEYS OF CALIFORNIA

David S. Casey, Jr.
President

Rick Simons
President-Elect

Donald C. Green
Chief Legislative Advocate

Nancy Drabble
Senior Legislative Counsel

Nancy Peverini
Legislative Counsel

Lea-Ann Tratten
Legal Counsel

April 14, 1997

Assembly Member Deborah Ortiz
State Capitol, Room 2148
Sacramento, CA 95814

RE: AB 939 (ORTIZ) REQUEST FOR AMENDMENTS

Dear Assembly Member Ortiz:

The Consumer Attorneys of California has reviewed AB 939, which is scheduled to be heard before the Assembly Judiciary Committee on April 16, 1997.

AB 939 attempts to rewrite, consolidate and expand existing statutes on mediation and arbitration, particularly confidentiality issues. While we do not disagree with the basic premise of the bill (these procedures should be confidential), we have the following comments:

First, CAOC must oppose the current definition of "mediation" in added Evidence Code Section 1115 (page 3, lines 36-40). AB 939 defines mediation as "a process in which a neutral person facilitates communication between disputants to assist them in reaching a mutually acceptable agreement compromising, settling, or resolving a dispute in whole or in part."

There is one absolutely crucial item missing from this general definition: except for statutorily authorized court ordered mediations (such as the current Los Angeles pilot project created by Senator Lockyer's SB 401 or the proposed pilot in Assembly Member Hertzberg's AB 1374), voluntary participation is essential to mediation. We and others believe that mediation, by its very nature, depends upon the voluntary submission of disputes to a neutral facilitator.

Mediation usually involves a neutral person who facilitates disputes between willing parties and primarily relies on communication skills. The mediator cannot impose a settlement, absent agreement, and the parties can choose to continue litigation if they do not reach an agreement. Mediation can be helpful in situations where the parties want or need to maintain some type of relationship, for example, divorcing parents who have children or business colleagues who may want to conduct future business despite the present conflict.

Legislative Department

980 9th Street, Suite 200, Sacramento, CA 95814-2721 • (916) 442-6902 • FAX (916) 442-7734
info@caoc.org • <http://seamless.com/consumer>

CAOC has opposed past legislation which mandates mediation, and we are very concerned that AB 939's definition undermines the principle of voluntariness in mediation.

The following amendment removes our concern:

“Mediation” means a statutorily authorized mediation process or the voluntary submission by parties to a process in which a neutral person facilitates communication between disputants to assist them in reaching a mutually acceptable agreement compromising, settling, or resolving a dispute in whole or in part.

We believe this definition allows the bill's protections to cover most mediations without changing the well-accepted definition and understanding of what constitutes mediation.

Second, we are working with the sponsors (the California Law Revision Commission) on issues surrounding the bill's definition of when a mediation ends (See page 7, line 37). Although we appreciate this section's purpose, there are situations outside the bill's definition of when the mediation ends--does that mean the mediation continues indefinitely? For example, two parties may spend a few hours at a mediation, reach no agreement, go home and continue to litigate the case. Under AB 939, the mediation only ends when (1) there is a written settlement, (2) there is a resolution, or (3) there is a declaration of some type. Technically, if none of those occurs, the mediation is continuing. We believe the sponsors are reviewing this issue and trying to resolve the problem.

Again, thanks for considering our views. There are significant issues within our organization and for consumers on alternative dispute resolution, and we appreciate your efforts. If you or a member of your staff would like to discuss this issue further, please contact me or one of our legislative representatives in Sacramento.

Sincerely,

David S. Casey - Jr.

David S. Casey, Jr.

President

cc: Assembly Judiciary Committee

APR 14 1997 10:28 No.002 P.02

California Dispute Resolution Council

promoting effective, accessible conflict resolution services statewide

April 11, 1997

Law Revision Commission
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Hon. Deborah V. Ortiz
Assemblymember, Ninth District
California State Assembly
Capitol Building #2148
Sacramento, CA 95814

RE: AB 939 on Mediation Confidentiality- Support with Amendments

Dear Assemblymember Ortiz:

I am writing to you on behalf of the California Dispute Resolution Council (CDRC), whose membership of more than 400 includes leaders from all the major dispute resolution organizations in California, all sectors of practice and all types of organizational affiliations. Among CDRC's individual members are prominent practitioners (both paid and volunteer service providers), directors and staff from a wide variety of practice organizations (both for-profit and non-profit), retired judges, trainers and leading academicians.

CDRC supports AB 939, with some suggested amendments. Last week, CDRC held three Statewide Dialogues with over 160 people attending. There was a strong consensus of support for AB 939, in principle, as it strengthens and clarifies the protections for mediation confidentiality. The Law Revision Commission, sponsor of AB 939, is to be commended for a fine job on drafting this comprehensive piece of legislation. CDRC has reviewed and worked closely with the Commission on the development of this important legislation over the past year and has approved of the Commission's intent to clarify and extend existing protections.

Based on the Statewide Dialogues and the review of the CDRC Mediation Legislation Committee, the CDRC Board of Directors is currently considering some suggested amendments to the following sections of AB 939:

Section 1118. There has been some expressed concern about this section as the only section of the bill which is not explicitly about mediation and some concerns that a mediator who received confidential information in a caucus meeting, would have an difficult challenge in later issuing a binding arbitration award which would not consider such information.

