

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Mediation Confidentiality

January 1997

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

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This publication (#193) will appear in Volume 26 of the Commission's *Reports, Recommendations, and Studies*.

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NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

Cite this report as *Mediation Confidentiality*, 26 Cal. L. Revision Comm'n Reports 407 (1996).

STATE OF CALIFORNIA

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January 24, 1997

To: The Honorable Pete Wilson
Governor of California, and
The Legislature of California

The Commission recommends reforming evidentiary provisions governing mediation confidentiality (Evidence Code Sections 703.5, 1152.5, 1152.6) to eliminate ambiguities. In particular, the Commission recommends clarifying the application of mediation confidentiality to settlements reached through mediation. Clarification is critical to aid disputants in crafting agreements they can enforce. The proposed legislation also would define the application of mediation confidentiality provisions, consolidate mediation confidentiality provisions in the Evidence Code, and clarify other aspects of mediation confidentiality.

This recommendation is submitted pursuant to Resolution Chapter 38 of the Statutes of 1996.

Respectfully submitted,

Allan L. Fink
Chairperson

ACKNOWLEDGMENTS

Many individuals and organizations have participated in the Commission's work on this recommendation. The Commission would like to acknowledge the assistance provided by those who have supported all or part of the proposal as well as those who have expressed objections to one or more aspects. The participation of a broad spectrum of experts aids the Commission in preparing a better proposed law, and the Commission benefits greatly from the public service performed by these individuals and organizations.

The Commission is indebted to mediator Ron Kelly, who provided extensive assistance in this study. His experience as a mediator and as a drafter and sponsor of existing legislation in the area has proved invaluable to the Commission. The Commission is also grateful to mediator John A. Gromala, who commented on many drafts of the proposal, offering helpful insights.

Inclusion of the name of an individual or organization should not be taken as an indication of the individual's opinion or the organization's position on any part of the proposed law. The Commission regrets any errors or omissions that may have been made in compiling these acknowledgments.

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MEDIATION CONFIDENTIALITY

There is broad consensus that mediation is an important means of dispute resolution¹ and confidentiality is crucial to effective mediation.² In recognition of the importance of confidentiality, the Legislature added Section 1152.5 to the Evidence Code in 1985 on recommendation of the Law Revision Commission.³ With limitations, the provision protects mediation communications from admissibility and disclosure in subsequent proceedings.

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

1. See, e.g., Code Civ. Proc. § 1775; 1996 Cal. Stat. res. ch. 6 (stating in part: "Mediation, which provides parties with a simplified and economical procedure for obtaining prompt and equitable resolution of their disputes, has proven over the years to be one of the most effective ... alternative dispute resolution techniques").

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

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

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

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

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

EXISTING LAW

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

General Rules: Section 1152.5

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

1152.5. (a) When a person consults a mediator or mediation service for the purpose of retaining the mediator or mediation service, or when persons agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving a dispute in whole or in part:

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

(2) Except as otherwise provided in this section, unless the document otherwise provides, no document prepared

6. Compare *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) with *Ryan v. Garcia*, 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (1994) (Section 1152.5 protects oral statement of settlement terms).

for the purpose of, or in the course of, or pursuant to, the mediation, or copy thereof, is admissible in evidence or subject to discovery, and disclosure of such a document shall not be compelled, in any civil action or proceeding in which, pursuant to law, testimony can be compelled to be given.

(3) When a person consults a mediator or mediation service for the purpose of retaining the mediator or mediation service, or when persons agree to conduct or participate in mediation for the sole purpose of compromising, settling, or resolving a dispute, in whole or in part, all communications, negotiations, or settlement discussions by and between participants or mediators in the course of a consultation for mediation services or in the mediation shall remain confidential.

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

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

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

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

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

(d) If the testimony of a mediator is sought to be compelled in any action or proceeding as to anything said or any admission made in the course of a consultation for mediation services or in the course of the mediation that is inadmissible and not subject to disclosure under this section, the court shall award reasonable attorney's fees and

costs to the mediator against the person or persons seeking that testimony.

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

Notably, Section 1152.5 does not define the term “mediation.” This omission was not accidental. When the section was originally enacted, mediation was just beginning to gain acceptance. The Commission considered it important to allow use of different techniques, without legislative constraints. Thus, instead of imposing a statutory definition of mediation, the Commission crafted Section 1152.5 to allow parties to adopt their own definition for purposes of their dispute.⁷ This was done by making Section 1152.5 applicable only where the parties executed a written agreement reciting the statutory text and stating that the section governed their proceeding.⁸

In 1993, Section 1152.5 was amended in a number of ways, including elimination of the requirement of a written agreement.⁹ Apparently, the requirement was considered onerous, particularly in disputes involving unsophisticated persons. Although the amendment eliminated the requirement of a written agreement, it left the term “mediation” undefined.

Competency of Mediators To Testify: Section 703.5

As amended in 1993,¹⁰ Evidence Code Section 703.5 makes a mediator incompetent to testify “in any subsequent civil

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

8. See 1985 Cal. Stat. ch. 731, § 1.

9. See 1993 Cal. Stat. ch. 1261, § 6. This 1993 amendment of Section 1152.5 remains the most significant amendment of the statute, although there have been other technical changes. See 1992 Cal. Stat. ch. 163, § 73; 1993 Cal. Stat. ch. 219, § 77.7; 1994 Cal. Stat. ch. 1269, § 8. In 1996, Section 1152.5 was amended to expressly protect the mediation intake process. See 1996 Cal. Stat. ch. 174, § 1.

10. 1993 Cal. Stat. ch. 1261, § 5.

proceeding” regarding the mediation. The section does not apply to a mediation of custody or visitation issues under the Family Code. Additionally, it excepts statements and conduct that “could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure.”¹¹ Before the 1993 amendment extending Section 703.5 to mediators, the section applied only to an arbitrator or a person presiding at a judicial or quasi-judicial proceeding.

