EXHIBIT 9.

First Supplement to Memorandum 97-3

Mediation Confidentiality: Input on Revised Staff Draft Recommendation

Attached are the following new letters commenting on the Commission's proposal:

Exhibit pp.

1. Terry Amsler, Community Board Program. 1
2. Jack Arns, Placer Dispute Resolution Service 2
3. Brian Connelly. 4
4. Cynthia Spears, Solution Strategies. 5
5. Christopher Viau, Institute for Study of Alternative Dispute Resolution, Humboldt State University 6
6. Jeffrey Krivis 9

The first five letters criticize Section 1127 (Option A) of the revised staff draft recommendation, which allows disclosure of a mediation communication if "[a]ll persons *other than the mediator* who conduct or otherwise participate in the mediation expressly agree" to the disclosure. (Emphasis added.) Because of the concerns raised in these letters and previous communications (see Mem. 97-3, Exhibit pp. 1-20), the staff strongly recommends replacing Section 1127 (Option A) with a statute along the lines of Section 1127 (Option B), as discussed at pages 18-20 of the revised staff draft recommendation. As a general rule, disclosure of a mediation communication should be allowed only if all mediation participants, including the mediator, agree to the disclosure.

Jeffrey Krivis, sponsor of the 1996 bill amending Evidence Code Section 1152.5 to protect intake communications, comments on the definition of "mediation consultation" in Section 1120 of the revised staff draft recommendation. He suggests the following revision:

> 1120. (c) "Mediation consultation" means a communication between a person and a mediator for the purpose of ~~initiating a~~ considering mediation or retaining the mediator.
>
> [See Exhibit p. 9.]

Mr. Krivis explains:

> When I was drafting the new language for § 1152.5, the word "initiate" was contemplated but ultimately removed based on discussions with many people who recognize that there should be protections for conversations in which a party is simply considering mediation but decides against it after conversations with the mediator. For example, someone might call a mediator about a case and the mediator might recommend that they finish taking depositions before we "initiate" the process of mediation. This could take several months or longer. Another example would be when someone contacts a mediator but after learning more about the dispute, the mediator tells the party that in his opinion, it wouldn't be productive to mediate the particular case. These conversations need the kind of broad protection we were able to prescribe in the new language to § 1152.5.
>
> [*Id.*]

The staff appreciates these insightful comments, and urges the Commission to revise Section 1120(c) as Mr. Krivis suggests.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

Conflict Resolution Resources

THE COMMUNITY BOARD PROGRAM

— 1540 Market Street, Suite 490 · San Francisco, CA 94102 · (415) 552-1250 · Fax (415) 626-0595 —

14 January 1997

Ms. Barbara Gaal, Staff Attorney
California Law Revision Commission
4000 Middlefield Road Room D-1
Palo Alto, CA 94303-4739

Re: Mediation Confidentiality
Study K-401 Draft Final Recommendations

Dear Ms. Gaal and Members of the Commission:

I am writing to you on behalf of The Community Board Program (CBP) in San Francisco. CBP is a non-profit organization, and is a member of the California Association of Community Mediation Programs (CACMP). We have over 230 trained neighborhood mediators in San Francisco who serve as "neighbors helping neighbors resolve conflicts that keep us apart." We receive case referrals from small claims, juvenile and the Superior Court, as well as from public departments, police officers and the disputants themselves.

CBP is strongly opposed to the proposed new replacement § 1127(a), which terminates the mediator's ability to maintain the confidentiality of the mediation proceedings. Confidentiality is necessary to facilitate an open, honest and productive mediation. Indeed, the CLRC previously has advocated confidentiality, and we encourage the CLRC to continue drafting and revising laws which affect mediation consistent with that tenet.

We have found that, without the assurance of confidentiality, mediation becomes significantly less effective. We urge you to strike this tentative decision and not to reduce current confidentiality protections.

Thank you for your consideration.

Sincerely,

Terry Amsler
Executive Director
The Community Board Program

Placer
Dispute
Resolution
Service

January 14, 1997

Barbara S. Gaal
California Law Review Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Dear Ms. Gaal,

Placer Dispute Resolution Service, a community mediation service in Placer County submits the following comment on legislation impacting sections 1152.5 and 1152.6 of the California Evidence Code. We urge you to keep in tact the explicit confidentiality of mediation by not allowing the disputants to remove the protection of confidentiality after the fact.

Specifically, newly proposed section 1127 would read:

1127. Notwithstanding section 1122, a communication, document or any writing as defined in Section 250, that is made or prepared for the purpose of, or in the course of, or pursuant to a mediation, may be admitted or disclosed if any of the following conditions exist:
(a) all persons OTHER THAN THE MEDIATOR who participate in the mediation expressly consent to disclosure of the communication, document or writing.

The ability to remove the protection of confidentiality after the fact, seems tantamount to removing the protection completely. Our concern is that parties could be pressured into alleged consent by the other party or their attorney saying "If you had nothing to hide" certainly you would consent to removing the protection of confidentiality. Therefore, the logic might progress, since you refuse to make what was said or written in the mediation public, you must be guilty of misrepresentation or manipulation during the mediation. In order to defend their veracity, a party may then feel compelled to agree to disclosure. The situation then becomes a lose/lose proposition for that party.

In addition, with this change the potential exists for mediators to see an increase in subpoenas for their files and notes, and that parties will use mediator oral statements, letters and proposals against each other in court.

The protection of confidentiality in mediation allows the parties to deal with each other in an informal environment which often strongly contributes to honesty and the sharing of true interests and concerns which ultimately leads to resolution. Removing the protection of confidentiality, even after the fact, creates a different tone for the proceeding and subjects the mediators to the threat of having their work subpoenaed.

We urge you to remove the recent proposed change adding OTHER THAN THE MEDIATOR to your recommendations on this legislation. Thank your for your consideration.

Sincerely,

Jack Arns
President
Placer Dispute Resolution Service
P.O. Box 4944
Auburn, Ca 95604
(916) 645-9260

LAW OFFICES OF BRIAN P. CONNELLY
161 PALM AVENUE, SUITE 2
AUBURN, CA 95603
916-889-0368
FAX: 916-823-1498

January 16, 1997

Barbara S. Gael
California Law Review Commission
4000 Middlefield Road Room D-1
Palo Alto, CA 94303-4739

Dear Ms. Gaal:

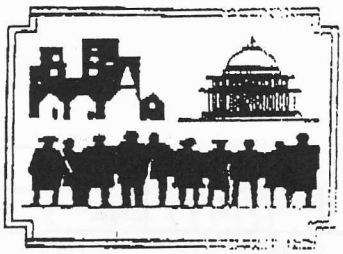
I am currently a volunteer Board member with a community mediation service, Placer Dispute Resolution Services(PDRS), located in Auburn, California. The purpose of this letter is to underscore the importance of retaining the confidential aspect of Mediation and the critical need to preserve this fundamental aspect of confidentiality within the Mediation Process. I strongly concur with the thoughts of Placer Dispute Resolution Service's President Jack Arns, as expressed in his letter to you dated January 15, 1997(copy enclosed).