Section 1120 (c) CDRC is concerned about what the bill intends with the word, "confidential", which has not been previously defined in the statute. CDRC believes that the participants in the mediation should decide whether or not they will be able to discuss what took place in the mediation with others outside of the mediation

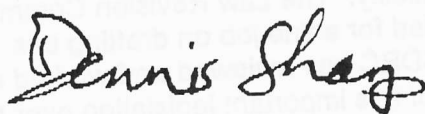
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AB 939 : Support with Some Technical Amendments
Page 2

process. One example might be to determine whether to discuss with a spouse or life partner; another could be to discuss with other neighbors who may have a community interest in the outcome; or in a public policy context, the end of many mediations is a press conference or press release of the terms and conditions of the proposed agreement.

Section 1125 (a) (3) and (4) In both sections, we would like to suggest that the term "declaration" is too formal and lends itself to a judicial or administrative proceeding. In addition, CDRC believes that most mediators would not like to be quoted stating the words, "further mediation would not be worthwhile." We would suggest that this wording be replaced with, "a written statement that the mediation is terminated, or words to that effect." Finally, this section is not clear what the parties to the mediation which has been terminated need to do to reinstate mediation if they think it would be helpful.

We thank you for the opportunity to comment and appreciate your leadership in carrying AB 939. We would be pleased to work with you, your staff and the Law Revision Commission on the suggested amendments above. In the event that you have questions or concerns about our comments, please direct them to Lauren Burton, Chair, CDRC Mediation Legislation Committee, P.O. Box 55020, Los Angeles, CA 90055, (213) 896-6535, fax (213) 627-1426 or e-mail: lburton@lacba.org or the CDRC Lobbyist, Donne Brownsey @ Government Solutions, 1005 12th Street, Suite 10, Sacramento, CA, 95814, (916) 448-2260, fax (916) 448-2554 or e-mail: brownsey@ix.netcom.com.

Sincerely,



Dennis Sharp
President

cc: Barbara S. Gaal, Esq.
Lauren Burton
Ron Kelly
CDRC Executive Committee
CDRC Mediation Committee
Donne Brownsey, Esq.



Law Revision Commission
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APR 15 1997

File: AB 939

April 15, 1997

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Ms. Barbara Gaal, Staff Counsel
California Law Revision Commission
Fax 415/494-1827
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Dear Ms. Gaal:

The Southern California Mediation Association supports AB 939, with the following recommendations:

- a. The following language be added to Section 1115 (c): "or reconvening a mediation."
- b. Language should be added to section 1125 (a) (3) to ensure that communications between the mediator and the participants, subsequent to the mediator's declaration that the mediation has ended (or words to that effect), are confidential. SCMA recommends that 1125 (a) (3) provide:

"The mediator provides the mediation participants with a declaration stating that further mediation would not be worthwhile, or words to that effect. Provided that all subsequent communications between the mediator and the participants concerning the mediation are for reconvening purposes and are therefore confidential pursuant to Sections 1115 (c) and 1120 (c)."

This way the mediator is protected from being subpoenaed regarding conversations after the mediation has allegedly "ended."

Sincerely,

Mary B. Culbert
Chair, SCMA Public Policy Committee

~~"small claims division," but the implementing legislation should continue to permit colloquial use of the term "small claims court."~~

Next Step

For the next meeting, the staff will revise the Code of Civil Procedure draft to incorporate the Commission's decisions, make stylistic revisions, add Commission Comments and a preliminary part, and insert staff notes on significant issues. Draft revisions of other Codes are also in progress and should be ready for the Commission to review at its next meeting, so that a tentative ~~recommendation (or several tentative recommendations) can be issued soon~~

STUDY K-401 – MEDIATION CONFIDENTIALITY

The Commission considered Memorandum 97-33, which discusses concerns relating to the Commission's bill on mediation confidentiality (AB 939 (Ortiz, Ackerman)). To address the concerns raised, the Commission decided to amend the bill as follows:

Evid. Code § 1115. Definitions

The definition of "mediation" should be amended to incorporate the existing definition in Code of Civil Procedure Section 1775.1:

~~"Mediation" means a process in which a neutral person facilitates communication between or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement compromising, settling, or resolving a dispute in whole or in part.~~

The definition of "mediation consultation" should be amended to cover efforts to reconvene a mediation:

~~"Mediation consultation" means a communication between a person and a mediator for the purpose of initiating or considering initiating, considering, or reconvening a mediation or retaining the mediator.~~

To make clear that the bill neither endorses nor prohibits mandatory mediation, the following language should be added to the bill:

Nothing in this chapter expands a court's authority to order participation in a dispute resolution proceeding. Nothing in this

chapter authorizes or affects the enforceability of a contractual clause in which parties agree to use of mediation.

Evid. Code § 1119. Recorded oral agreement

Section 1119(b) should be amended to read:

(b) The terms of the oral agreement are recited on the record in the presence of the parties and the mediator, and the parties express on the record that they agree to the terms recited.

Evid. Code § 1121. Types of evidence not covered

As suggested by the State Bar Committee on Administration of Justice, Section 1121 should be amended to read:

1121. (a) Notwithstanding any other provision of this chapter, evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation.

(b) This chapter does not limit any of the following:

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

(2) The effect of an agreement not to take a default or an agreement to extend the time within which to act or refrain from acting in a pending civil action.

(3) Disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute.

