

Memorandum 84-64

Subject: Study K-400 - Mediation Privilege

At its November 1983 meeting, the Commission considered whether any legislation is needed to facilitate the use of the mediation process in resolving disputes. The staff was directed to prepare a tentative recommendation to provide a privilege for the mediation process if it is commenced after legal action has been filed.

As was noted at that meeting, Section 1152 of the Evidence Code (offer to compromise and the like) may provide some protection for communications during the mediation process. This section provides:

1152. (a) Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his liability for the loss or damage or any part of it.

(b) This section does not affect the admissibility of evidence of:

(1) Partial satisfaction of an asserted claim or demand without questioning its validity when such evidence is offered to prove the validity of the claim; or

(2) A debtor's payment or promise to pay all or a part of his preexisting debt when such evidence is offered to prove the creation of a new duty on his part or a revival of his preexisting duty.

A copy of the Australian privilege provisions for mediation is attached as Exhibit 1.

The staff believes that the mediation process is analogous to settlement or compromise negotiations. For this reason, we have drafted a provision that will follow Section 1152 in the Evidence Code. The provision is drawn in part from the Australian provisions. The staff recommended provision is attached as Exhibit 2.

It is important to understand that the protections afforded by the Evidence Code privileges and Evidence Code provision relating to offers of compromise relate only to the admission of evidence. These provisions apply only in a situation in which, pursuant to law, testimony can be compelled to be given. The Evidence Code does not, for example, deal with the duty of a lawyer or psychotherapist not to disclose confiden-

tial communications in other situations, such as in casual conversation. The scope of the proposed provision is consistent with the Evidence Code scheme.

We have not attempted to define "mediator" or "mediation." The varied qualifications and lack of any requirement of licensing for mediators makes it, in our view, impossible to develop a definition of "mediator" that would be useful. Because of the variety of methods and means of "mediation," we have not attempted to define that term. Instead, we have sought to narrow the situations where protection is given under the proposed provision. We require, as the Commission previously determined, that the mediation be in connection with a pending civil action or proceeding. We require, in addition, that the mediation be sought with a view to the compromise, settlement, or resolution of the civil action or proceeding. This in effect restricts the protection to cases where mediation is an alternative to a judicial determination of the civil action or proceeding. Finally, we require that the parties execute a written agreement that the proposed protection for written and verbal communications apply to the mediation. The requirement of written agreement will impose no burden on the mediator; the mediator can have the parties execute a form agreement before the mediation commences. However, this requirement will limit the protection to cases where the parties have agreed that the protection should apply.

We have provided an exception to the protection: The exception is taken from the Australian statute and makes the protection not applicable where disclosure is necessary to protect the party or another or the property of another from threatened harm. A broader exception might be substituted for this narrow exception. The broader exception could be drawn from the "official information" privilege; this exception is set out in the Comment to the proposed section.

Please note that the proposed section includes some language in brackets that might be substituted for the language in the proposed section.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

EXHIBIT 1

Australian Mediation Privilege Provisions

27. Privilege. The like privilege with respect to defamation exists with respect to mediation sessions as exists with respect to judicial proceedings.

Evidence of anything said or of any admission made in a mediation session is not admissible in any proceedings before any court, tribunal or body.

No document prepared for the purpose of, or in the course of, or pursuant to, a mediation session, or any copy thereof, is admissible in evidence in any proceedings before any court, tribunal or body.

Such evidence and documents are admissible by consent of the parties to the mediation session, and also in proceedings in connection with which a disclosure of confidential information has been made where thought necessary to prevent or minimise the danger of injury to any person or damage to property.

28. Misprision of felony. Certain C.J.C. persons and parties to a mediation session are not liable for misprision in respect of information obtained in connection with the administration or execution of the Act.
29. Secrecy. Mediators must take an oath or make an affirmation of secrecy.