Mediator Declarations and Findings: Section 1152.6

Section 1152.6, enacted in 1995,¹² provides in significant part: “A mediator may not file, and a court may not consider, any declaration or finding of any kind by the mediator, other than a required statement of agreement or nonagreement, unless all parties in the mediation expressly agree otherwise in writing prior to commencement of the mediation.” Section 1152.6 is intended to prevent a mediator from coercing a

11. Code of Civil Procedure Section 170.1(a)(1) and (a)(6) provide:

170.1. (a) A judge shall be disqualified if any one or more of the following is true:

(1) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.

A judge shall be deemed to have personal knowledge within the meaning of this paragraph if the judge, or the spouse of the judge, or a person within the third degree of relationship to either of them, or the spouse of such a person is to the judge’s knowledge likely to be a material witness in the proceeding.

....

(6) For any reason (A) the judge believes his or her recusal would further the interests of justice, (B) the judge believes there is a substantial doubt as to his or her capacity to be impartial, or (C) a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial. Bias or prejudice towards a lawyer in the proceeding may be grounds for disqualification.

12. 1995 Cal. Stat. ch. 576, § 8.

party to settle by threatening to inform the assigned judge that the party is being unreasonable or is pressing a meritless argument.¹³ Section 1152.5 may not have accomplished this, because some courts had local rules stating that a party participating in mediation was deemed to have consented in advance to waive Section 1152.5 with regard to having the mediator submit an evaluation to the court.¹⁴

Other Protections

In addition to Sections 703.5, 1152.5, and 1152.6, there are specialized provisions protecting mediation confidentiality to various degrees in differing contexts.¹⁵ Another source of protection is Section 1152, which makes offers to compromise inadmissible to establish liability.¹⁶ Perhaps most importantly, the constitutional right to privacy¹⁷ encompasses communications “tendered under a guaranty of privacy,” and

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

14. See, e.g., *Contra Costa Sup. Ct., Loc. R. 207* (1996).

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

16. Section 1152.5(c) expressly provides that the statute does not make admissible evidence that is inadmissible under Section 1152 or another statute. “[E]ven though a communication is not made inadmissible by Section 1152.5, the communication is protected if it is protected under Section 1152.” Section 1152.5 Comment.

17. Cal. Const. art. I, § 1.

calls for balancing of the interest in mediation confidentiality against competing interests.¹⁸

COMMISSION RECOMMENDATIONS

The Commission recommends adding a new chapter on mediation confidentiality to the Evidence Code. The substance of existing Sections 1152.5 and 1152.6 would be included in the new chapter. The recommended legislation would reform existing law in the following respects:

Definitions

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

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

Given the broad array of current dispute resolution techniques, and the importance of confidentiality in promoting candor that may affect the success of those techniques, a participant needs to be able to assess whether the proceeding qualifies as a “mediation” for purposes of the provisions protecting mediation confidentiality.¹⁹

The Commission recommends adding a definition of “mediation” to the Evidence Code. It would be broad, stating

18. *Garstang v. Superior Court*, 39 Cal. App. 4th 526, 532-37, 46 Cal. Rptr. 2d 84 (1995).

19. For an example of the uncertainty in application, see *id.* at 531-32 (alluding to but not resolving whether sessions before an ombudsperson employed by a private educational institution constitute “mediation” within the meaning of Section 1152.5).

simply: “‘Mediation’ means 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.”²⁰ This definition would encompass a wide range of mediation styles, such as a mediation conducted as a number of sessions, only some of which include the mediator. Mediation confidentiality would extend to a mediation in which participation is voluntary or pursuant to an agreement. Confidentiality would also extend to a mediation in which participation is ordered by a court or other adjudicative body. Language in Section 1152.5(a) arguably restricting its protection to voluntary mediations would be deleted.²¹

The proposed definition of “mediator” is also broad. A “mediator” is “a neutral person who conducts a mediation.” To ensure that confidentiality extends to communications with persons who assist the mediator in the mediation or in preparation for the mediation, the definition includes assistants, such as a case-developer, interpreter, or secretary. The definition focuses on a person’s role, not the person’s title. A person may be a “mediator” under the definition even though the person has a different title, such as “ombudsperson.”

Ideally, a mediator lacks authority to compel a result or render a decision in the mediated dispute. The proposed definition of “mediator” does not include such a requirement, however, because that could unduly narrow application of the provisions protecting mediation confidentiality and prohibit-

20. The definition of “mediation” is drawn from Code of Civil Procedure Section 1775.1, which defines “mediation” for purposes of a pilot project on mediation of civil disputes in participating courts.

21. The recommended legislation would not expand a court’s authority to order participation in a dispute resolution proceeding.

ing the mediator from reporting to the tribunal adjudicating the dispute.²²

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

Because family disputes present special considerations, the chapter on mediation confidentiality does not apply to a proceeding in family conciliation court or a mediation of custody or visitation issues.

Likewise, the chapter is inapplicable to a settlement conference pursuant to Rule 222 of the California Rules of Court. A settlement conference is conducted under the aura of the court and is subject to special rules.

There would also be a specific rule for mediation-arbitration (“Med-Arb”) agreements and other dispute resolution agreements in which mediation, if unsuccessful, is followed by another dispute resolution proceeding conducted by the same person who acted as mediator. Under that rule, the mediation confidentiality provisions would protect the mediation phase. If mediation does not fully resolve the dispute, the arbitrator may not consider any information from the mediation unless all of the mediation parties expressly agree before or after the mediation that the arbitrator may use specific information.²³

22. For example, suppose a court orders disputants to participate in a proceeding that is called a mediation and, unbeknownst to the disputants, directs the person conducting the proceeding to prepare a decision if the disputants do not reach a settlement. If the statutory definition of “mediator” were limited to persons who lack authority to render a decision, the person conducting that proceeding would fall outside the definition and would not be subject to the statute prohibiting a “mediator” from reporting to the court adjudicating the dispute. In contrast, the Commission’s recommended definition of “mediator” would encompass such a person, so the prohibition on reporting would apply, barring the person from submitting a decision to the court.

23. The recommended legislation neither sanctions nor prohibits Med-Arb agreements. It just clarifies how mediation confidentiality applies, given the existence of such an agreement.