Evid. Code § 1124. Written settlements and oral agreements reached through mediation

Evid. Code § 1125. When mediation ends

Sections 1124 and 1125 should be reorganized into parallel provisions on written settlements and oral agreements, respectively. Section 1124 should be amended along the following lines:

1124. (a) Notwithstanding any other provision of this chapter, an executed written settlement agreement prepared in the course of, or pursuant to, a mediation, may be admitted in evidence or disclosed if any of the following conditions is satisfied:

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

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

(3) All signatories to the agreement expressly agree in writing, or orally in accordance with Section 1119, to its disclosure.

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

~~(b) Notwithstanding any other provision of this chapter, an oral agreement made in the course of, or pursuant to, a mediation, may be admitted in evidence or disclosed, but only if the agreement is in accordance with Section 1119. Unless the parties expressly agree otherwise, in writing or orally in accordance with Section 1119:~~

~~(1) When a written settlement fully resolving the dispute is fully executed, the mediation ends.~~

~~(2) When a written settlement partially resolving the dispute is fully executed, the mediation ends as to the issues resolved.~~

The Comment to Section 1124 should be revised to explain that the provision does not affect the use of confidential settlement agreements.

Section 1125 should be amended along the following lines:

1125. (a) For purposes of this chapter, a mediation ends when any of the following conditions is satisfied:

~~(1) A written settlement fully resolving the mediated dispute is fully executed.~~

~~(2) The mediation participants fully resolve the dispute by an oral agreement in accordance with Section 1119.~~

~~(3) The mediator provides the mediation participants with a declaration stating that further mediation would not be worthwhile, or words to that effect.~~

~~(4) A disputant provides the mediator and the other mediation participants with a declaration stating that the mediation is terminated, or words to that effect.~~

~~(b) For purposes of this chapter, if a mediation partially resolves a dispute, mediation ends as to the issues resolved when either of the following conditions is satisfied:~~

~~(1) A written settlement partially resolving the dispute is fully executed.~~

~~(2) The mediation participants partially resolve the dispute by an oral agreement in accordance with Section 1119. Notwithstanding any other provision of this chapter, an oral agreement made in the course of, or pursuant to, a mediation may be admitted in evidence or disclosed if any of the following conditions is satisfied:~~

~~(1) The agreement is in accordance with Section 1119.~~

~~(2) The agreement is in accordance with subdivisions (a) and (b) of Section 1119, and all parties to the agreement expressly agree, in~~

writing, or orally in accordance with Section 1119, to disclosure of the agreement.

(3) The agreement is in accordance with subdivisions (a) and (b) of Section 1119, and the agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

(b) Unless the parties expressly agree otherwise, in writing or orally in accordance with Section 1119:

(1) When an oral agreement fully resolving a dispute is reached in accordance with Section 1119, the mediation ends.

(2) When an oral agreement partially resolving a dispute is reached in accordance with Section 1119, the mediation ends as to the issues resolved.

~~STUDY N-200 JUDICIAL REVIEW OF AGENCY ACTION SB-209~~

The Commission considered Memorandum 97-26, the First Supplement to Memorandum 97-26, and a letter from Robert Bezemek, a copy of which is attached to these Minutes as Exhibit p. 36. The Commission asked the staff to continue working with the organizations that opposed the bill and the Office of Administrative Law to try to resolve their concerns. The staff should point out to organizations that opposed the bill that the bill generally continues existing law on the rights and remedies in traditional mandamus. In addressing OAL concerns, the staff should consider whether to exempt preenforcement review of underground regulations from the bill, or whether a satisfactory substantive provision can be drafted. The staff should also confer with Senate Judiciary Committee staff to help with the bill analysis.

The Commission made the following decisions on sections in the bill:

§ 1123.120. Finality

§ 1123.140. Exception to finality requirement

The Commission approved the staff recommendation to consolidate Sections 1123.120 (finality) and 1123.140 (exception to finality) as follows:

1123.120. A (a) Except as provided in subdivision (b), a person may not obtain judicial review of agency action unless the agency action is final.

(b) A person may obtain judicial review of agency action that is not final if all of the following conditions are satisfied:

(1) It appears likely that the person will be able to obtain judicial review of the agency action when it becomes final.

(2) The issue is fit for immediate judicial review.

EXHIBIT 13.

Memorandum 97-51

AB 939: Mediation Confidentiality

The Commission's bill on mediation confidentiality, AB 939 (Ortiz, Ackerman), was passed by the Assembly in April and is now pending in the Senate Judiciary Committee. The bill is likely to be heard after the Legislature reconvenes in August. If negotiations over the state budget are protracted and the Legislature does not recess this week, the hearing may be on July 22, 1997.

The current version of the bill is attached as Exhibit pages 1-15. The bill has been amended twice since the Commission last saw it. The first set of amendments incorporated changes approved by the Commission at its May meeting and addressed concerns raised by the State Bar Committee on Administration of Justice ("CAJ") after that meeting. The staff consulted with the Commission's Chairperson and Vice Chairperson regarding the amendments to meet CAJ's concerns.

The second set of amendments (shown in ~~strikeout~~ and italics in the attached version of the bill) stems from a recent meeting focusing on concerns of the Consumer Attorneys of California ("CAOC") and the California Defense Counsel ("CDC"). The meeting was attended by representatives of those organizations, as well as the Chief Counsel of the Senate Judiciary Committee, a consultant to Assembly Member Ortiz, mediator Ron Kelly, a consultant to Assemblyman Ackerman, counsel for the Assembly Republican Caucus, a representative of the Association for California Tort Reform, and a staff attorney from the Commission. A few further amendments have been requested since that meeting.

