

#K-400

1/16/85

Second Supplement to Memorandum 85-17

Subject: Study K-400 - Mediation Privilege

In connection with the Commission's Tentative Recommendation on the mediation privilege, you will be interested in the attached letter and form. The form is an agreement signed by the parties to the mediation purporting to protect any disclosures from subsequent disclosure in a judicial proceeding.

The court rule referred to in the agreement is found in the Judicial Arbitration Rules for Civil Cases. These rules are adopted by the Judicial Council pursuant to authority given by Code of Civil Procedure Section 1141.14.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

**MEDIATION SERVICES**  
CITIZENS SERVICE OFFICE

ADMINISTRATION BUILDING  
CIVIC CENTER - ROOM 423  
SAN RAFAEL, CA 94903

BETTY J. TIMES, DIRECTOR

JODY ANNE BECKER  
PROGRAM COORDINATOR

ELEANOR SALESKY  
CASE COORDINATOR

2 January 1985

Mr. John H. DeMouilly  
Executive Secretary  
California Law Revision Commission  
4000 Middlefield Road, Room D-2  
Palo Alto, California 94306

Dear Mr. DeMouilly:

As program coordinator of Marin County Mediation Services I am concerned with what I have heard regarding proposed changes to sections 1152.5 A,B, and C of the evidence code. Would you please send me a copy of the proposed revisions so that I may confer with our county counsel on how our program would be affected.

Enclosed is an agreement form we presently use. This form has not been challenged in the four years of its use. We would welcome your opinion on the form since it appears to have some relation to the changes proposed by your commission.

Sincerely,

*Jody Anne Becker*  
Jody Anne Becker  
Program Coordinator  
Mediation Services  
Citizens Service Office

JAB/ttg

Enclosure

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CITIZENS SERVICE OFFICE

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CASE COORDINATOR

MEDIATION SERVICES AGREEMENT

CASE NO. \_\_\_\_\_

and

hereby submit their dispute to mediation under the rules of the Division of Mediation Services which have been presented and read by us with the understanding:

1. The process is voluntary and, therefore, due process requirements of the United States and California Constitutions as well as any statutes are not applicable in the mediation procedure.
2. The mediator may, but is not required to, make a record of the mediation proceedings. The records of the proceedings, by or at the direction of the mediator, shall be deemed to be the mediator's personal notes and are not subject to subpoena or to discovery and the mediator will seek not to deliver said notes to any party to the mediation or to any other person other than an employee of the Division of Mediation Services. In this connection, the parties hereto agree that they will neither seek nor authorize anyone on their behalf to seek the compelling of testimony in any court or administrative proceeding by the mediator or anyone on the Mediation staff. This promise shall apply to case notes taken by staff during telephone calls to or from the parties to this agreement or any other persons involved in the case and the case notes taken during conversation with the disputants or any other parties to the case during conversations in the Mediation Office.
3. It is also understood that no one other than the Division of Mediation staff or mediators or persons acting under their direction and control may make a record of the proceedings, and the parties shall not secure the presence of a stenographer, court reporter, or cause the use of any recording device to be made at the mediation proceedings.
4. If, after mediation, any proceedings take place arising out of the same dispute no reference may be had in the subsequent proceedings to the mediation proceedings. The evidence presented at the mediation proceedings, or to any other aspect of the mediation proceedings in an attempt to violate this provision will constitute an irregularity as with the same consequences as set forth in Section 1616 of California Rules of Court.

DATE: \_\_\_\_\_

\_\_\_\_\_  
Signature

DATE: \_\_\_\_\_

\_\_\_\_\_  
Signature

TELEPHONE (415) 499 - 6191 OR 499 - 6194

Revised by County Counsel 7/21/82

xxxx 94303

January 16, 1983

Jody Anne Becker  
Program Coordinator  
Mediation Services  
Citizens Service Office  
Administration Building  
Civic Center, Room 423  
San Rafael, CA 94903

Dear Ms. Becker:

In response to your letter concerning protection of mediation communications, I am sending you a copy of Memorandum 85-17 and the First Supplement to Memorandum 85-17.

Evidence Code Section 911 provides that privileges exist only where provided by statute. In view of this section, I question whether you can provide by your agreement protection to relevant communications that are offered in a judicial action or proceeding. Evidence Code Section 1152 provides protection where evidence "that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, 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 offered "to prove his liability for the loss or damage or any part of it." However, this section may not be broad enough to cover some matters that are mediated.

We would appreciate receiving any comments you have on the Commission's tentative recommendation.

Sincerely,

John H. DeMouilly  
Executive Secretary

JHD/vvm

encl.