Settlements Reached Through Mediation; When Mediation Ends

As currently drafted, Section 1152.5 fails to provide clear guidance concerning application of the section to an oral compromise reached in mediation and a document reducing that compromise to writing. Appellate courts have reached conflicting decisions on whether the confidentiality of Section 1152.5 extends to the process of converting an oral compromise to a definitive written agreement.²⁴ 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. Resolution of this uncertainty is critical: A disputant must be able to determine when the opponent is effectively bound.

In addition, Section 1152.5 fails to highlight a critical requirement concerning written settlement agreements reached through mediation. Under Section 1152.5(a)(2), unless it is offered to prove fraud, duress, or illegality, a written settlement agreement is admissible only if it so provides.²⁵ Parties overlooking this requirement may inadvertently enter into a written settlement agreement that is unenforceable because it is inadmissible.

The Commission proposes to remedy these problems by consolidating in a single section the requirements applicable to written settlements and oral agreements reached through mediation. This will draw attention to the requirements and decrease the likelihood that disputants will inadvertently enter into an unenforceable agreement. There would also be a sec-

24. See *supra* note 6.

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

tion specifically covering when mediation ends for purposes of the chapter on mediation confidentiality.

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

The proposed section on settlements would also make clear that an executed written settlement agreement is subject to disclosure if all of the signatories expressly agree to disclosure, in writing or orally in accordance with a statutory procedure. To facilitate enforcement of such a settlement, other mediation participants, such as the mediator, would not have to agree to disclosure. In contrast, existing law is unclear as to precisely whose agreement to disclosure is required.²⁶

Finally, the proposed section on settlements provides for admissibility and disclosure of an oral agreement, but only if the agreement is prepared in accordance with a statutory procedure. For purposes of mediation confidentiality, if the agreement fully resolves the dispute, the mediation ends upon completion of that procedure. Under the section on when mediation ends, any subsequent proceedings are not confidential. If the agreement partially resolves the dispute, mediation ends only as to the issues resolved, and subsequent discussion of other issues is still confidential.

Unless the disputants follow the specified procedure, the rule of *Ryan v. Garcia*²⁷ applies: Confidentiality extends through the process of converting an oral compromise reached in mediation to a fully executed written settlement.

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

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

Difficult issues can surface in this process, and confidentiality may promote frankness and creativity in resolving them.

If the written settlement only partially resolves the dispute, mediation ends, and thus confidentiality ceases, only as to the issues resolved. Where the disputants do not settle, the recommended legislation establishes a clear means of differentiating between confidential mediation communications and unprotected post-mediation discussions. Mediation ends when the mediator provides the mediation participants with a declaration stating that further mediation would not be worthwhile, or words to that effect, or a disputant provides the mediator and the other mediation participants with a declaration stating that the mediation is terminated, or words to that effect.

These recommended reforms on achieving an effective settlement are the most crucial element of the Commission's recommendation. They should enhance the effectiveness of mediation in promoting durable settlements. They will also reduce disputes over whether an oral compromise was reached in mediation, and whether a communication was a confidential mediation disclosure.

Disclosure by Agreement

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

Section 1152.5(a)(4) is similarly ambiguous. It provides: "All or part of a communication or document which may be otherwise privileged or confidential may be disclosed if all *parties who conduct or otherwise participate* in mediation so consent." (Emphasis added.) Formerly, the section called for

consent of “all *persons who conducted or otherwise participated* in the mediation.”²⁸ The current wording is not clear as to precisely whose agreement is necessary for disclosure.

The Commission recommends resolving these ambiguities by adding a section specifically addressing disclosure by agreement. It would establish a general rule that to waive the statutory protection for mediation confidentiality, all mediation participants must expressly agree to the disclosure, in writing or in accordance with a statutory procedure for memorializing an oral agreement. All persons attending a mediation, parties as well as nonparties, should be able to speak frankly, without fear of having their words turned against them. Because obtaining agreement from each of a mediator’s assistants could be burdensome, however, if the person who conducts a mediation agrees to disclosure, that agreement binds the person’s assistants.

The proposed section would apply a special rule to materials prepared by or on behalf of fewer than all of the mediation participants. To ensure that participants generating such materials are not unfairly deprived of the benefits of their work, only the agreement of the mediation participants for whom the material was prepared would be required for disclosure, *provided* the material does not disclose anything said or done or any admission made in the course of the mediation. Material that necessarily discloses mediation communications could be admitted or disclosed only upon satisfying the general rule requiring agreement of all mediation participants.

Any agreement to disclosure would have to be express, not just implied. This requirement should help ensure the existence of true, uncoerced agreement, as opposed to mere acquiescence in a judge’s referral to a court’s mediation program.²⁹

28. 1985 Cal. Stat. ch. 731, § 1 (emphasis added).

29. See generally Kelly, *supra* note 13.

Types of Subsequent Proceedings in Which Confidentiality Applies

As originally enacted, the protection of Section 1152.5 applied in “any civil action” in which testimony could be compelled.³⁰ When Section 1152.5 was amended in 1993, the reference to “civil action” was changed to “civil action or proceeding.”³¹ The meaning of this change is subject to differing interpretations.

It is debatable whether the term “civil” modifies “action” and not proceeding, with the result that the protection of Section 1152.5 extends to criminal cases.³² It is also unclear whether the protection applies to arbitration and administrative adjudication.

The Commission recommends resolving the ambiguity by making explicit that mediation confidentiality extends to any subsequent “arbitration, administrative adjudication, civil action, or other noncriminal proceeding.” The Commission also recommends a similar amendment to Section 703.5.

As in its original recommendation proposing Section 1152.5,³³ the Commission does not recommend extending mediation confidentiality to a subsequent criminal case. Such an extension might unduly hamper the pursuit of justice.³⁴

30. 1985 Cal. Stat. ch. 731, § 1.

31. 1993 Cal. Stat. ch. 1261, § 6.

32. One view is that “civil” modifies “action” but not “proceeding,” so the protection of Section 1152.5 now extends to criminal cases as well as civil matters. That argument draws support from Section 120’s definition of “civil action.” Using that definition, the reference to “proceeding” in Section 1152.5 is redundant unless it encompasses more than just civil proceedings.

