

First Supplement to Memorandum 96-17

Mediation Confidentiality: Additional Issues

There have been important developments in the area of mediation confidentiality since the staff wrote Memorandum 96-17. In particular, the Commission may want to consider the following matters:

CONFLICTING APPELLATE DECISIONS ON WHEN MEDIATION ENDS

Section 1152.5(a)(1) protects “evidence of anything said or of any admission made *in the course of the mediation*” (Emph. added.) Until recently, the only published case interpreting that phrase was *Ryan v. Garcia*, 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (1994) (Exhibit pp. 1-5). Now, however, there are conflicting appellate decisions on the point. *Cf. Regents of University of California v. Sumner*, __ Cal. App. 4th __, 50 Cal. Rptr. 2d 200 (1996) (Exhibit pp. 6-9) (Section 1152.5 does not protect oral statement of settlement terms) *with* *Ryan v. Garcia*, 27 Cal. App. 4th at 1009-1013 (Exhibit pp. 2-5) (Section 1152.5 protects oral statement of settlement terms). Ron Kelly and others in the mediation community are very concerned about this.

Ryan v. Garcia

In *Ryan v. Garcia*, a dispute was mediated and

[e]ventually, the mediator called the parties together and announced an agreement. For the next 15 minutes, someone, it is not clear who, stated the terms of that agreement. Garcia’s attorney was assigned to reduce the agreement to writing, and the parties left the session feeling the case was settled. However, the parties later disagreed concerning the terms of the settlement, and no written agreement was ever executed.

[27 Cal. App. 4th at 1008-09 (Exhibit p. 2).]

One of the parties tried to enforce the oral arrangement, but the other side argued that evidence of it was inadmissible pursuant to Section 1152.5. The trial court disagreed, reasoning that “mediation ended when an agreement was

reached, and the statement of the terms of the agreement was therefore not a part of mediation.” *Id.* at 1009 (Exhibit p. 2).

On appeal, the court analyzed the issue at length and reversed. *Id.* at 1009-1013 (Exhibit pp. 2-5). The court reasoned in part that

section 1152.5 must be interpreted broadly to serve its purpose, that is, to encourage the use of mediation by ensuring confidentiality. Judicial sifting of statements made at a confidential mediation to select those which can be used as evidence of an agreement contravenes the legislative intent underlying adoption of section 1152.5. Indeed, the risk of this judicial sifting would deter some litigants from participating freely and openly in mediation. As quoted above, the Law Revision Commission comment states the purpose of section 1152.5 is to promote mediation as an alternative to judicial proceedings. To condone further judicial proceedings to enforce oral agreements made during mediation directly undercuts the effect of the statute intended by the Legislature.

By using the broad phrase “in the course of the mediation,” the Legislature manifested its intent to protect a broad range of statements from later use as evidence in litigation. To establish arbitrary boundaries within the general process of “mediation,” with a vague delineation between what is included and what is not included, is contrary to that intent and may not be inferred from the language of the statute.

Narrow interpretation of “in the course of the mediation” leads to anomalous results not intended by the Legislature. For example, under the interpretation urged by the Ryans, if the parties here had committed their settlement agreement to writing but failed to include in the writing a waiver of confidentiality, they could prove the settlement agreement by reciting their recollections of the oral agreement but could not introduce the written agreement because it was “prepared for the purpose of, or in the course of, or pursuant to, the mediation” (§ 1152.5, subd. (a)(2).) Common sense dictates the Legislature did not intend to allow admission of an oral agreement while excluding a written memorial of the same agreement.

[*Id.* at 1011 (Exhibit pp. 3-4).]

The court also dismissed the argument that applying Section 1152.5 to oral statements of settlement terms would reduce mediation to a meaningless exercise. Rather, Section 1152.5 “provides a simple means by which settlement agreements executed during mediation can be made admissible in later proceedings.” *Id.* at 1012 (Exhibit p. 4). “The parties may consent, as part of a writing, to subsequent admissibility of the agreement.” *Id.*

Justice Raye dissented from the majority's conclusion that Section 1152.5 protects oral recitations of settlement terms. He explained:

Once a compromise is reached the mediation process is over. An oral agreement cannot be crafted until after compromise has been reached. Therefore an oral statement of the terms of the agreement does not fall within Evidence Code 1152.5.

[*Id.* at 1014 (Exhibit p. 5).]