To protect the Mediation Process, including all of the participants, any proposed legislation, including the Evidence Code, must be drafted to protect and preserve absolute confidentiality in the entire Mediation forum. Thank you for your anticipated attention and efforts in this matter and contact me if you have any questions.

Sincerely,

Brian P. Connelly
Attorney At Law
BPC/sl

cc: Jack Arns, PDRS



Solution Strategies

Facilitation, Mediation and Training in Conflict Resolution

January 19, 1997

Law Revision Commission
RECEIVED

JAN 21 1997

File: K-401

Barbara S. Gaal
California Law Review Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Dear Ms. Gaal

As both a commercial and community mediator, I urge you to keep in tact the explicit confidentiality of mediation by not allowing the disputants to remove the protection of confidentiality after the fact.

The protection of confidentiality in mediation allows the parties to deal with each other in an informal environment which often contributes to open discussion and the sharing of true interests and concerns allowing for mutually agreeable resolution. Removing the protection of confidentiality after the fact, creates a different tone for the proceeding and could subject a disputant to coercion from the other party to reveal details shared under the guise of confidentiality.

There are many other forms of dispute resolution which create a non-confidential forum and can be used if mediation fails. In addition, with this change the potential exists for mediators to see an increase in subpoenas for their files and notes, and that parties will use mediator oral statements, letters, and documents against each other in court. Attorneys are protected by client-attorney privilege by the weight and sometimes fiduciary nature of their responsibilities to their clients. As neutrals, mediators have a responsibility to see that the mediation process serves all the parties to a dispute and we therefore strive to maintain the integrity of the process. Confidentiality is integral to the integrity of mediation. Indeed, this type of change could even discourage mediators from practice thereby making scarce the availability of mediation as an alternative form of dispute resolution.

I urge you to remove the recent proposed change from Section 1127 (b) of the Evidence Code adding OTHER THAN THE MEDIATOR to your recommendations on this legislation. Thank your for your consideration.

Sincerely,

Cynthia Spears

2742 Penny Lane, Lincoln CA 95648 (916) 645-1734

HUMBOLDT STATE UNIVERSITY

Institute for Study of Alternative Dispute Resolution

Post-it™ Fax Note 7671	Date 1/16/97	# of pages ▶ 3
To Ms. Barbara Gaal	From Chris Viau	
Co./Dept. CLRC	Co. ISADR	
Phone # 415 494 1335	Phone # 707 826 4754	
Fax # 415 494 1827	Fax # 707 826 5450	

January 9, 1997

Ms. Barbara Gaal
Staff Counsel
California Law Revision Commission
4001 Middlefield Rd. Room D-1
Palo Alto, CA 94303-4739

Law Revision Commission
RECEIVED
JAN 16 1997
File: K-401

Re: Mediation Confidentiality
Staff draft recommendation - section 1127

Dear Ms. Gaal:

As an instructor at the Institute for Study of Alternative Dispute Resolution (ISADR) here at Humboldt State University, the matter of mediation confidentiality is extremely important to me. I am curious as to whether or not the wording "All persons" in subsection (a) means that experts who participate in a mediation must consent to disclosure? The wording "or otherwise participate" seems to indicate that this is the intent of this subsection proposal. At this point in time, most professionals in the field are of the understanding that a mediator "conducts" the mediation and all other individuals (including the disputants) "participate" in the mediation process. If the mediator's consent is not required, then what exactly is the intent of the wording "who conduct or otherwise participate"?

It is unclear to me what the express purpose is of creating exceptions to the strict privilege currently accorded to mediation proceedings. Are there any cases or rulings currently extant showing that confidentiality impairs the conduct of the mediation process? Alternately phrased, how would adoption of 1127 (a) improve the mediation process?

I am of the opinion that section 1127 (a) should be deleted. When I conduct mediations, I have disputants sign an agreement to mediate, which expressly guarantees confidentiality. This is standard practice within the

Arcata, California 95521-8299 • (707) 826-4750 • Fax (707) 826-5450

field of mediation, and this practice would be essentially voided by adoption of this section. I am also curious if the wording "or in the court of" should read "or in the course of" in the third line of the first paragraph?

If section 1127 (a) were to be adopted, both private parties and the courts would be immediately plagued by many troubling questions. Would participants be able to demand the working notes taken by the mediator? Would mediators be required to keep their working materials, and if so, for how long? If this section were adopted, would it mean that mediators could be subpoenaed to testify regarding confidential communications originating in private caucuses? Would disputants hesitate to participate in a mediation if they felt that the potential for litigating their case would be damaged by waiving confidentiality? Would outside experts be forthcoming with their candid assessments of family, business and environmental disputes in a mediation setting with a mediator who could not give an assurance of absolute confidentiality? If the current confidential nature of mediation is modified, these are only a few of the troubling questions that will arise, and eventually have to be settled through litigation.

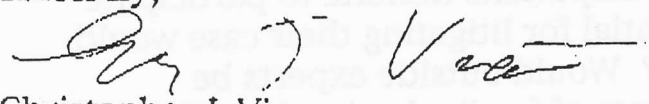
One of the functions of mediation and other forms of ADR is to alleviate court congestion. However, 1127 (a) seems to substitute confusion for clarity, thereby diminishing the Legislative, Judicial, and professional intent of the mediation process. Potentially, the ambiguity inherent in 1127 (a) could create a field day for litigation pertaining to ADR cases, dealing a double blow to both mediators and the Judiciary. Even if parties to a dispute agreed that their mediation would not be subject to section 1127 (a), such a waiver could be contested through litigation.

A definitive characteristic of mediation is that of absolute confidentiality, and the secure environment that this creates encourages disputants to speak candidly, resolving their issues without resorting to litigation. If this absolute privilege is amended through the adoption of 1127 (a) to conditional confidentiality, this may very well be a critical blow to the efficacy of the mediation process

Frequently, mediators are employed in a process of fact-finding between disputants, and this may be seen as a type of non-adversarial discovery. This procedure, which is in many cases, of great benefit to both parties, would be virtually eliminated if 1127 (a) were to be adopted. It is unclear whether or not the purpose of this section is to either improve mediation, or transform it into a new tool to be used in preparation for litigation, expanding the scope of discovery.

Thank you for your time and consideration of my apprehensions regarding this matter. Once again , I recommend wholeheartedly that section 1127 (a) should be deleted. Normally, in the course of its duties, the CLRC displays exceptionally good judgement, and I am sure that in this situation, the CLRC will carefully consider the sentiments expressed by the dispute resolution community and proceed accordingly. Ms Gaal, I would be more than happy to discuss these issues with you and the Commission if that would be of any help in reaching an informed decision.

Sincerely,



Christopher J. Viau
Certificate Course II Instructor

JEFFREY KRIVIS

ATTORNEY AT LAW

MEDIATION □ ARBITRATION

16501 Ventura Blvd.
Suite 610
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January 19, 1997

Barbara S. Gaal
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

RE: Law Revision Commission Study On Mediation Confidentiality

Dear Barbara:

In response to your inquiry about the term "mediation consultant" as that has been defined in §1120 of the proposed legislation, I would urge the commission to remove the term "initiate" and replace it with the term "considering." That allows for a broader protection with respect to conversations between people who are thinking about bringing a case to mediation but are not sure if it would make sense to do so.