If, however, the intent of the 1993 amendment was to encompass criminal cases, it would have been clearer to eliminate the word “civil,” instead of adding the word “proceeding.” The failure to follow that approach suggests that Section 1152.5 currently applies only in the civil context.

33. *1985 Recommendation*, *supra* note 3, at 246; *see also* 1985 Cal. Stat. ch. 731, § 1.

34. Expressly extending confidentiality to a subsequent criminal case would also require consideration of the Victims’ Bill of Rights (Proposition 8), which prohibits restrictions on use of relevant evidence in a criminal case (unless

Reforms of Section 1152.6

Section 1152.6, which generally restricts mediators from filing declarations and findings with courts, would benefit from clarification in a number of respects. In particular, it should be made clear that (1) the restriction applies to all submissions, not just filings, (2) the restriction is not limited to court proceedings, but rather applies to all types of adjudications, including arbitrations and administrative adjudications, (3) the restriction applies to any report or statement of opinion, however denominated, and (4) neither a mediator nor anyone else may submit the prohibited information. These changes would help ensure that courts interpret the section in a manner consistent with its goal of preventing coercion by mediators.³⁵

The Commission also recommends modifying the exception to Section 1152.6, which permits submission and consideration of a mediator's report where "all parties to the mediation expressly agree" in writing to that approach. Specifically, the recommended revision would allow the parties to make their agreement at any time, not just before the mediation, and would permit them to use a statutory procedure for orally memorializing their agreement.³⁶

Other Reforms

Mediation intake. The recommended legislation would continue the protection for mediation intake communications that

passed by a two-thirds vote of each house), but contains an exception for "any existing statutory rule of evidence relating to privilege" See Cal. Const. art. I, § 28(d). Proposition 8 was approved in 1982, before enactment of Section 1152.5.

35. See Kelly, *supra* note 13.

36. Where the parties properly agree to have the mediator report to the adjudicating tribunal, the mediator's report may disclose mediation communications only if all persons who participate in the mediation agree to the disclosure. See *supra* pp. 424-25.

was made explicit in 1996.³⁷ The Commission proposes to define “mediation consultation” as “a communication between a person and a mediator for the purpose of initiating or considering a mediation or retaining the mediator.” In addition to the process of retaining a mediator, the definition encompasses contacts concerning whether to mediate, such as where a mediator contacts a disputant because another disputant desires to mediate, and contacts concerning initiation of mediation, such as where a case-developer meets with a disputant before mediation. Broad protection of intake communications is important because it may promote openness in such exchanges and help a mediation get off to a good start.³⁸

Oral Communications Relating to Mediation. Section 1152.5(a)(1) protects “evidence of anything said or of any admission made in the course of ... the mediation.” Section 1152.5(a)(2) is broader. It protects documents “prepared for the purpose of, or in the course of, or pursuant to, the mediation.”

To encourage frankness in discussions relating to mediation, the Commission proposes to eliminate this distinction and protect “evidence of anything said or of any admission made for the purpose of, or in the course of, or pursuant to,” the mediation.

Technological Advances. Section 1152.5(a)(2) protects any mediation “document,” but the term “document” is not defined in the Evidence Code. Technological advances such as the increasing use of electronic mail and other electronic communications raise issues concerning the extent of coverage.

The Commission proposes to address this potential problem by incorporating Section 250’s broad definition of “writing”

37. 1996 Cal. Stat. ch. 174.

38. See, e.g., Kirtley, *supra* note 2, at 24-26.

into the mediation confidentiality provisions.³⁹ Because some persons may mistakenly interpret “writing” more narrowly than “document,” the proposal would retain the latter term in the mediation confidentiality provisions as well.

Agreements To Mediate. As originally enacted, Section 1152.5 included an express exception for an agreement to mediate a dispute.⁴⁰ The exception facilitated enforcement of such agreements, as by a mediator seeking to collect an unpaid fee.

The express exception for an agreement to mediate was eliminated in 1993,⁴¹ but the change appears to have been inadvertent. The recommended legislation would reinstate the earlier provision.

Mediator Involvement in Other Disputes. Basic information about a mediator’s track record, such as whether an adversary has repeatedly used the mediator’s services, may be critical in selecting an impartial mediator. To ensure that disputants have access to such information, the recommended legislation would make explicit that the mediation confidentiality provision does not prevent 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.”

Attorney’s Fees Provision. Section 1152.5(d) was added in 1993 to provide for an award of attorney’s fees and costs to a mediator if the mediator is subpoenaed to testify “as to *anything said or any admission made* in the course of the mediation that is inadmissible and not subject to disclosure under

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

40. See 1985 Cal. Stat. ch. 731, § 1.

41. 1993 Cal. Stat. ch. 1261, § 6.

this section.” (Emphasis added.) The reference to “anything said or any admission made” encompasses communications protected under Section 1152.5(a)(1), but would appear not to cover an improper attempt to compel disclosure of documents protected under Section 1152.5(a)(2).⁴²

A mediator may, however, incur substantial litigation expenses regardless of whether a subpoena violates Section 1152.5(a)(1), Section 1152.5(a)(2), or Section 703.5. Thus, the Commission recommends conforming the scope of the attorney’s fees provision to the scope of protection for mediation confidentiality. The proposed law would also clarify that either a court or another adjudicative body (e.g., an arbitrator or an administrative tribunal) may award the fees and costs. Because the definition of “mediator” includes not only the neutral person who takes the lead in conducting a mediation, but also any neutral who assists in the mediation,⁴³ fees would be available regardless of the role played by the neutral person subjected to discovery.

Irregularity in proceedings. Referring to a mediation in a subsequent civil trial, administrative adjudication, or other noncriminal proceeding would be an irregularity in the proceedings.⁴⁴ An appropriate situation for invoking this rule is where a party urges the trier-of-fact to draw an adverse inference from an adversary’s refusal to disclose a mediation communication. The irregularity is grounds for vacating or modifying a decision and granting a new hearing only if it materially affects the substantial rights of the party requesting relief.