At this point, the substantive amendments directed to concerns raised by CAOC and CDC appear essential if the bill is to pass. With those amendments, the bill will still implement important reforms, including resolution of the conflict in appellate decisions on confidentiality of an oral agreement reached in mediation, clarification of the procedures for reaching an enforceable agreement, and elimination of ambiguities in the provision restricting a mediator from reporting to the decisionmaker. Briefly, the new amendments are:

- (1) Amendment of proposed Evidence Code Section 1117(a) to read: "Except as provided in subdivision (b), this chapter applies to a mediation as defined in Section 1115." (Exhibit p. 4.) CAOC and

CDC interpreted the previous version of Section 1117(a) as expressing approval of mandatory mediation. The intent was not to express approval of mandatory mediation, but rather to ensure that the confidentiality provisions apply to all mediations. Because "mediation" is broadly defined in Section 1115, Section 1117(a) as amended should effectuate that intent, while omitting language offensive to CAOC and CDC.

(2) Deletion of proposed Section 1118 (Exhibit pp. 4-5), the provision on mediation-arbitration, which has been controversial throughout this study. (*See, e.g.*, Memorandum 97-33 at p. 5 & Exhibit p. 19; Memorandum 96-75 at pp. 11-14.)

(3) Modification of the procedure in Section 1119, such that the recorded oral agreement must be transcribed and the transcript "executed by the parties within 72 hours after it is recorded." (Exhibit p. 5.) The California Dispute Resolution Council has requested a further change: Instead of requiring that the recording be "transcribed" and the transcript "executed," Section 1119(d) would require that "the recording is reduced to writing and the writing is signed by the parties within 72 hours after it is recorded." This apparently noncontroversial revision would be implemented through an author's amendment at the hearing.

(4) Elimination of language in Sections 1124 and 1125 on how confidentiality applies to partial resolution of a dispute. (Exhibit pp. 7-8.) Those issues would be left to the courts.

(5) Addition of language to Sections 1124 and 1125 clarifying that those provisions do not prevent parties from leaving a mediation without reaching an agreement. Subdivision (c) of each provision now states: "Nothing in this section shall preclude a party from ending the mediation without reaching an agreement." (Exhibit pp. 7-8.)

(6) Revision of Sections 1123, 1124, and 1125 to make clear that they are subject to Section 1121(a), which essentially prevents a party from shielding a "smoking gun" by using it in a mediation. This would be done at the hearing through an author's amendment revising the introductory clause of Sections 1123, 1124, and 1125 to read: "Notwithstanding any other provision of this chapter except Section 1121."

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

AMENDED IN SENATE JULY 10, 1997
AMENDED IN SENATE JUNE 11, 1997
AMENDED IN ASSEMBLY APRIL 9, 1997

CALIFORNIA LEGISLATURE—1997-98 REGULAR SESSION

ASSEMBLY BILL**No. 939**

**Introduced by Assembly Member Ortiz
(Principal coauthor: Assembly Member Ackerman)**

February 27, 1997

An act to amend Section 467.5 of the Business and Professions Code, to amend Section 1775.10 of the Code of Civil Procedure, to amend Section 703.5 of, to amend and renumber the heading of Chapter 2 (commencing with Section 1150) of Division 9 of, to add Chapter 2 (commencing with Section 1115) to Division 9 of, and to repeal Sections 1152.5 and 1152.6 of, the Evidence Code, to amend Sections 66032 and 66033 of the Government Code, to amend Sections 10089.80 and 10089.82 of the Insurance Code, to amend Section 65 of the Labor Code, and to amend Section 350 of the Welfare and Institutions Code, relating to mediation.

LEGISLATIVE COUNSEL'S DIGEST

AB 939, as amended, Ortiz. Mediation.

(1) Under existing law, when a person consults a mediator or mediation service for the purpose of retaining mediation services, or when persons agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving a civil dispute, anything said in the course of the

mediation is not admissible in evidence nor subject to discovery, and all communications, negotiations, and settlement discussions by and between participants or mediators are confidential, except as specified. If the testimony of a mediator is sought to be compelled in any civil action or proceeding regarding anything said in the course of a mediation, the court is required to award reasonable attorney's fees and costs to the mediator against the person seeking the testimony. Existing law provides that a mediator may not file, and a court may not consider, any declaration or finding of any kind by the mediator, except as specified.

This bill would, among other things, revise and recast these provisions, as specified, to apply to a mediation ordered by a court or other adjudicative body, and to a mediation consultation, would define the terms "mediation," "mediator," and "mediation consultation" for this purpose and make corresponding changes.

(2) Existing law provides that if an insured party and an insurer reach an agreement proposed during mediation, the insured will have 3 business days to rescind the agreement.

This bill would provide that if such rescission occurs, the agreement may not be admitted ~~in evidence~~ or disclosed unless all the parties to the agreement agree to its disclosure.

(3) Existing law provides that records of the Department of Industrial Relations relating to labor disputes are confidential, except that any decision or award arising out of arbitration proceedings shall be a public record.

This bill would apply the provisions of this bill described in (1) above to a mediation conducted by the California State Mediation and Conciliation Service, and any person conducting the mediation. It would provide that all other records relating to labor disputes are confidential, except as specified.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

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

- 1 SECTION 1. Section 467.5 of the Business and
- 2 Professions Code is amended to read:

1 467.5. Notwithstanding the express application of
2 Chapter 2 (commencing with Section 1115) of Division
3 9 of the Evidence Code to mediations, all proceedings
4 conducted by a program funded pursuant to this chapter,
5 including, but not limited to, arbitrations and
6 conciliations, are subject to Chapter 2 (commencing with
7 Section 1115) of Division 9 of the Evidence Code.