When I was drafting the new language for §1152.5, the word "initiate" was contemplated but ultimately removed based on discussions with many people who recognize that there should be protections for conversations in which a party is simply considering mediation but decides against it after conversations with the mediator. For example, someone might call a mediator about a case and the mediator might recommend that they finish taking depositions before we "initiate" the process of mediation. This could take several months or longer. Another example would be when someone contacts a mediator but after learning more about the dispute, the mediator tells the party that in his opinion, it wouldn't be productive to mediate the particular case. These conversations need the kind of broad protection we were able to prescribe in the new language to §1152.5.

Unfortunately I will not be able to attend the January 24, 1997 meeting, but appreciate being kept informed of further developments. I will continue to report to the board of the Southern California Mediation Association about the proposed legislation.

Sincerely,

Jeffrey Krivis

EXHIBIT 10.

Study K-401 January 23, 1997

Second Supplement to Memorandum 97-3

Mediation Confidentiality: Additional Input on Revised Staff Draft Recommendation

Attached for the Commission's consideration are letters from: (1) Steve Toben, program officer for the Hewlett Foundation's conflict resolution program, which is "the nation's primary source of grants assistance to nonprofit dispute resolution providers" (Exhibit page 1), and (2) Kim Harmon, director of the San Francisco Dependency Mediation Program (Exhibit pages 2-5). Ron Kelly and John Gromala have also raised some new concerns by phone.

TOBEN'S COMMENTS ON SECTION 1127

Steve Toben reports that he discussed Section 1127 (disclosure by agreement) with Associate Dean Nancy Rogers of Ohio State Law School, "one of the nation's foremost authorities on legal regulation of mediation." (Exhibit p. 1.) She informed him that in some states the privilege for mediation communications runs to all participants in the mediation, but in other states the disputants may waive the privilege over objections of the mediator. (*Id.*) Ohio follows a hybrid approach:

> [T]he disputants may jointly waive the privilege, but the mediator may only be compelled to give evidence as to the statements of the disputants. The mediator may not be forced to disclose his or her own notes or to recount his or her own statements to the parties in caucuses of in plenary sessions.
> [*Id.*]

According to Mr. Toben, this approach "preserves the capacity of the mediator to function freely with assurance that the candor so crucial to the success of mediation is not chilled by the prospect of later disclosure." (*Id.*)

Ohio's hybrid approach may be more acceptable to the California mediation community than the Commission's current proposal, under which a mediation communication may be disclosed if all mediation participants "other than the mediator" expressly agree to the disclosure. (Revised Staff Draft Recommendation, Section 1127 (Option A)). As Ron Kelly has pointed out,

however, in proposing Section 1127 (Option A) the Commission is not "revers[ing] the current prohibition on mediator testimony embodied in Evidence Code section 703.5." (Mem. 97-3, Exhibit p. 15.) The hybrid approach differs from Section 1127 (Option A) in protecting the mediator's notes, but it would not protect the mediator from having to disclose other documents, nor prevent other mediation participants from disclosing what occurred at a mediation. The staff is dubious that the approach would fully allay the concerns expressed in the numerous letters objecting to Section 1127 (Option A). (See Memorandum 97-3, Exhibit pp. 1-20; First Supplement to Memorandum 97-3, Exhibit pp. 1-8.) It may be more productive to focus on Section 1127 (Option B), under which a mediation communication may be disclosed only if the mediator and all other mediation participants expressly agree to the disclosure.

GROMALA'S COMMENTS ON SECTION 1127

Section 1127 (Option B) states in part:

> 1127. (c) If a person refuses to agree to disclosure pursuant to this section, any reference to that refusal during any subsequent trial is an irregularity in the proceedings of the trial for purposes of Section 657 of the Code of Civil Procedure.

By phone, John Gromala questioned whether this provision could be broadened to include not only a court trial, but also an arbitration, administrative adjudication, or other noncriminal proceeding.

That seems like a good idea, but Code of Civil Procedure Section 657 pertains only to a court trial. Comparable provisions may not exist for all noncriminal proceedings. Perhaps the following revision would work:

> 1127. (c) If a person refuses to agree to disclosure pursuant to this section, any reference to that refusal during any subsequent trial is an irregularity in the proceedings of the trial for purposes of Section 657 of the Code of Civil Procedure. <u>Any reference to that refusal during any other subsequent noncriminal proceeding is grounds for vacating or modifying the decision in that proceeding, in whole or in part, and granting a new or further hearing on all or part of the issues, if the reference materially affected the substantial rights of the party requesting that relief.</u>

COMMENTS OF SAN FRANCISCO DEPENDENCY MEDIATION PROGRAM

Kim Harmon, Director of San Francisco Superior Court's Dependency Mediation Program, comments on two aspects of the Commission's proposal: (1) the provision making the mediation confidentiality statutes inapplicable to settlement conferences, and (2) the definition of intake communications. (Exhibit pp. 2-5.) Her comments relate to an earlier version of the Commission's proposal; her initial assessment of the revised staff draft recommendation was that it addressed her main concerns. (*Id.* at p. 2.)

Settlement conferences and similar proceedings

Ms. Harmon points out that "there is a tremendous need for" mediation programs in the juvenile dependency context. (Exhibit p. 3.) "[D]ue to the financial situation of the vast majority of families involved in the juvenile dependency system, family members do not have the option to hire a private mediator." (*Id.* at p. 2.) "Therefore, without the resources of the court, mediation would not be available at all." (*Id.*)

She also explains that San Francisco Dependency Mediation Program and all other juvenile dependency mediation programs in California are "clearly 'court annexed' programs." (Exhibit p. 3.) "Dependency mediators are hired by the court (or, at least, are supervised by the court), the parties in our program (though not in all dependency mediation programs) are ordered to attend mediation, and the mediators are involved in handling mediations attended by the same attorneys, and sometimes the same parties, with regard to other disputes." (*Id.*)

She considers it essential that the mediation confidentiality statutes apply to the San Francisco program and others like it:

> [T]he need for confidentiality in the mediation process, particularly in the context of an adversarial system where a family member's every act (or failure to act) can be at issue, is self evident. Dependency mediation programs must be afforded the confidentiality protections contemplated by the Evidence Code amendments. Without the protection of confidentiality in the dependency mediation process, there can be no meaningful discussion of the issues that must be aired in order to move the case (and the family) forward.
>
> [*Id.*]

She recognizes "the potential risk of undue influence by the mediator," but asserts that "the need for confidentiality far outweighs" that risk. (*Id.*) She explains that the mediator's "ability to pressure settlement in our program, as well as the other statewide dependency mediation programs, is checked in a number of significant ways." (*Id.*) "The shared safeguards of all of these programs include the following: (1) the mediator does not report to the court in any manner as to the reason for the failure to settle; (2) the mediator does not make recommendations, of any type, to the court; and (3) the mediator does not practice in front of the court in any professional or non-professional capacity in the case he or she is mediating, except as a mediator." (*Id.*)

In light of these considerations, Ms. Harmon was "quite concerned with the broad brush used to define 'settlement conference'" at pages 12-13 of the staff draft recommendation attached to Memorandum 96-86. She is more comfortable with Section 1120.2 of the revised staff draft recommendation. (*Id.* at 2.) Nonetheless, because of her concerns and concerns raised by Ron Kelly (see below), the staff suggests revising Section 1120.2(a) to read:

> 1120.2(a). This chapter does not apply to a settlement conference conducted by a judge with authority to compel a result or render a decision on any issue in the dispute.