Regents of University of California v. Sumner

In the recent case of *Regents of University of California v. Sumner*, the court found Justice Raye's analysis persuasive. *Sumner* involved a mediation in which the parties reached an agreement, dictated detailed settlement terms into a tape recorder, and had a transcript prepared. The agreement was subject to approval of the Regents and was to be reduced to writing. Although the Regents approved the deal and their counsel prepared a written release (which incorporated a rescission clause not in the dictated settlement), the other side refused to sign. 50 Cal. Rptr. 2d at 201-02 (Exhibit pp. 7-8).

The trial court enforced the settlement despite the lack of an executed written agreement. On appeal, appellants contended that Section 1152.5 precluded consideration of the settlement transcript. The court disagreed, observing that appellants had waived the point in the trial court. *Id.* at 202 (Exhibit p. 8). The court also distinguished *Ryan v. Garcia* on the ground that “[i]n the present case, the parties *concluded* their mediation session, and then created a transcript of the settlement they had reached in order to memorialize the agreement they had reached.” *Id.* (emph. in original). Thus, the court reasoned, the transcript “was not a part of the mediation session, where section 1152.5 would bar introduction into evidence of concessions of liability made only for purposes of mediation or settlement discussions.” *Id.*

Lastly, the court went on to quote Justice Raye's dissent with approval and criticize the majority opinion in *Ryan v. Garcia*:

We also recognize that certain language in the majority opinion in *Ryan, supra*, seems inconsistent with our ruling. Our views are indeed more closely in accord with Justice Raye's dissenting opinion in *Ryan, supra*, which properly recognized that evidence of oral statements defining the scope of a settlement agreement reached after mediation is admissible to enforce the settlement, since the Legislature's enactment of section 1152.5 does not affect

the admissibility of evidence of an oral settlement which is reached after mediation has successfully concluded: “Once a compromise is reached the mediation process is over. An oral agreement cannot be crafted until after compromise has been reached. Therefore an oral statement of the terms of the agreement does not fall within [section] 1152.5.” (*Ryan, supra*, 27 Cal.App.4th at p. 1014, 33 Cal.Rptr.2d 158 (dis. opn. of Raye, J).)

The majority opinion in *Ryan* has never been cited or followed in a published opinion before today, and we respectfully decline to follow it. We conclude section 1152.5 does not bar evidence of oral statements defining the terms of a settlement agreement reached after mediation. The trial court properly enforced the settlement agreement according to the terms stated in the transcript which the parties created in order to memorialize their agreement, after the mediation sessions were successfully concluded.

[*Id.* at 203 (Exhibit p. 9).]

Comments from Mediators

Ron Kelly thinks that the analysis in *Regents of University of California v. Sumner* is seriously flawed. He believes that confidentiality is important not only in helping parties reach a compromise proposal, but also in the process of solidifying that compromise in a written agreement. Consequently, he views *Regents of University of California v. Sumner* as a major impediment to effective mediation. He urges prompt corrective action.

Although he does not refer to *Regents of University of California v. Sumner*, mediator John Gromala of Eureka apparently shares Mr. Kelly’s concerns. He writes:

Success in mediation is dependent upon confidentiality and flexibility. To protect the growing use of mediation it is necessary to guarantee that all proceedings in mediation will be privileged until an agreement is signed by the parties. If alleged oral agreements in mediation are honored, and confidentiality terminates at that point, the result will be to increase litigation instead of decreasing it. Ambiguity about when confidentiality ceases will jeopardize the use and success of mediation. People will be reluctant to make conditional agreements, while continuing negotiations, if there is risk that such action can be construed as a binding contract.

I have had many cases in which tentative oral “deals” have been struck, then discarded after further consideration, and replaced with an agreement which better satisfied the interests of all parties. Participants are encouraged to seek resolution by agreeing to

segments, with the understanding that nothing is binding until there is total agreement on all issues.

The participants must have the freedom to experiment with various options for settlement. Any limitation on, or ambiguity about, the scope of privileged communications prior to the signing of a written agreement would seriously compromise the process.

I respectfully request the Commission to recommend appropriate legislation which would guarantee confidentiality of all proceedings in mediation until a written agreement is signed by all the parties.

[Exhibit pp. 10-11.]