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

43. See *supra* p. 420.

44. This concept is drawn from Code of Civil Procedure Section 1775.12, which pertains to a pilot project on mediation of civil disputes in participating courts.

CONCLUSION

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

PROPOSED LEGISLATION

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

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

467.5. Notwithstanding the express application of ~~Section 1152.5 Chapter 2 (commencing with Section 1115) of Division 9~~ of the Evidence Code to mediations, all proceedings conducted by a program funded pursuant to this chapter, including, but not limited to, arbitrations and conciliations, are subject to ~~Section 1152.5 Chapter 2 (commencing with Section 1115) of Division 9~~ of the Evidence Code.

Comment. Section 467.5 is amended to reflect the relocation of former Evidence Code Section 1152.5 and the addition of new Evidence Code provisions governing mediation confidentiality. See Evid. Code §§ 703.5 (testimony by a judge, arbitrator, or mediator), 1115-1127 (mediation).

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

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

1775.10. All statements made by the parties during the mediation shall be subject to ~~Sections 1152 and 1152.5~~ *Section 703.5, Section 1152, and Chapter 2 (commencing with Section 1115) of Division 9* of the Evidence Code.

Comment. Section 1775.10 is amended to reflect the relocation of former Evidence Code Section 1152.5 and the addition of new Evidence Code provisions governing mediation confidentiality. See Evid. Code §§ 703.5 (testimony by a judge, arbitrator, or mediator), 1115-1127 (mediation).

Evid. Code § 703.5 (amended). Testimony by a judge, arbitrator, or mediator

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

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

Comment. Section 703.5 is amended to make explicit that it precludes testimony in a subsequent arbitration or administrative adjudication, as well as in any civil action or proceeding. See Section 120 (“civil action” includes civil proceedings). See also Sections 1115-1127 (mediation).

Evid. Code §§ 1115-1127 (added). Mediation

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

CHAPTER 2. MEDIATION

§ 1115. Definitions

1115. For purposes of this chapter:

(a) “Mediation” means 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.

(b) “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) “Mediation consultation” means a communication between a person and a mediator for the purpose of initiating or considering a mediation or retaining the mediator.

Comment. Subdivision (a) of Section 1115 is drawn from Code of Civil Procedure Section 1775.1 and the introductory clause of former Section 1152.5(a). To accommodate a wide range of mediation styles, the definition is broad, without specific limitations on format. For example, it would include a mediation conducted as a number of sessions, only some of which involve the mediator. The definition focuses on the nature of a proceeding, not its label. A proceeding may be a “mediation” for purposes of this chapter, even though it is denominated differently.

Under subdivision (b), a mediator must be neutral. The neutrality requirement is drawn from Code of Civil Procedure Section 1775.1. An attorney or other representative of a party is not neutral and so does not qualify as a “mediator” for purposes of this chapter.

A “mediator” may be an individual, group of individuals, or entity. See Section 175 (“person” defined). See also Section 10 (singular includes the plural). This definition of mediator encompasses not only the neutral person who takes the lead in conducting a mediation, but also any neutral who assists in the mediation, such as a case-developer, interpreter, or secretary. The definition focuses on a person’s role, not the person’s title. A person may be a “mediator” under this chapter even though the person has a different title, such as “ombudsperson.” Any person who meets the definition of “mediator” must comply with Section 1122 (mediator reports and communications), which generally prohibits a mediator from reporting to a court or other tribunal concerning the mediated dispute.

Subdivision (c) is drawn from former Section 1152.5, which was amended in 1996 to explicitly protect mediation intake communications. See 1996 Cal. Stat. ch. 174, § 1. Subdivision (c) is not limited to communications to retain a mediator. It also encompasses contacts concerning whether to mediate, such as where a mediator contacts a disputant because another disputant desires to mediate, and contacts concerning initiation of mediation, such as where a case-developer meets with a disputant before mediation.

For other provisions governing the scope of this chapter, see Sections 1116 (scope of chapter), 1117 (court-ordered and court-supervised proceedings), 1118 (mediation-arbitration).

§ 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.

Comment. Subdivision (a) of Section 1116 continues without substantive change former Section 1152.5(b). Special confidentiality rules apply to a proceeding in family conciliation court or a mediation of child custody or visitation issues. See Section 1040; Fam. Code §§ 1818, 3177.

Subdivision (b) continues the first sentence of former Section 1152.5(c) without substantive change.

§ 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.

Comment. Pursuant to subdivision (a) of Section 1117, a court settlement conference is not a mediation within the scope of this chapter. A settlement conference is conducted under the aura of the court and is subject to special rules.

Under subdivision (b), the protections of this chapter, including in particular Sections 1120 (mediation confidentiality) and 1122 (mediator reports and communications), are not limited to a voluntary mediation. They also extend to a court-ordered mediation, unless it is a proceeding in family conciliation court or a mediation of child custody or visitation issues. This section does not expand a court's authority to order participation in a dispute resolution proceeding.

See Section 1115(a) ("mediation" defined).

§ 1118. Mediation-arbitration

1118. (a) This chapter 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) If a dispute is governed by an agreement described in subdivision (a), in arbitrating or otherwise deciding all or part of the dispute, the person who served as mediator may not consider any information from the mediation that is inadmissible or protected from disclosure under this chapter, unless all of the parties to the mediation expressly agree in writing, or orally in accordance with Section 1119, before or after the mediation that the person may use specific information from the mediation.

Comment. Section 1118 neither sanctions nor prohibits mediation-arbitration agreements. It just clarifies how this chapter, including in particular Section 1120 (mediation confidentiality), applies, given the existence of such an agreement.

See Sections 1115(a) (“mediation” defined), 1115(b) (“mediator” defined). For other provisions governing the scope of this chapter, see Sections 1116 (scope of chapter), 1117 (court-ordered and court-supervised proceedings).

§ 1119. Recorded oral agreement

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.