The staff will further explain this proposed revision at the Commission's meeting.

Intake communications

Ms. Harmon also expresses concern about protecting pre-mediation case development. (*Id.* at 5.) Section 1120(c) of the revised staff draft recommendation would seem to satisfy that concern, but not if it is revised as suggested by Jeffrey Krivis at page 1 of the First Supplement to Memorandum 97-3. To meet both her concern and the concerns expressed by Mr. Krivis (see First Supp. to Mem. 97-3, pp. 1-2), the staff suggests defining "mediation consultation" as follows:

> 1120(c) "Mediation consultation" means a communication between a person and a mediator for the purpose of initiating or considering mediation or retaining the mediator.

COMMENTS OF RON KELLY

By phone, Ron Kelly has expressed serious concern about the revised staff draft recommendation. He is concerned that the definition of mediator in Section

1120(b) and the limitations of Sections 1120.1(c) and 1120.2 will result in undesirable narrowing of protections for mediation confidentiality and the prohibition on mediator reporting (Section 1123 in the revised staff draft recommendation). In other words, because of the limitations on application of the chapter on mediation, some proceedings that should be subject to the ban on reporting back to the court will not be so protected and will not be confidential, despite disputants' expectations to the contrary. The staff has had similar thoughts but has not yet thought of a satisfactory alternative approach. Mr. Kelly has some specific suggestions, which he intends to present in written form at the Commission's meeting.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

Date: Tue, 21 Jan 1997 16:20:00 -0800 (PST)
From: Steve Toben <S.TOBEN@hewlett.org>
Subject: Proposed Evidence Code sec. 1127
To: Barbara Gaal <bgaal@clrc.ca.gov>
Cc: Ron Kelly <ronkelly@igc.org>
MIME-version: 1.0

Dear Ms. Gaal:

I write with reference to proposed Evidence Code sec. 1127, which as presently drafted would allow parties to a mediation to waive the privilege of confidentiality over the objections of a mediator.

I direct the program on conflict resolution at the Hewlett Foundation, which is the nation's primary source of grants assistance to nonprofit dispute resolution providers. Before coming to the Foundation in 1991, I practiced law for nine years in the private and public sectors. I received my first mediation training in 1985 and have mediated professionally and as a volunteer in a variety of contexts.

In assessing proposed section 1127, I consulted with Associate Dean Nancy Rogers of the Ohio State Law School. Prof. Rogers is considered to be one of the nation's foremost authorities on the legal regulation of mediation. She has authored the leading treatise analyzing the statutes, rules, ethical provisions, and case law regarding mediation, and she has served as an advisor to the Ohio Supreme Court on law and mediation.

Prof. Rogers reports that states have treated the problem of mediation confidentiality in many different ways. In some states the privilege runs to all participants in the mediation; in other states, the disputants may waive the privilege over the objections of the mediator. Ohio offers a distinctive, hybrid approach that addresses the interests of both disputants and mediators. Summarizing, the disputants may jointly waive the privilege, but the mediator may only be compelled to give evidence as to the statements of the disputants. The mediator may not be forced to disclose his or her own notes or to recount his or her own statements to the parties in caucuses or in plenary sessions. This approach preserves the capacity of the mediator to function freely with assurance that the candor so crucial to the success of mediation is not chilled by the prospect of later disclosure.

In summary, Prof. Rogers does not believe that a mediator should be able to block the mutual waiver of parties to disclose aspects of the mediation other than the notes and statements of the mediator. She holds out one exception: in the labor-management arena, a strong public policy would favor barring the production of evidence by the mediator, evidence whose purpose would be to support one side or another. Because labor-management mediations generally involve a few "repeat players", this scenario would over time likely taint the standing of neutral third parties.

For additional information, you may contact Prof. Rogers at Ohio State University, College of Law, 55 West Twelgth Ave., Columbus, Oh, 43210-1391, (614) 292-2631.

Thank you for your consideration.

Sincerely,

Steve Toben
Program Officer

Dependency Mediation Program
San Francisco Superior Court

375 Woodside Avenue • San Francisco, CA 94127 • (415) 753-7697 • Fax: (415) 753-7888

FAX TRANSMITTAL

To: Barbara S. Gaal
From: Kim Harmon
Date: January 22, 1997
# of Pages (including cover): 4
Fax #: 494-1827

Re: Mediation Confidentiality

Dear Barbara,

I have enclosed a letter I composed prior to receiving the latest proposed revisions. After looking over the Commission's latest draft, particularly Section 1120.2, it appears that my main concerns have been addressed. However, I have not had the time to look carefully at all the information you sent me.

Perhaps my letter, in any event, will give you a better sense of our program's particular issues. I also wanted to let you know that Maxine Baker Johnson, who is a mediator in the dependency mediation program in Los Angeles is planning to attend the Commission's meeting this Friday and will be informing the Commission of the particular issues facing dependency mediation programs.

I very much appreciate your keeping me informed of the Commission's work and look forward o working with you in the future.

Dependency Mediation Program
San Francisco Superior Court

375 Woodside Avenue San Francisco, CA 94127 (415) 753-7697 Fax : (415) 753-7888

January 22, 1997

Barbara Gaal
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Dear Barbara,

After reviewing the Law Revision Commission's recommendations with regard to the confidentiality of mediation, I would like to explain the unique context in which juvenile dependency mediation is practiced and offer some specific suggestions for changing the proposed legislation.

Unlike other litigants, the parents and guardians involved in juvenile dependency matters are involved in the dependency system against their will and are in opposition to the power and resources of the State. They do not have the ability to "settle" a case and exit the system in the same manner as civil litigants. Settlement, in the dependency context, generally relates to the settlement of the issues involved at a specific statutory review date, rather than a settlement that will end the family's involvement in the dependency system all together. In fact, juvenile dependency cases can, and often do, continue until the minor reaches the age of majority. It should also be noted that due to the financial situation of the vast majority of families involved in the juvenile dependency system, family members do not have the option to hire a private mediator. Therefore, without the resources of the court, mediation would not be available at all.

The issue raised by the Commission with regard to the pressure that can be exerted by "neutrals" on parties to a mediation is well taken, but I am quite concerned with the broad brush used to define "settlement conference". On pages 12 and 13 the Commission suggests the following with regard to determining whether or not a meeting is a settlement conference (and therefore not to be afforded the protection of confidentiality):

> (A) under section 1120© the focus will be on whether a proceeding is "before the court" *even though* the person conducting it lacks decision making power.
>
> (B) "In assessing whether a proceeding is a court settlement conference, among the relevant factors are whether the person conducting the proceeding is *permanently associated with the court adjudicating the dispute*, and whether that person's ties to the decision maker create an impression of power to influence the decision."