8 SEC. 2. Section 1775.10 of the Code of Civil Procedure
9 is amended to read:

10 1775.10. All statements made by the parties during
11 the mediation shall be subject to Sections 703.5 and 1152,
12 and Chapter 2 (commencing with Section 1115) of
13 Division 9, of the Evidence Code.

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

16 703.5. No person presiding at any judicial or
17 quasi-judicial proceeding, and no arbitrator or mediator,
18 shall be competent to testify, in any subsequent
19 arbitration, administrative adjudication, civil action, or
20 other noncriminal proceeding, as to any statement,
21 conduct, decision, or ruling, occurring at or in
22 conjunction with the prior proceeding, except as to a
23 statement or conduct that could (a) give rise to civil or
24 criminal contempt, (b) constitute a crime, (c) be the
25 subject of investigation by the State Bar or Commission
26 on Judicial Performance, or (d) give rise to
27 disqualification proceedings under paragraph (1) or (6)
28 of subdivision (a) of Section 170.1 of the Code of Civil
29 Procedure. However, this section does not apply to a
30 mediator with regard to any mediation under Chapter 11
31 (commencing with Section 3160) of Part 2 of Division 8
32 of the Family Code.

33 SEC. 4. Chapter 2 (commencing with Section 1115)
34 is added to Division 9 of the Evidence Code, to read:

35
36
37

CHAPTER 2. MEDIATION

38 1115. For purposes of this chapter:

39 (a) "Mediation" means a process in which a neutral
40 person or persons facilitate communication between the

1 disputants to assist them in reaching a mutually
2 acceptable agreement.

3 (b) “Mediator” means a neutral person who conducts
4 a mediation. “Mediator” includes any person designated
5 by a mediator either to assist in the mediation or to
6 communicate with the participants in preparation for a
7 mediation.

8 (c) “Mediation consultation” means a communication
9 between a person and a mediator for the purpose of
10 initiating, considering, or reconvening a mediation or
11 retaining the mediator.

12 1116. (a) Nothing in this chapter expands or limits a
13 court’s authority to order participation in a dispute
14 resolution proceeding. Nothing in this chapter authorizes
15 or affects the enforceability of a contract clause in which
16 parties agree to the use of mediation.

17 (b) Nothing in this chapter makes admissible evidence
18 that is inadmissible under Section 1152 or any other
19 statute.

20 1117. (a) Except as provided in subdivision (b), this
21 chapter applies to ~~any mediation, regardless of whether~~
22 ~~participation in the mediation is voluntary, pursuant to an~~
23 ~~agreement, pursuant to order of a court or other~~
24 ~~adjudicative body, or otherwise. a mediation as defined in~~
25 ~~Section 1115.~~

26 (b) This chapter does not apply to either of the
27 following:

28 (1) A proceeding under Part 1 (commencing with
29 Section 1800) of Division 5 of the Family Code or Chapter
30 11 (commencing with Section 3160) of Part 2 of Division
31 8 of the Family Code.

32 (2) A settlement conference pursuant to Rule 222 of
33 the California Rules of Court.

34 ~~1118. (a) This chapter does not prohibit either of the~~
35 ~~following:~~

36 ~~(1) A premediation agreement that, if mediation does~~
37 ~~not fully resolve the dispute, the mediator will then act as~~
38 ~~arbitrator or otherwise render a decision in the dispute.~~

1 ~~(2) A postmediation agreement that the mediator will~~
2 ~~arbitrate or otherwise decide issues not resolved in the~~
3 ~~mediation.~~

4 ~~(b) If a dispute is governed by an agreement described~~
5 ~~in subdivision (a), in arbitrating or otherwise deciding all~~
6 ~~or part of the dispute, the person who served as mediator~~
7 ~~may not consider any information from the mediation~~
8 ~~that is inadmissible or protected from disclosure under~~
9 ~~this chapter, unless all of the parties to the mediation~~
10 ~~expressly agree in writing, or orally in accordance with~~
11 ~~Section 1119, before or after the mediation that the~~
12 ~~person may use specific information from the mediation.~~

13 1119. An oral agreement "in accordance with Section
14 1119" means an oral agreement that satisfies all of the
15 following conditions:

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

19 (b) The terms of the oral agreement are recited on the
20 record in the presence of the parties and the mediator,
21 and the parties express on the record that they agree to
22 the terms recited.

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

26 *(d) The recording is transcribed and the transcript is*
27 *executed by the parties within 72 hours after it is*
28 *recorded.*

29 1120. (a) Except as otherwise expressly provided by
30 statute, no evidence of anything said or any admission
31 made for the purpose of, in the course of, or pursuant to,
32 a mediation or a mediation consultation is admissible ~~in~~
33 ~~evidence~~ or subject to discovery, and disclosure of the
34 evidence shall not be compelled, in any arbitration,
35 administrative adjudication, civil action, or other
36 noncriminal proceeding in which, pursuant to law,
37 testimony can be compelled to be given.

38 (b) Except as otherwise expressly provided by statute,
39 no document, or writing as defined in Section 250, or copy
40 of a document or writing, that is prepared for the purpose

1 of, in the course of, or pursuant to, a mediation or a
2 mediation consultation, is admissible ~~in evidence~~ or
3 subject to discovery, and disclosure of the document or
4 writing shall not be compelled, in any arbitration,
5 administrative adjudication, civil action, or other
6 noncriminal proceeding in which, pursuant to law,
7 testimony can be compelled to be given.