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

Comment. Section 1119 establishes a procedure for orally memorializing an agreement, in the interest of efficiency. Provisions permitting use of that procedure for certain purposes include Sections 1118

(mediation-arbitration), 1122 (mediator reports and communications), 1123 (disclosure by agreement), and 1124 (written settlements and oral agreements reached through mediation). See also Section 1125 (when mediation ends).

§ 1120. Mediation confidentiality

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

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

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

Comment. Subdivision (a) of Section 1120 continues without substantive change former Section 1152.5(a)(1), except that its protection explicitly applies in a subsequent arbitration or administrative adjudication, as well as in any civil action or proceeding. See Section 120 (“civil action” includes civil proceedings). In addition, the protection of Section 1120(a) extends to oral communications made for the purpose of or pursuant to a mediation, not just oral communications made in the course of the mediation. To “expressly provide” an exception to subdivision (a), a section must explicitly be aimed at overriding

mediation confidentiality. See, e.g., Section 1121 (“Notwithstanding any other provision of this chapter . . .”).

Subdivision (b) continues without substantive change former Section 1152.5(a)(2), except that its protection explicitly applies in a subsequent arbitration or administrative adjudication, as well as in any civil action or proceeding. See Section 120 (“civil action” includes civil proceedings). In addition, subdivision (b) expressly encompasses any type of “writing” as defined in Section 250, regardless of whether the representations are on paper or on some other medium. To “expressly provide” an exception to subdivision (b), a section must explicitly be aimed at overriding mediation confidentiality. See, e.g., Section 1121 (“Notwithstanding any other provision of this chapter . . .”).

Subdivision (c) continues former Section 1152.5(a)(3) without substantive change. A mediation is confidential notwithstanding the presence of an observer, such as a person evaluating or training the mediator or studying the mediation process.

See Sections 1115(a) (“mediation” defined), 1115(c) (“mediation consultation” defined). See also Section 703.5 (testimony by a judge, arbitrator, or mediator).

For examples of specialized mediation confidentiality provisions, see Bus. & Prof. Code §§ 467.4-467.5 (community dispute resolution programs), 6200 (attorney-client fee disputes); Code Civ. Proc. §§ 1297.371 (international commercial disputes), 1775.10 (civil action mediation in participating courts); Fam. Code §§ 1818 (family conciliation court), 3177 (child custody); Food & Agric. Code § 54453 (agricultural cooperative bargaining associations); Gov’t Code §§ 11420.20-11420.30 (administrative adjudication), 12984-12985 (housing discrimination), 66032-66033 (land use); Ins. Code § 10089.80 (earthquake insurance); Lab. Code § 65 (labor disputes); Welf. & Inst. Code § 350 (dependency mediation). See also Cal. Const. art. I, § 1 (right to privacy); *Garstang v. Superior Court*, 39 Cal. App. 4th 526, 46 Cal. Rptr. 2d 84, 88 (1995) (constitutional right of privacy protected communications made during mediation sessions before an ombudsperson).

§ 1121. Types of evidence not covered

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 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.

Comment. Subdivision (a) of Section 1121 continues former Section 1152.5(a)(6) without change. It limits the scope of Section 1120 (mediation confidentiality), preventing parties from using a mediation as a pretext to shield materials from disclosure.

Subdivision (b)(1) makes explicit that Section 1120 does not restrict admissibility of an agreement to mediate. Subdivision (b)(2) continues former Section 1152.5(e) without substantive change. Subdivision (b)(3) makes clear that Section 1120 does not preclude a disputant from obtaining basic information about a mediator's track record, which may be significant in selecting an impartial mediator. Similarly, mediation participants may express their views on a mediator's performance, so long as they do not disclose anything said or done at the mediation.

See Sections 1115(a) ("mediation" defined), 1115(b) ("mediator" defined), 1115(c) ("mediation consultation" defined).

§ 1122. Mediator reports and communications

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

Comment. Section 1122 continues the first sentence of former Section 1152.6 without substantive change, except to make clear that (1) the section applies to all submissions, not just filings, (2) the section is not limited to court proceedings but rather applies to all types of adjudications, including arbitrations and administrative adjudications, (3) the section applies to any report or statement of opinion, however denominated, and (4) neither a mediator nor anyone else may submit the

prohibited information. The section does not prohibit a mediator from providing a mediation participant with feedback on the dispute in the course of the mediation.

Rather, the focus is on preventing coercion. As Section 1122 recognizes, a mediator should not be able to influence the result of a mediation or adjudication by reporting or threatening to report to the decisionmaker on the merits of the dispute or reasons why mediation failed to resolve it. Similarly, a mediator should not have authority to resolve or decide the mediated dispute, and should not have any function for the adjudicating tribunal with regard to the dispute, except as a non-decisionmaking neutral. See Section 1117 (court-ordered and court-supervised proceedings), which excludes settlement conferences from this chapter. For guidance on mediation-arbitration agreements, see Section 1118 (mediation-arbitration).

The exception to Section 1122 (permitting submission and consideration of a mediator's report where "all parties to the mediation expressly agree" in writing) is modified to allow use of the oral procedure in Section 1119 (recorded oral agreement) and to permit making of the agreement at any time, not just before the mediation. A mediator's report to a court may disclose mediation communications only if all parties to the mediation agree to the reporting and all persons who participate in the mediation agree to the disclosure. See Section 1123 (disclosure by agreement).

The second sentence of former Section 1152.6 is continued without substantive change in Section 1116 (scope of chapter), except that Section 1116 excludes proceedings under Part 1 (commencing with Section 1800) of Division 5 of the Family Code, as well as proceedings under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

See Sections 1115(a) ("mediation" defined), 1115(b) ("mediator" defined). See also Sections 703.5 (testimony by a judge, arbitrator, or mediator), 1126 (attorney's fees), 1127 (irregularity in proceedings).

§ 1123. Disclosure by agreement

1123. (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 either of the following conditions is satisfied:

(1) All persons who conduct or otherwise participate in the mediation expressly agree in writing, or orally in accordance with Section 1119, 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 1119, 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 subdivision (a), if the neutral person who conducts a mediation expressly agrees to disclosure, that agreement also binds any other person described in subdivision (b) of Section 1115.