I

Our program fits the currently suggested profile of "settlement conference", as do all of the juvenile dependency mediation programs throughout the State. We are clearly "court annexed" programs. Dependency mediators are hired by the court (or, at least, are supervised by the court), the parties in our program (though not in all dependency mediation programs) are ordered to attend mediation, and the mediators are involved in handling mediations attended by the same attorneys, and sometimes the same parties, with regard to other disputes.

However, as discussed above, there is a tremendous need for court annexed mediations in the juvenile dependency context. Likewise, the need for confidentiality in the mediation process, particularly in the context of an adversarial system where a family member's every act (or failure to act) can be at issue, is self evident. Dependency mediation programs must be afforded the confidentiality protections contemplated by the Evidence Code amendments. Without the protection of confidentiality in the dependency mediation process, there can be no meaningful discussion of the issues that must be aired in order to move the case (and the family) forward.

In fact, the need for confidentiality far outweighs the potential risk of undue influence by the mediator. The mediator's ability to pressure settlement in our program, as well as the other statewide dependency mediation programs, is checked in a number of significant ways. The shared safeguards of all of these programs include the following: (1) the mediator does not report to the court in any manner as to the reason for the failure to settle; (2) the mediator does not make recommendations, of any type, to the court; and (3) the mediator does not practice in front of the court in any professional or non-professional capacity in the case he or she is mediating, except as a mediator. Each county's dependency mediation program operates according to the situation presented by its specific needs and, therefore, may have additional safeguards. However, the shared safeguards enumerated above should be incorporated into the proposed legislation.

Therefore, the following suggestions are made to address both our concerns that court-annexed mediation programs have the protection of confidentiality, as well as to meet the larger concerns of potential mediator abuse or pressure on parties involved in court annexed mediations:

Sec. 1120.1 (a)(1) (1120(c)of SDR)

The following should be added to the Comments of this Section.

The term mediation includes those meetings conducted by neutrals, whether or not those neutrals are permanently associated with the court adjudicating the dispute, so long as the neutrals have no authority to resolve disputes, have no other function before the adjudicating court with regard to the case being mediated other than that of a non decision making neutral, and make no reports or recommendations to the court with regard to either the specific merits of the cases brought to mediation or any report as to the reasons for the lack of resolution.

I also think it important to specifically include the task of case development as part of the mediation process for purposes of protecting confidentiality and propose the following additions:

Sec. 1120©
"Mediation consultation" means a consultation by a person with a mediator or mediation service for the purpose of retaining the mediator or mediation service, *as well as any discussions which are in furtherance of the mediator's or mediation service's understanding of the issues and/or dynamics involved in the dispute being brought to mediation.*

Sec. 1122(a)
"Except as otherwise expressly provided by statute, evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation, a mediation consultation *or pre-mediation case development conducted by the mediator* is not admissible in evidence . . . . "

I'm sorry that I was unaware of your work until only recently and could not sooner address these issues. It is critical to the juvenile dependency mediation programs that these concerns are addressed in the final draft of the Law Revision Commission's recommended legislation and we hope that you will be able to incorporate these changes into the work you've already done. Thank you for all of your work on this important legislation. Please call me with any questions.

Yours truly,

KIM HARMON

Director,
San Francisco Dependency
Mediation Program

warning is provided on a petition for or judgment of dissolution or annulment of marriage. This warning should be expanded to also warn of the effect of dissolution or annulment upon a marital joint tenancy, and any other spousal dispositions revoked by dissolution or annulment of marriage.

Agreement of parties controls

Dissolution or annulment of marriage will not sever a joint tenancy where contrary to a written agreement of the spouses whose marriage has been dissolved or annulled.

Revival of a joint tenancy severed by dissolution or annulment of marriage upon remarriage of the former spouses

Remarriage of former spouses will restore a joint tenancy severed by dissolution or annulment of their former marriage, with two exceptions. A joint tenancy will not be revived on remarriage where a third party has acquired an interest in the property in the time between divorce and remarriage. A joint tenancy will not be revived on remarriage where any event sufficient to sever the joint tenancy, had the joint tenancy not already been severed by dissolution or annulment of marriage, occurs in the time between divorce and remarriage.

Innocent third parties protected

The rights of a third party purchaser or encumbrancer with no knowledge of a severance by dissolution or annulment of marriage are not affected by such a severance.

Reform prospective

The reform will have prospective effect only.

STUDY K-401 – MEDIATION CONFIDENTIALITY

The Commission considered Memorandum 97-3, the First and Second Supplements to Memorandum 97-3, the revised staff draft recommendation attached to Memorandum 97-3, written suggestions from Ron Kelly (Exhibit p. 1), a letter from Maxine Baker-Jackson, representative for the Juvenile Dependency Court Mediation Association (Exhibit pp. 2-3), a letter from Fred Butler, president of the Northern California Mediation Association (Exhibit pp. 4-5), and an electronic mail message from Barbara Giuffre (Exhibit p. 6). The

Commission approved the revised staff draft recommendation for printing and submission to the Legislature, subject to the following revisions:

Definitions (§ 1120 of revised staff draft recommendation)

Section 1120 should be revised as follows:

> 1120. For purposes of this chapter:
>
> (a) "Mediation" means a process in which a ~~mediator~~ 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.
>
> (b) "Mediator" means a neutral person who conducts a mediation ~~and who has no authority to compel a result or render a decision on any issue in the dispute~~. "Mediator" includes any person designated by a mediator either to assist in the mediation or to communicate with the parties in preparation for a mediation.
>
> (c) "Mediation consultation" means a communication between a person and a mediator for the purpose of initiating or considering a mediation or retaining the mediator.

The concept that a mediator should have no authority to compel a result or render a decision on any issue in the dispute should be included in a Comment, at an appropriate place in the chapter on mediation.

Scope of chapter (§ 1120.1 of revised staff draft recommendation)

Subdivision (c) of Section 1120.1 should be deleted.

Court-ordered and court-supervised proceedings (§ 1120.2 of revised staff draft recommendation)

Section 1120.2 should be revised along the following lines:

> 1120.2. (a) This chapter does not apply to a settlement conference~~, or other proceeding to resolve a dispute, that is conducted by a judge or other representative of the tribunal in which the dispute is pending~~ pursuant to Rule 222 of the California Rules of Court.
>
> (b) ~~Where a court or other adjudicative body orders persons to participate in a proceeding to resolve a dispute, this chapter applies to the proceeding if all of the following conditions are satisfied:~~
>
> ~~(1) The proceeding is a mediation as defined in Section 1120.~~
>
> ~~(2) The person conducting the proceeding is a mediator as defined in Section 1120.~~
>
> ~~(3) The proceeding is not excluded from this chapter by paragraph (a) or by Section 1120.1.~~

~~(4) The court or other adjudicative body refers to the proceeding as a "mediation."~~ This chapter applies to a mediation that is ordered by a court or other adjudicative body, unless the proceeding is excepted by subdivision (a) of Section 1120.1.