8 (c) All communications, negotiations, or settlement
9 discussions by and between participants in the course of
10 a mediation or a mediation consultation shall remain
11 confidential.

12 1121. (a) Notwithstanding any other provision of this
13 chapter, evidence otherwise admissible or subject to
14 discovery outside of a mediation or a mediation
15 consultation shall not be or become inadmissible or
16 protected from disclosure solely by reason of its
17 introduction or use in a mediation or a mediation
18 consultation.

19 (b) This chapter does not limit any of the following:

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

22 (2) The effect of an agreement not to take a default or
23 an agreement to extend the time within which to act or
24 refrain from acting in a pending civil action.

25 (3) Disclosure of the mere fact that a mediator has
26 served, is serving, will serve, or was contacted about
27 serving as a mediator in a dispute.

28 1122. Neither a mediator nor anyone else may submit
29 to a court or other adjudicative body, and a court or other
30 adjudicative body may not consider, any report,
31 assessment, evaluation, recommendation, or finding of
32 any kind by the mediator concerning a mediation
33 conducted by the mediator, other than a report that is
34 mandated by court rule or other law and that states only
35 whether an agreement was reached, unless all parties to
36 the mediation expressly agree otherwise in writing, or
37 orally in accordance with Section 1119.

38 1123. (a) Notwithstanding any other provision of this
39 chapter, a communication, document, or any writing as
40 defined in Section 250, that is made or prepared for the

1 purpose of, or in the course of, or pursuant to, a mediation
2 or a mediation consultation, is not made inadmissible ~~into~~
3 ~~evidence~~, or protected from disclosure, by provisions of
4 this chapter if either of the following conditions is
5 satisfied:

6 (1) All persons who conduct or otherwise participate
7 in the mediation expressly agree in writing, or orally in
8 accordance with Section 1119, to disclosure of the
9 communication, document, or writing.

10 (2) The communication, document, or writing was
11 prepared by or on behalf of fewer than all the mediation
12 participants, those participants expressly agree in
13 writing, or orally in accordance with Section 1119, to its
14 disclosure, and the communication, document, or writing
15 does not disclose anything said or done or any admission
16 made in the course of the mediation.

17 (b) For purposes of subdivision (a), if the neutral
18 person who conducts a mediation expressly agrees to
19 disclosure, that agreement also binds any other person
20 described in subdivision (b) of Section 1115.

21 1124. (a) Notwithstanding any other provision of this
22 chapter, an executed written settlement agreement
23 prepared in the course of, or pursuant to, a mediation, is
24 not made inadmissible ~~into evidence~~, or protected from
25 disclosure, by provisions of this chapter if any of the
26 following conditions is satisfied:

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

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

31 (3) All parties to the agreement expressly agree in
32 writing, or orally in accordance with Section 1119, to its
33 disclosure.

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

36 (b) ~~Unless~~ *For purposes of this chapter, unless* the
37 parties expressly agree otherwise, in writing or orally in
38 accordance with Section 1119, ~~when a written settlement~~
39 ~~fully resolving the dispute is fully executed, the mediation~~
40 ~~ends.~~

1 ~~(e) Unless the parties expressly agree otherwise, in~~
2 ~~writing or orally in accordance with Section 1119, when~~
3 ~~a written settlement partially resolving the dispute is fully~~
4 ~~executed, the mediation ends as to the issues resolved. the~~
5 ~~mediation ends when the parties execute a written~~
6 ~~settlement agreement resolving the dispute.~~

7 *(c) Nothing in this section shall preclude a party from*
8 *ending the mediation without reaching an agreement.*

9 1125. (a) Notwithstanding any other provision of this
10 chapter, an oral agreement made in the course of, or
11 pursuant to, a mediation is not made inadmissible ~~into~~
12 ~~evidence~~, or protected from disclosure, by the provisions
13 of this chapter if any of the following conditions is
14 satisfied:

15 (1) The agreement is in accordance with Section 1119.

16 (2) The agreement is in accordance with subdivisions
17 ~~(a) and (b)~~, *(b)*, and *(d)* of Section 1119, and all parties
18 to the agreement expressly agree, in writing or orally in
19 accordance with Section 1119, to disclosure of the
20 agreement.

21 (3) The agreement is in accordance with subdivisions
22 ~~(a) and (b)~~, *(b)*, and *(d)* of Section 1119, and the
23 agreement is used to show fraud, duress, or illegality that
24 is relevant to an issue in dispute.

25 ~~(b) Unless For purposes of this chapter, unless the~~
26 ~~parties expressly agree otherwise, in writing or orally in~~
27 ~~accordance with Section 1119, when an oral agreement~~
28 ~~fully resolving a dispute is reached in accordance with~~
29 ~~Section 1119, the mediation ends.~~

30 ~~(e) Unless the parties expressly agree otherwise, in~~
31 ~~writing or orally in accordance with Section 1119, when~~
32 ~~an oral agreement partially resolving a dispute is reached~~
33 ~~in accordance with Section 1119, the mediation ends as to~~
34 ~~the issues resolved. the mediation ends when an oral~~
35 ~~agreement resolving the dispute is reached in accordance~~
36 ~~with Section 1119.~~

37 *(c) Nothing in this section shall preclude a party from*
38 *ending the mediation without reaching an agreement.*

39 1126. If a person subpoenas or otherwise seeks to
40 compel a mediator to testify or produce a document, and

1 the court or other adjudicative body determines that the
2 testimony or document is inadmissible or protected from
3 disclosure under Section 703.5 or this chapter, the court
4 or adjudicative body making the determination shall
5 award reasonable attorney's fees and costs to the
6 mediator against the person seeking the testimony or
7 document.