Comment. Section 1123 supersedes former Section 1152.5(a)(4) and part of former Section 1152.5(a)(2), which were unclear regarding precisely whose agreement was required for admissibility or disclosure of mediation communications and documents.

Subdivision (a)(1) states the general rule that mediation documents and communications may be admitted or disclosed only upon agreement of all participants, including not only parties but also the mediator and other nonparties attending the mediation (e.g., a disputant not involved in litigation, a spouse, an accountant, an insurance representative, or an employee of a corporate affiliate). Agreement must be express, not implied. For example, parties cannot be deemed to have agreed in advance to disclosure merely because they agreed to participate in a particular dispute resolution program.

Subdivision (a)(2) facilitates admissibility and disclosure of unilaterally prepared materials, but it only applies so long as those materials may be produced in a manner revealing nothing about the mediation discussion. Materials that necessarily disclose mediation communications may be admitted or disclosed only upon satisfying the general rule of subdivision (a).

Subdivision (b) makes clear that if the person who takes the lead in conducting a mediation agrees to disclosure, it is unnecessary to seek out and obtain assent from each assistant to that person, such as a case developer, interpreter, or secretary.

For an exception to Section 1123, see Section 1124 (written settlements and oral agreements reached through mediation) & Comment.

See Section 1115(a) (“mediation” defined), 1115(c) (“mediation consultation” defined). See also Sections 703.5 (testimony by a judge, arbitrator, or mediator), 1120 (mediation confidentiality), 1122 (mediator reports and communications).

§ 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.

Comment. Section 1124 consolidates and clarifies provisions governing written settlements and oral agreements reached through mediation.

As to an executed written settlement agreement, subdivision (a)(1) continues part of former Section 1152.5(a)(2). See also *Ryan v. Garcia*, 27 Cal. App. 4th 1006, 1012, 33 Cal. Rptr. 2d 158, 162 (1994) (Section 1152.5 “provides a simple means by which settlement agreements executed during mediation can be made admissible in later proceedings,” i.e., the “parties may consent, as part of a writing, to subsequent admissibility of the agreement”).

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

As to fully executed written settlement agreements, subdivision (a)(3) supersedes former Section 1152.5(a)(4). To facilitate enforceability of such agreements, disclosure pursuant to subdivision (c) requires only agreement of the signatories. Agreement of the mediator and other mediation participants is not necessary. Subdivision (a)(3) is thus an exception to the general rule governing disclosure of mediation communications by agreement. See Section 1123.

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

Subdivision (b) makes clear that by following the procedure in Section 1119 (recorded oral agreement), mediation participants may create an oral settlement agreement that can be enforced without violating Section 1120 (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. See Section 1125 (when mediation ends).

Unless the mediation participants follow the specified procedure, confidentiality extends through the process of converting an oral compromise to a definitive written agreement. Section 1124(b) 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 1115(a) (“mediation” defined).

§ 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.

Comment. By specifying when a mediation ends, Section 1125 provides guidance on which communications are protected by Section 1120 (mediation confidentiality).

Under subdivision (a)(1), if mediation participants reach an oral compromise and reduce it to a written settlement fully resolving their dispute, confidentiality extends until the agreement is fully executed. Subdivision (a)(2) establishes a special rule where mediation participants fully resolve their dispute by an oral agreement in accordance with Section 1119. 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. See Section 1124 (written settlements and oral agreements reached through mediation). Subdivisions (a)(3) and (a)(4) are drawn from Rule 14 of the American Arbitration Association's Commercial Mediation Rules (as amended, Jan. 1, 1992).

Subdivision (b) applies where mediation partially resolves a dispute, such as when the disputants resolve only some of the issues (e.g., contract, but not tort, liability) or when only some of the disputants settle.

See Sections 1115(a) ("mediation" defined), 1115(b) ("mediator" defined).

§ 1126. Attorney's fees

1126. If a person subpoenas or otherwise seeks to compel a mediator to testify or produce a document, and the court or other adjudicative body determines that the testimony or document is inadmissible or protected from disclosure under Section 703.5 or this chapter, the court or adjudicative body making the determination shall award reasonable attorney's

fees and costs to the mediator against the person seeking the testimony or document.

Comment. Section 1126 continues former Section 1152.5(d) without substantive change, except to clarify that (1) fees and costs are available for violation of this chapter or Section 703.5 (testimony by a judge, arbitrator, or mediator), and (2) either a court or another adjudicative body (e.g., an arbitrator or an administrative tribunal) may award the fees and costs. Because Section 1115 (definitions) defines “mediator” to include not only the neutral person who takes the lead in conducting a mediation, but also any neutral who assists in the mediation, fees are available regardless of the role played by the person subjected to discovery.

See Section 1115(b) (“mediator” defined).

§ 1127. Irregularity in proceedings

1127. Any reference to a mediation, or a declaration under Section 1125, during any subsequent trial is an irregularity in the proceedings of the trial for the purposes of Section 657 of the Code of Civil Procedure. Any reference to a mediation, or a declaration under Section 1125, 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 relief.

Comment. Section 1127 is drawn from Code of Civil Procedure Section 1775.12. The first sentence makes it an irregularity to refer to a mediation in a subsequent civil trial; the second sentence extends that rule to other noncriminal proceedings, such as an administrative adjudication. An appropriate situation for invoking this section is where a party urges the trier of fact to draw an adverse inference from an adversary’s refusal to disclose mediation communications.

See Section 1115 (“mediation” defined).

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

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

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

Comment. The chapter heading is renumbered to reflect the addition of a new Chapter 2 (commencing with Section 1115) (Mediation).