(c) ~~Notwithstanding subdivision (b), this chapter does not apply to a proceeding ordered by a court or other adjudicative body if the court or other adjudicative body expressly informs the disputants before the proceeding, in writing or on the record, that the chapter does not apply.~~

~~(d) Nothing in this section authorizes a court or other adjudicative body to order disputants to participate in any proceeding.~~

The Comment to Section 1120.2 should continue to state that Section 1120.2 "does not expand a court's authority to order participation in a dispute resolution proceeding." Language similar to the last paragraph of Maxine Baker-Jackson's letter (Exhibit p. 3) should be included in a Comment at an appropriate place in the chapter on mediation.

Mediation-arbitration (§ 1121 of revised staff draft recommendation)

Section 1121 should be revised along the following lines:

1121. (a) Section 1121 does not prohibit either of the following:

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

(2) A post-mediation agreement that the mediator will arbitrate or otherwise decide issues not resolved in the mediation.

(b) ~~Notwithstanding Section 1120, if a dispute is subject to an agreement described in subdivision (a), the neutral person who facilitates communication between disputants to assist them in reaching a mutually acceptable agreement is a mediator for purposes of this chapter. In~~ If a dispute is governed by an agreement described in subdivision (a), in arbitrating or otherwise deciding all or part of the dispute, ~~that person~~ the person who served as mediator may not consider any information from the mediation that is subject to the protection of this chapter, unless all of the mediation parties expressly agree in writing, or orally in accordance with Section 1121.1, before or after the mediation that the person may use specific information from the mediation.

Recorded oral agreement (§ 1121.1 of revised staff draft recommendation)

Section 1121.1(b) should be revised to read: "The ~~mediator recites the~~ terms of the oral agreement are recited on the record."

Disclosure by agreement (§ 1127 of revised staff draft recommendation)

The recommendation should incorporate Section 1127 (Option B), with revisions along the following lines:

> 1127. (a) Notwithstanding any other provision of this chapter, a communication, document, or any writing as defined in Section 250, that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, may be admitted in evidence or disclosed if any of the following conditions are satisfied:
>
> (1) All persons who conduct or otherwise participate in the mediation expressly agree in writing, or orally in accordance with Section 1121.1, to disclosure of the communication, document, or writing.
>
> (2) The communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree in writing, or orally in accordance with Section 1121.1, to its disclosure, and the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation.
>
> (b) For purposes of paragraph (a), if the neutral person who conducts a mediation expressly agrees to disclosure, that agreement binds any person ~~designated by the mediator either to assist in the mediation or to communicate with the parties in preparation for the mediation~~ included in the definition of "mediator" in Section 1120.
>
> ~~(c) If a person refuses to agree to disclosure pursuant to this section, any reference to that refusal during any subsequent trial is an irregularity in the proceedings of the trial for purposes of Section 657 of the Code of Civil Procedure.~~

In place of subdivision (c), the recommendation should include a statute similar to Code of Civil Procedure Section 1775.12.

Written settlements and oral agreements reached through mediation (§§ 1128 and 1129 of revised staff draft recommendation)

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.

STUDY K-410 – CONFIDENTIALITY OF SETTLEMENT NEGOTIATIONS

The Commission considered Memorandum 96-59, the First and Second Supplements to Memorandum 96-59, and the staff draft tentative recommendation attached to Memorandum 96-59. The Commission made the following decisions:

• The approach of making compromise evidence generally inadmissible, with specified exceptions, should be retained in the next draft.

• The staff should explore the idea, suggested by Professor Leonard, that humanitarian conduct be handled separately from compromise evidence.

• Section 1132(a) should be broadened to make compromise evidence inadmissible in any civil action, not just in "a civil action for the loss, damage, or claim that is the subject of the act of compromise." The statute should be narrowed, however, such that an offer of compromise is inadmissible only if it is proffered against the person who made the offer.

• The staff should explore the idea of making compromise evidence inadmissible in a criminal action in some circumstances.

• The standard in Section 1132(b) for discovery of compromise evidence should be retained in the next draft.

• Section 1138(b)(1) should be deleted.

STUDY L-4000 – HEALTH CARE DECISIONMAKING

The Commission considered Memorandum 96-66 concerning health care decisions under the Natural Death Act. The Commission engaged in a general discussion of the issues raised by the memorandum and heard the comments of Matthew S. Rae, Jr., California Commission on Uniform State Laws, Los Angeles, Melvin H. Kirschner, MD, LACMA-LACBA Joint Committee on Biomedical

Concern: Instead of cl..fying and maintaining the current protections of Evidence Code §§ 1152.5 and 1152.6, B&P § 467.5, CCP § 1775.10, Gov. Code §§ 66032, Ins. Code § 10089.80, and Welfare and Institutions Code §350, the Commission's current draft proposal would negate these protections in many mediations. Instead of prohibiting settlement coercion, the Commission's oposed new paragraphs 1120 (b), 1120.1 (c), and 1120.2 (b) and (c) would enable it, by saying the protections for the mediation participants don't apply if the mediator is a court employee or an employee of a tribunal like the American Arbitration Association, or if a judge instructs a mediator to report back a decision on an issue heard by the mediator. The Commission clearly intended to prevent mediation from being used to coerce settlements in civil cases, and mediation communications from being used against participants in a later trial or hearing. Revisions below would keep the Commission's proposal consistent with its original intent.

1120. Definitions

1120. For purposes of this chapter:

(a) "Mediation" means a process in which a ~~mediator~~ 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.

(b) "Mediator" means a neutral person who conducts a mediation and ~~who has no authority to compel a result or render a decision on any issue in the dispute. "Mediator~~" includes any person designated by a mediator either to assist in the mediation or to communicate with the parties in preparation for a mediation.

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

§ 1120.1. Scope of chapter

1120.1. (a) This chapter does not apply to a proceeding under Part 1 (commencing with Section ,00) of Division 5 of the Family Code or a proceeding under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

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

~~(c) If a statute provides that this chapter applies to a mediation under that statute or another statute, this chapter applies to the mediation only if Sections 1120 through 1120.2, inclusive, are satisfied.~~

§ 1120.2. Court-ordered and court-supervised proceedings

1120.2. (a) This chapter does not apply to a settlement conference~~, or other proceeding to resolve a dispute,~~ that is conducted by a judge or other trier-of-fact ~~or other representative of the tribunal in which~~ before whom the dispute is pending.

(b) Where a court or other adjudicative body orders persons to participate in a proceeding to resolve a dispute, which is referred to as a mediation, then this chapter applies to the proceeding unless the proceeding is exempted by 1120.1 (a).

~~if all of the following conditions are satisfied:~~

~~(1) The proceeding is a mediation as defined in Section 1120.~~

~~(2) The person conducting the proceeding is a mediator as defined in Section 1120.~~

~~(3) The proceeding is not excluded from this chapter by paragraph (a) or by Section 1120.1.~~

~~(4) The court or other adjudicative body refers to the proceeding as a "mediation."~~

(c) ~~Notwithstanding subdivision (b), this chapter does not apply to a proceeding ordered by a ,urt or other adjudicative body if the court or other adjudicative body expressly informs the ,putants before the proceeding, in writing or on the record, that the chapter does not apply.~~

~~(d)~~ Nothing in this section authorizes a court or other adjudicative body to order disputants to participate in any proceeding.