8 1127. Any reference to a mediation, or a declaration
9 under Section 1125, during any subsequent trial is an
10 irregularity in the proceedings of the trial for the
11 purposes of Section 657 of the Code of Civil Procedure.
12 Any reference to a mediation, or a declaration under
13 Section 1125, during any other subsequent noncriminal
14 proceeding is grounds for vacating or modifying the
15 decision in that proceeding, in whole or in part, and
16 granting a new or further hearing on all or part of the
17 issues, if the reference materially affected the substantial
18 rights of the party requesting relief.

19 SEC. 5. The heading of Chapter 2 (commencing with
20 Section 1150) of Division 9 of the Evidence Code is
21 amended and renumbered to read:

22

23 CHAPTER 3. OTHER EVIDENCE AFFECTED OR EXCLUDED
24 BY EXTRINSIC POLICIES

25

26 SEC. 6. Section 1152.5 of the Evidence Code is
27 repealed.

28 SEC. 7. Section 1152.6 of the Evidence Code is
29 repealed.

30 SEC. 8. Section 66032 of the Government Code is
31 amended to read:

32 66032. (a) Notwithstanding any provision of law to
33 the contrary, all time limits with respect to an action shall
34 be tolled while the mediator conducts the mediation,
35 pursuant to this chapter.

36 (b) Mediations conducted by a mediator pursuant to
37 this chapter that involve less than a quorum of a
38 legislative body or a state body shall not be considered
39 meetings of a legislative body pursuant to the Ralph M.
40 Brown Act (Chapter 9 (commencing with Section 54950)

1 of Part 1 of Division 2 of Title 5), nor shall they be
2 considered meetings of a state body pursuant to the
3 Bagley-Keene Open Meeting Act (Article 9
4 (commencing with Section 11120) of Chapter 1 of Part 1
5 of Division 3 of Title 2).

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

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

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

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

17 (e) Section 703.5 and Chapter 2 (commencing with
18 Section 1115) of Division 9 of the Evidence Code apply to
19 any mediation conducted pursuant to this chapter.

20 SEC. 9. Section 66033 of the Government Code is
21 amended to read:

22 66033. (a) At the end of the mediation, the mediator
23 shall file a report with the Office of Permit Assistance,
24 consistent with Chapter 2 (commencing with Section
25 1115) of Division 9 of the Evidence Code, containing each
26 of the following:

27 (1) The title of the action.

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

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

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

36 SEC. 10. Section 10089.80 of the Insurance Code is
37 amended to read:

38 10089.80. (a) The representatives of the insurer shall
39 know the facts of the case and be familiar with the
40 allegations of the complainant. The insurer or the

1 insurer's representative shall produce at the settlement
2 conference a copy of the policy and all documents from
3 the claims file relevant to the degree of loss, value of the
4 claim, and the fact or extent of damage.

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

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

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

34 (b) The mediator shall determine prior to the
35 mediation conference whether the insured will be
36 represented by counsel at the mediation. The mediator
37 shall inform the insurer whether the insured will be
38 represented by counsel at the mediation conference. If
39 the insured is represented by counsel at the mediation
40 conference, the insurer's counsel may be present. If the

1 insured is not represented by counsel at the mediation
2 conference, then no counsel may be present.

3 (c) Section 703.5 and Chapter 2 (commencing with
4 Section 1115) of Division 9 of the Evidence Code apply to
5 a mediation conducted under this chapter.

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

15 SEC. 11. Section 10089.82 of the Insurance Code is
16 amended to read:

17 10089.82. (a) An insured may not be required to use
18 the department's mediation process. An insurer may not
19 be required to use the department's mediation process,
20 except as provided in Section 10089.75.

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

23 (c) If the parties agree to a settlement agreement, the
24 insured will have three business days to rescind the
25 agreement. Notwithstanding Chapter 2 (commencing
26 with Section 1115) of Division 9 of the Evidence Code, if
27 the insured rescinds the agreement, it may not be
28 admitted in evidence or disclosed unless the insured and
29 all other parties to the agreement expressly agree to its
30 disclosure. If the agreement is not rescinded by the
31 insured, it is binding on the insured and the insurer, and
32 acts as a release of all specific claims for damages known
33 at the time of the mediation presented and agreed upon
34 in the mediation conference. If counsel for the insured is
35 present at the mediation conference and a settlement is
36 agreed upon that is signed by the insured's counsel, the
37 agreement is immediately binding on the insured and
38 may not be rescinded.

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

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

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

22 SEC. 12. Section 65 of the Labor Code is amended to
23 read:

24 65. The department may investigate and mediate
25 labor disputes providing any bona fide party to this type
26 of dispute requests intervention by the department and
27 the department may proffer its services to both parties
28 when work stoppage is threatened and neither party
29 requests intervention. In the interest of preventing labor
30 disputes the department shall endeavor to promote
31 sound union-employer relationships. The department
32 may arbitrate or arrange for the selection of boards of
33 arbitration on such terms as all of the bona fide parties to
34 the dispute may agree upon. Any decision or award
35 arising out of an arbitration conducted pursuant to this
36 section is a public record. Section 703.5 and Chapter 2
37 (commencing with Section 1115) of Division 9 of the
38 Evidence Code apply to a mediation conducted by the
39 California State Mediation and Conciliation Service, and
40 any person conducting the mediation. All other records

1 of the department relating to labor disputes are
2 confidential.