Evid. Code § 1152.5 (repealed). Mediation confidentiality

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

~~1152.5. (a) When a person consults a mediator or mediation service for the purpose of retaining the mediator or mediation service, or when persons agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving a dispute in whole or in part:~~

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

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

~~(3) When a person consults a mediator or mediation service for the purpose of retaining the mediator or mediation service, or when persons agree to conduct or participate in mediation for the sole purpose of compromising, settling, or resolving a dispute, in whole or in part, all communications, negotiations, or settlement discussions by and between participants or mediators in the course of a consultation for mediation services or in the mediation shall remain confidential.~~

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

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

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

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

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

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

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

Comment. The introductory clause of Section 1152.5(a) is continued in part in Section 1115(a) ("mediation" defined). The reference to an agreement to mediate is not continued. Section 1120 (mediation confidentiality) is not limited to a voluntary mediation. It also extends to a court-ordered mediation, unless it is a proceeding in family conciliation court or a mediation of child custody or visitation issues. See Section 1117 (court-ordered and court-supervised proceedings).

Except as noted in the Comment to Section 1120, former Section 1152.5(a)(1)-(3) are continued without substantive change in Section 1120 (mediation confidentiality). Former Section 1152.5(a)(4) is superseded by Section 1123 (disclosure by agreement). See also Section 1124 (written settlements and oral agreements reached through mediation). Former Section 1152.5(a)(5) is continued without substantive change in Section 1124 (written settlements and oral agreements reached through mediation). Former Section 1152.5(a)(6) is continued without substantive change in Section 1121 (types of evidence not covered).

Former Section 1152.5(b) is continued without substantive change in Section 1116 (scope of chapter).

The first sentence of former Section 1152.5(c) is continued without substantive change in Section 1116 (scope of chapter). The second sentence of former Section 1152.5(c) is superseded. See Lab. Code § 65.

Except as noted in the Comment to Section 1126, former Section 1152.5(d) is continued without substantive change in Section 1126 (attorney's fees).

Former Section 1152.5(e) is continued without substantive change in Section 1121 (types of evidence not covered).

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

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

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

Comment. Former Section 1152.6 is continued and broadened in Section 1122 (mediator reports and communications). See Section 1122 Comment.

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

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

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

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

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

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

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

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

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

~~(f) Sections 703.5 and 1152.5 of the Evidence Code shall Section 703.5 and Chapter 2 (commencing with Section 1115) of Division 9 of the Evidence Code apply to any mediation conducted pursuant to this chapter.~~

Comment. Section 66032 is amended to reflect the relocation of former Evidence Code Section 1152.5 and the addition of new Evidence Code provisions governing mediation confidentiality. See Evid. Code §§

703.5 (testimony by a judge, arbitrator, or mediator), 1115-1127 (mediation).

Former subdivision (e) is deleted as surplus. See new subdivision (e); Evid. Code § 1122 (mediator reports and communications).

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

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

66033. (a) At the end of the mediation, the mediator shall file a report with the Office of Permit Assistance, consistent with ~~Section 1152.5 Chapter 2 (commencing with Section 1115) of Division 9~~ of the Evidence Code, containing each of the following:

(1) The title of the action.

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

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

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

Comment. Section 66033 is amended to reflect the relocation of former Evidence Code Section 1152.5 and the addition of new Evidence Code provisions governing mediation confidentiality. See Evid. Code §§ 1115-1127 (mediation).

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

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

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

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

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

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

(b) The mediator shall determine prior to the mediation conference whether the insured will be represented by counsel at the mediation. The mediator shall inform the insurer whether the insured will be represented by counsel at the mediation conference. If the insured is represented by counsel at the mediation conference, the insurer's counsel may be

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

(c) ~~Sections 703.5 and 1152.5~~ *Section 703.5 and Chapter 2 (commencing with Section 1115) of Division 9* of the Evidence Code apply to a mediation conducted under this chapter.

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

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

Comment. Section 10089.80 is amended to reflect the relocation of former Evidence Code Section 1152.5 and the addition of new Evidence Code provisions governing mediation confidentiality. See Evid. Code §§ 703.5 (testimony by a judge, arbitrator, or mediator), 1115-1127 (mediation). Former subdivision (d) is deleted as surplus. See subdivision (c); Evid. Code § 1122 (mediator reports and communications).

Ins. Code § 10089.82 (amended). Noncompulsory participation in mediation

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

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

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

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

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

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

Referral to mediation or the pendency of a mediation under this article is not a basis to prevent or stay the filing of civil litigation arising in whole or in part out of the same facts. Any applicable statute of limitations is tolled for the number of days beginning from the referral to mediation until the date on which the mediation is either completed or declined, or the date on which the insured fails to appear for a scheduled mediation for the second time, or, in the event that a

settlement is completed, the expiration of any applicable three business day cooling off period.

Comment. Subdivision (c) of Section 10089.82 is amended to reflect the addition of new Evidence Code provisions governing mediation confidentiality. See Evid. Code §§ 1115-1127 (mediation).

Lab. Code § 65 (amended). Powers and duties of department; access to records

SEC. 12. Section 65 of the Labor Code is amended to 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.*

Comment. Section 65 is amended to reflect the addition of new Evidence Code provisions governing mediation confidentiality and make clear that those provisions apply to mediations conducted by the State Mediation and Conciliation Service. See Evid. Code §§ 703.5 (testimony by a judge, arbitrator, or mediator), 1115-1127 (mediation).

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

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

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

(2) Each juvenile court is encouraged to develop a dependency mediation program to provide a problem-solving forum for all interested persons to develop a plan in the best interests of the child, emphasizing family preservation and strengthening. The Legislature finds that mediation of these matters assists the court in resolving conflict, and helps the court to intervene in a constructive manner in those cases where court intervention is necessary. Notwithstanding any other provision of law, no person, except the mediator, who is required to report suspected child abuse pursuant to the Child Abuse and Neglect Reporting Act (Article 2.5 (commencing with Section 11164) of Chapter 2 of Title 1 of Part 4 of the Penal Code), shall be exempted from those requirements under ~~Section 1152.5 Chapter 2 (commencing with Section 1115) of Division 9~~ of the Evidence Code because he or she agreed to participate in a dependency mediation program established in the juvenile court.

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

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

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

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

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

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

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

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

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

Comment. Subdivision (a)(2) of Section 350 is amended to reflect the relocation of former Evidence Code Section 1152.5 and the addition of new Evidence Code provisions governing mediation confidentiality. See Evid. Code §§ 1115-1127 (mediation).