Prepared 1/23/97 by Ron Kelly

JUVENILE DEPENDENCY COURT MEDIATION ASSOCIATION

201 Centre Plaza Drive, Ste.2 Monterey Park,CA, 213-526-6671

January 24, 1997

Barbara Gaal
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

Dear Barbara:

This is to express concerns that Dependency Court Mediators have as your committee revises the mediation confidentiality sections of the Evidence Code and other related code sections.

Dependency Court Mediation exists in a legal environment where the parents and guardians are in the system involuntarily because they are subjects of child maltreatment allegations. Nevertheless, mediation has proven effective in assisting the parents, guardians, children and attorneys in resolving most, if not all, of the issues.The mediation process is less disruptive for the family.

In this context, the confidentiality of the mediation is critical because of the fear and mistrust developed by the families during the initial DFCS involvement. Without absolute confidentiality, there would be no meaningful communication and issues would not be resolved; therefore, Dependency Court Mediation must be afforded the confidentiality protections contemplated by the Evidence Code amendments.

The need for confidentiality outweighs the potential risk of undue influence by the mediator. The mediator's ability to pressure settlement in dependency court mediation programs is checked in the following ways: (1) the mediator does not report to the court in any matter as to the reason for the failure to settle; (2) the mediator does not make recommendations of any type to the court;(3) the mediator does not practice in front of the court in any professional capacity in the case he or she is mediating, except as a

mediator. Each County's dependency mediation program operates according to the situation presented by its specific needs, and therefore, may have additional safeguards. However, the shared safeguards enumerated above should be incorporated into the proposed legislation.

In conclusion, we suggest the following which addresses our concerns that court-annexed mediation programs have the protection of confidentiality, as well as to meet the larger concerns of potential mediator abuse or pressure on parties involved in court-annexed mediations:

Sec. 1120.1(a)(1) (1120(c) of SDR-

The following should be added to the Comments of this Section-

The term mediation includes those meetings conducted neutrals, whether or not those neutrals are permanently *associated with the court adjudicating the dispute, so long as the neutrals have no authority to resolve disputes; have no other function before the adjudicating court with regard to the case being mediated other than that of a non decision making neutral, and make no reports or recommendations to the court with regard to either the specific merits of the cases brought to mediation or any report as to the reasons for the lack of resolution.*

Respectfully yours,

Maxine Baker-Jackson

Maxine Baker-Jackson,
Mediator

Representative for JDCMA

ccs: Other Commission Members

Northern California Mediation Association

Post Office Box 544, Corte Madera, CA 94976-0544
415-927-4308

January 23, 1997

Law Revision Commission
RECEIVED

JAN 23 1997

File: _____

California Law Revision Commission
4000 Middlefield Rd., Room D-1
Palo Alto, CA 94303-4739

Attn: Ms. Barbara Gael

Dear Sir/Ms:

The Northern California Mediation Association is a membership organization representing more than 500 practicing mediators in Northern California.

As you know, Evidence Code Section 1152.5, which was enacted in 1985, provided the mediation process with confidentiality of the issues discussed and or prepared during the mediation. This confidentiality provision allows for a greater degree of openness in the process and currently requires that all of the participants, including the mediator, adhere to confidentiality. Disclosure of information can only occur when all parties, including the mediator, agree.

We are concerned that the new requirement as proposed in Section 1127(a) which allows the parties to agree to disclose information excluding the mediator will have an adverse impact on the integrity of the mediation process. One major concern is the imbalance of power so commonly present in mediation. Although imbalance is normally leveled during the mediation process, it is possible that this imbalance can re-occur in the post-mediation context where one of the parties can use their power to convince the other parties to disclose. This would have a chilling effect on others entering the process as well as a chilling effect on mediators' discussions, especially in "confidential caucuses." A mediator might feel compelled to act in a self-protective way for fear that his/her personal notes and files could be subject to disclosure.

Finally, although the mediator cannot currently be summoned into court to testify about the process, Section 1127(a) opens the door to future challenges to that well-thought-out protection.

The interests of all concerned are better protected by current Code Provision 1152.(a)(4) which allows both parties and their attorneys to continue to make informed decisions with the in-put and oversight of a neutral facilitator.

Thank you for your time and attention in this matter.

Very truly yours,

Fred D. Butler /NB

Fred D. Butler
President

FB:njb

Date: Thu, 23 Jan 1997 13:58:09 -0800 (PST)
X-Sender: barbara@pop.igc.org
Mime-Version: 1.0
To: bgaal@clrc.ca.gov
From: Barbara Giuffre <barbara@igc.org>
Subject: Proposed Changes to Evid. Code 1152.5
Sender: barbara@igc.org

Dear Ms. Gaal,

I would like to take this opportunity to oppose the Commission's proposed revision of Evid. Code 1152.5 to remove the mediator's current ability under law to maintain the confidentiality of the mediation process. I serve as both a mediator and and advocate in mediations; in both instances, I think the current law, allowing the mediator alone to say that the process is to be confidential, is critical to the flow of the process itself.

Thank you. Sincerely, Barbara Giuffre

EXHIBIT 11.

Study K-401 February 24, 1997

Second Supplement to Memorandum 97-5

Mediation Confidentiality: Recent Developments

Assemblywoman Debra Ortiz, a member of the Assembly Judiciary Committee, has agreed to author the Commission's bill on mediation confidentiality. Two issues warrant attention:

SCOPE OF COVERAGE

In the bill as submitted to Legislative Counsel, proposed Evidence Code Sections 1116 and 1117 read as follows:

> **§ 1116. Scope of chapter**
>
> 1116. (a) This chapter does not apply to a proceeding under Part 1 (commencing with Section 1800) of Division 5 of the Family Code or a proceeding under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.
>
> (b) Nothing in this chapter makes admissible evidence that is inadmissible under Section 1152 or any other statute.
>
> **§ 1117. Court-ordered and court-supervised proceedings**
>
> 1117. (a) This chapter does not apply to a settlement conference pursuant to Rule 222 of the California Rules of Court.
>
> (b) This chapter applies to a mediation that is ordered by a court or other adjudicative body, unless the proceeding is excepted by subdivision (a) of Section 1116.

The California Dispute Resolution Council ("CDRC") has pointed out that Section 1117, as currently worded, may generate confusion about whether the chapter on mediation confidentiality applies to a voluntary mediation.

To eliminate the problem and simplify the bill, the staff suggests replacing Sections 1116 and 1117 with a provision along the following lines:

> **§ 1116. Scope of chapter**
>
> 1116. (a) This chapter applies to a mediation, regardless of whether participation in the mediation is voluntary, pursuant to an agreement, pursuant to order of a court or other adjudicative body, or otherwise.

(b) Notwithstanding any other provision of this chapter, this chapter does not apply to either of the following:

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

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

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

If the Commission approves, the staff will have the mediation confidentiality bill so amended.