3 SEC. 13. Section 350 of the Welfare and Institutions
4 Code is amended to read:

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

18 (2) Each juvenile court is encouraged to develop a
19 dependency mediation program to provide a
20 problem-solving forum for all interested persons to
21 develop a plan in the best interests of the child,
22 emphasizing family preservation and strengthening. The
23 Legislature finds that mediation of these matters assists
24 the court in resolving conflict, and helps the court to
25 intervene in a constructive manner in those cases where
26 court intervention is necessary. Notwithstanding any
27 other provision of law, no person, except the mediator,
28 who is required to report suspected child abuse pursuant
29 to the Child Abuse and Neglect Reporting Act (Article 2.5
30 (commencing with Section 11164) of Chapter 2 of Title
31 1 of Part 4 of the Penal Code), shall be exempted from
32 those requirements under Chapter 2 (commencing with
33 Section 1115) of Division 9 of the Evidence Code because
34 he or she agreed to participate in a dependency
35 mediation program established in the juvenile court.

36 If a dependency mediation program has been
37 established in a juvenile court, and if mediation is
38 requested by any person who the judge or referee deems
39 to have a direct and legitimate interest in the particular
40 case, or on the court's own motion, the matter may be set

1 for confidential mediation to develop a plan in the best
2 interests of the child, utilizing resources within the family
3 first and within the community if required.

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

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

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

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

15 After testimony in chambers, the parent or parents of
16 the minor may elect to have the court reporter read back
17 the testimony or have the testimony summarized by
18 counsel for the parent or parents.

19 The testimony of a minor also may be taken in
20 chambers and outside the presence of the guardian or
21 guardians of a minor under the circumstances specified
22 in this subdivision.

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

O

~~(7) Section 580 (relief awardable). Likewise, Section 580 should track the~~
current rules on relief awardable, but should accommodate trial court
unification.

(8) *Section 904.5 (appellate jurisdiction)*. Subdivision (c) should be revised as
follows: "Nothing in this section provides a right of appeal in any civil cause that
is ~~nonappealable by law~~ not otherwise appealable by law."

(9) *Small claims*. The Commission revisited and reaffirmed its decision that
references to the "small claims court" should be corrected to "small claims
division."

Judicial Districts

The Commission considered Memorandum 97-52, relating to treatment of
judicial districts under trial court unification. The Commission decided that the
draft should presumptively make judicial districts countywide in a county in
which the courts have unified. The draft should note the practical effect of any
changes this would cause under particular statutes. Where it appears necessary
to preserve judicial districts for some purpose, the staff should consider whether
it makes sense to include the courts in the determination of any revised district
boundaries, along with the county supervisors. The staff should raise these
concepts with county representatives.

The draft provision that "judicial district" does not include superior court
district or court of appeal district should be reviewed with some care. There may
be at least a few instances where the term does encompass the other districts. The
statutes in those instances might be adjusted accordingly.

The staff should investigate state/county funding issues in a unified court
~~and whether any statutory changes are needed to accommodate unification.~~

STUDY K-401 – MEDIATION CONFIDENTIALITY

The Commission considered Memorandum 97-51, concerning the status of AB
939, the Commission's bill on mediation confidentiality. The Commission raised
no objections to the amendments discussed in that memorandum, but directed
the staff to make the following additional amendments:

(1) In proposed Evidence Code Section 1127, the references to a
"declaration under Section 1125" should be deleted.

(2) Because a "writing as defined in Section 250" includes a document, the
phrase "document or writing as defined in Section 250" should be revised

throughout the bill to eliminate the term "document" or state that a "writing as defined in Section 250" includes a document.

~~STUDY N-200 - JUDICIAL REVIEW OF AGENCY ACTION~~

The Commission considered Memorandum 97-48 and First Supplement, relating to judicial review of agency action. The Commission made the following decisions:

State Agency Regulations

The Commission approved the staff recommendation to exempt underground regulations of state agencies from the draft statute, but not to exempt duly adopted state agency regulations, as follows:

1121. (a) This title does not apply to any of the following:

(1) Judicial review of agency action by any of the following means:

(A) Where a statute provides for trial de novo.

(B) Action for refund of taxes or fees under Section 5140 or 5148 of the Revenue and Taxation Code, or under Division 2 (commencing with Section 6001) of the Revenue and Taxation Code.

(C) Action under Division 3.6 (commencing with Section 810) of the Government Code, relating to claims and actions against public entities and public employees.

(2) Litigation in which the sole issue is a claim for money damages or compensation and the agency whose action is at issue does not have statutory authority to determine the claim.

(3) Judicial review of a decision of a court.

(4) Judicial review of an ordinance, regulation rule, or resolution enacted by a county board of supervisors or city council that is legislative in nature.

(5) Judicial review of agency proceedings pursuant to a reference to the agency ordered by the court.

(6) Judicial review of a state agency regulation alleged to be in violation of Section 11340.5 of the Government Code.

(b) This title applies to an original proceeding in the Supreme Court or court of appeal under Section 10 of Article VI of the California Constitution only to the extent provided by rules of court adopted by the Judicial Council.

11340.5. (a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, ~~instruction, order, standard of general application, or other rule,~~