Disclosure of information may be made:

- (a) by consent of the person from whom the information was obtained;
- (b) in connection with administration or execution of the Act;
- (c) where there are reasonable grounds to believe that disclosure is necessary to prevent or minimise the danger of injury to any person or damage to any property;
- (d) where disclosure is reasonably required in referral to other agencies, for the purpose of dispute resolution or assisting the parties in any other manner;
- (e) for research and evaluation;
- (f) under a statutory requirement.

the evidence is received without objection. Thus, information made inadmissible by the section should be considered to the extent it is relevant when it is presented to the trier of fact without objection. This is consistent with the protection given to an offer to compromise under Section 1152. See the Comment to Section 1152. In addition, subdivision (b) permits admission of evidence where there is consent to disclose.

Section 1152.5 provides protection to information disclosed during the mediation process to encourage this alternative to a judicial determination of the action. The same policy that protects offers to compromise (Section 1152) justifies protection to information disclosed in the mediation process. Section 1152.5 is broadly drawn to apply to any pending civil action or proceeding. See Sections 105 and 120. Thus, Section 1152.5 would apply, for example, to a mediation used to reach a property settlement in a marriage dissolution proceeding as well as to a traditional civil action to recover damages for injury to person or property.

Because of the variety of means and methods of mediation, Section 1152.5 does not attempt to define "mediation." Instead, the applicability of the section is limited to a case where three requirements are satisfied: (1) the parties to the mediation must be "parties to a pending civil action," (2) the parties must agree to mediation "for the purpose of compromising, settling, or resolving the pending action," and (3) the parties, before the mediation begins, must execute a written agreement stating that Section 1152.5 shall apply to the mediation.

Subdivision (c) of Section 1152.5 provides an important exception to the protection afforded by the section: the admissibility of evidence is not limited where there is a reasonable cause to believe that admission is necessary to prevent or minimize the danger of injury to any person or damage to any property. For a similar exception, see Evidence Code Section 1024 (psychotherapist-patient privilege not available "if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger"). The exception provided by subdivision (c) of Section 1152.5 is somewhat similar to the exception to the protection afforded to conciliation proceedings under Sections 4351.5 and 4607 of the Civil Code and Section 1747 of the Code of Civil Procedure. Those sections provide that all communications, verbal or written, from the parties to the mediator in the conciliation proceeding shall be deemed to be official information within the meaning of Section 1040 of the Evidence Code. Section 1040 of the Evidence Code protects official information only where disclosure of the information "is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice"

Subdivision (d) makes clear that in a case where Section 4351.5 or 4607 or 4800.9 of the Civil Code or Section 1747 of the Code of Civil Procedure is applicable, the admissibility of communications is determined under that section and not under Section 1152.5.

EXHIBIT 2

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Evidence Code § 1152.5. Mediation for the purpose of resolution of action or proceeding

1152.5. (a) Subject to the conditions and exceptions provided in this section, when parties to a pending civil action agree to mediation for the purpose of compromising, settling, or resolving the pending action:

(1) Evidence of anything said or of any admission made in a mediation session is not admissible in any action or in any proceeding in which, pursuant to law, testimony can be compelled to be given.

(2) No document prepared for the purpose of, or in the course of, or pursuant to, a mediation session, or copy thereof, is admissible in evidence in any action or in any proceeding in which, pursuant to law, testimony can be compelled to be given.

(b) This section does not apply unless, before the mediation begins, the parties execute an agreement in writing that sets out the text of this section and states that the parties agree that this section shall apply to the mediation. Notwithstanding the agreement, this section does not limit the admissibility of evidence if all the parties to the mediation session consent to the disclosure of the evidence [if the person from whom the information was obtained consents to its disclosure].

(c) This section does not limit the admissibility of evidence where there is reasonable cause to believe that admission is necessary to prevent or minimize the danger of injury to any person or damage to any property.

(d) This section does not apply where the admissibility of the evidence is governed by any of the following:

- (1) Section 4351.5, 4607, or 4800.9 of the Civil Code.
- (2) Section 1747 of the Code of Civil Procedure.

Comment. Section 1152.5 gives effect to a written agreement of the parties to a mediation proceeding that oral and written information disclosed in the mediation proceeding will not later be disclosed in an action (defined in Section 105) or other proceeding in which, pursuant to law, testimony can be compelled to be given. This broad scope of protection is consistent with the protection given by various privileges. See Sections 901 and 910. Nothing in Section 1152.5 prohibits consideration of information disclosed in the mediation proceeding if