LABOR CODE SECTION 65

As originally submitted to Legislative Counsel, the proposed conforming revision of Labor Code Section 65 read:

> 65. The department may investigate and mediate labor disputes providing any bona fide party to such dispute requests intervention by the department and the department may proffer its services to both parties when work stoppage is threatened and neither party requests intervention. In the interest of preventing labor disputes the department shall endeavor to promote sound union-employer relationships. The department may arbitrate or arrange for the selection of boards of arbitration on such terms as all of the bona fide parties to such dispute may agree upon. ~~Records of the department relating to labor disputes are confidential; provided, however, that any decision or award arising out of arbitration proceedings shall be a public record.~~ Any decision or award arising out of an arbitration conducted pursuant to this section is a public record. Section 703.5 and Chapter 2 (commencing with Section 1115) of Division 9 of the Evidence Code apply to a mediation conducted by the California State Mediation and Conciliation Service, and any person conducting the mediation.

Based on this conforming revision, Legislative Counsel designated the bill to go to the Fiscal Committee. Legislative Counsel apparently reasoned that the amendment, particularly the deletion of "[r]ecords of the department relating to labor disputes are confidential," might make some previously confidential materials public, and therefore change an existing duty of the department.

On learning of this concern, the Department of Industrial Relations ("DIR") requested a change in the conforming revision. (Exhibit p. 1.) The new language

is intended to make clear that the amendment only affects the confidentiality of mediations conducted by the California State Mediation and Conciliation Service, and does not change the confidentiality of any other materials. To eliminate the Fiscal Committee designation, staff submitted a new bill request to Legislative Counsel, which incorporated DIR's proposed language (with nonsubstantive modifications):

> 65. The department may investigate and mediate labor disputes providing any bona fide party to such dispute requests intervention by the department and the department may proffer its services to both parties when work stoppage is threatened and neither party requests intervention. In the interest of preventing labor disputes the department shall endeavor to promote sound union-employer relationships. The department may arbitrate or arrange for the selection of boards of arbitration on such terms as all of the bona fide parties to such dispute may agree upon. Section 703.5 and Chapter 2 (commencing with Section 1115) of Division 9 of the Evidence Code apply to a mediation conducted by the California State Mediation and Conciliation Service, and any person conducting the mediation. All other records ~~Records~~ of the department relating to labor disputes are confidential; provided, however, that any decision or award arising out of arbitration proceedings shall be a public record.

Legislative Counsel has prepared the bill with this revision, removing the Fiscal Committee designation. Staff urges the Commission to approve this change.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

STATE OF CALIFORNIA PETE WILSON, *GOVERNOR*

DEPARTMENT OF INDUSTRIAL RELATIONS
FFICE OF THE DIRECTOR - LEGAL UNIT
45 Fremont Street, Suite 450
San Francisco, CA 94105

ADDRESS REPLY TO:
Office of the Director - Legal Unit
P.O. Box 420603
San Francisco, CA 94142
(415) 972-8900
FAX No.: (415) 972-8928

December 10, 1996

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

Law Revision Commission
RECEIVED
FEB 19 1997
File: mediation conf. bill file

Sent by FAX to (415) 494-1827

Dear Ms. Gaal,

Re: Proposed Legislation- Mediation Confidentiality

After conversations last week with you and with Jack Zorman of the Legislative Counsel office, and later conversations among management of our department, the Department suggests the following language to be included as an amendment to Labor Code section 65. This proposed amendment to the Labor Code section makes no change in existing law, other than providing the additional protection of the proposed Evidence Code provisions to the mediation efforts of the Department. This change, if enacted, will have no fiscal impact on the Department.

Eliminate the last sentence of Labor Code section 65. In its place add:

> The provisions of Evidence Code Division 9, Chapter 2, beginning with section 1120, apply to all mediations conducted by the California State Mediation and Conciliation Service. All other records of the Department relating to labor disputes are confidential, provided, however, that any decision or award arising out of arbitration proceedings conducted pursuant to this section shall be a public record.

If you have any questions, please call me at 972-8970.

Very truly yours,

Martin Fassler
Counsel for Director of Industrial Relations

cc: Jack Zorman, Office of Legislative Counsel

Homestead Exemption

The Commission decided to revisit the recommendation on the homestead exemption in light of a recent Ninth Circuit decision (Jones v. Heskett & Kelleher Lumber Co.). As a low priority, the staff will investigate how best to resolve technical problems in the application of statutory homestead law.

STUDY E-100 – ENVIRONMENTAL LAW

The Commission considered Memorandum 97-6, relating to the organization of the environmental law consolidation study.

The Commission decided to develop an outline of a California Environmental Code. For this purpose, it approved the contracts with the academic consultants described in the memorandum.

The Commission will circulate the outline to interested persons, organizations, entities, and agencies for comment, prefaced by the Mission Statement set out in the memorandum. The language "This is a nonsubstantive project," should be replaced with "This is not a policy revision."

The request for comments should include an inquiry as to (1) whether the project is desirable, (2) whether the outline is sound, (3) whether the contents identified in the outline are correct, and (4) whether the commentator is willing to review drafts or otherwise assist in the preparation of the new code.

STUDY K-401 – MEDIATION CONFIDENTIALITY

The Commission considered the Second Supplement to Memorandum 97-5, relating to mediation confidentiality. Proposed Evidence Code Sections 1116 and 1117 should be replaced with a provision that reads substantially as follows:

§ 1116. Scope of chapter

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

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

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

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

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

The Commission approved the following change in the conforming revision to Labor Code Section 65, which was implemented to eliminate the fiscal committee designation:

> 65. The department may investigate and mediate labor disputes providing any bona fide party to such dispute requests intervention by the department and the department may proffer its services to both parties when work stoppage is threatened and neither party requests intervention. In the interest of preventing labor disputes the department shall endeavor to promote sound union-employer relationships. The department may arbitrate or arrange for the selection of boards of arbitration on such terms as all of the bona fide parties to such dispute may agree upon. ~~Records~~ Any decision or award arising out of an arbitration conducted pursuant to this section is a public record. Section 703.5 and Chapter 2 (commencing with Section 1115) of Division 9 of the Evidence Code apply to a mediation conducted by the California State Mediation and Conciliation Service, and any person conducting the mediation. All other records of the department relating to labor disputes are confidential~~; provided, however, that any decision or award arising out of arbitration proceedings shall be a public record.~~

STUDY K-410 — CONFIDENTIALITY OF SETTLEMENT NEGOTIATIONS

The Commission considered Memorandum 97-10 and the revised staff draft tentative recommendation attached to Memorandum 97-10. The Commission approved the draft as a tentative recommendation, with the following revisions.

§ 1132. Protection of act of compromise

Section 1132 should be revised to refer to "a civil action, administrative adjudication, arbitration, or other noncriminal proceeding."

§ 1137. Sliding scale recovery agreement

Section 1137 should be redrafted to refer to Code of Civil Procedure Section 877.5.

§ 1138. Miscarriage of justice

Section 1138 should be deleted.

§ 1139. Least restrictive means

As suggested by the State Bar Litigation Section and State Bar Committee on Administration of Justice, the provision on least restrictive means should be