Staff Analysis and Recommendation

The staff agrees with Messrs. Kelly and Gromala that the current situation is untenable. Mediation participants need to know at what point the protection of Section 1152.5 ceases. In part, that is because the extent of protection may influence how frankly they speak at different stages of the dispute resolution process. More importantly, parties need to know when they have an enforceable agreement, and a compromise reached in mediation becomes binding only when evidence of it is admissible. Clarification of the area is essential.

The staff understands, however, that the appellants in *Regents of University of California v. Sumner* are seeking review in the California Supreme Court. The staff is unclear on the timetable of the petition for review, but will attempt to ascertain that before the Commission's meeting on April 12, 1996. Depending on when the Court is expected to reach a decision, the Commission may want to delay action on this issue until after the Court acts.

Alternatively, it may be helpful to have the staff more fully research and discuss the relevant policy considerations for the next meeting, so that the Commission is in a position to act by the next legislative session if need be. Based on the information it has thus far, the staff tends to agree with the analysis in *Ryan v. Garcia*, rather than that of *Regents of University of California v. Sumner*. Further research, including study of experience in other jurisdictions, may help refine the issues and options.

PENDING BILL ON INTAKE COMMUNICATIONS

Another recent development is the introduction of a bill to amend Section 1152.5 to expressly protect communications made when "a person consults a

mediator or mediation service for the purpose of retaining the mediator or mediation service.” SB 1522 (Senator Greene) (Exhibit pp. 12-14). The bill is pending in the Senate Judiciary committee.

SB 1522 is similar to the staff’s suggested amendment to protect intake communications, which would add a new subdivision stating that Section 1152.5 “applies to communications and documents made or prepared in the course of attempts to initiate mediation, regardless of whether an agreement to mediate is reached.” See Memorandum 96-17 at page 9. Mr. Kelly does not intend to oppose SB 1522, but he prefers the staff’s proposed language to that in the bill. The staff also prefers its proposal, for two reasons: (1) it is simpler, adding only one sentence to Section 1152.5, as opposed to SB 1522’s multiple clauses, and (2) it does not focus on “retention” of a mediator, which may exclude efforts to obtain voluntary mediation services.

Nonetheless, SB 1522 would be a big step forward in protecting intake communications. The Commission should take its progress into account in deciding how to proceed on that point.

COMMENTS ON CONSENT ISSUES

Lastly, in Memorandum 96-17 the staff proposes to amend Sections 1152.5(a)(1) and (a)(2) as follows:

1152.5. (a) 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~~ by statute, evidence of anything said or of any admission made 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~~ by statute, 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~~ the document shall not be compelled, in any civil action or proceeding in which, pursuant to law, testimony can be compelled to be given.

[Memorandum 96-17 at Exhibit p. 4.]

The staff's reason for modifying the first clause of paragraphs (1) and (2) was to account for the proposed addition of Section 1152.7, pertaining to consent. See Memorandum 96-17 at pp. 6-9.

Mr. Kelly has pointed out, however, that some statutes (he has not given specific examples) require disclosure of information. If the first clause of paragraph (a)(1) and the first clause of paragraph (a)(2) are amended as proposed, he fears that such statutes will be construed as exceptions to the protection of Section 1152.5.

It is not the intent of the staff's recommendation to have general discovery statutes override mediation confidentiality. To the extent that the language suggested in Memorandum 96-17 is susceptible to such an interpretation, the problem could be fixed. Specifically, the staff suggests the following alternative language:

1152.5. (a) 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~~ expressly provided by statute, evidence of anything said or of any admission made 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~~ expressly provided by statute, 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~~ the document shall not be compelled, in any civil action or proceeding in which, pursuant to law, testimony can be compelled to be given.

....

Comment. Subdivisions (a)(1) and (a)(2) are amended to make clear that their protection is not limited to civil actions and proceedings, but also extends to other contexts, such as arbitral, administrative, and criminal adjudications.

Subdivisions (a)(1) and (a)(2) are also amended to reflect the addition of Section 1152.7 (consent to disclosure of mediation communication). To "expressly provide" an exception to subdivisions (a)(1) or (a)(2), a statute must explicitly be aimed at

overriding mediation confidentiality. See, e.g., Section 1152.7 (“Notwithstanding Section 1152.5 ...”).

Subdivision (a)(2) is amended to make a technical change.

...

For the Commission’s convenience, a synthesis of the staff’s recommended revisions of Section 1152.5 and other mediation confidentiality statutes is attached as Exhibit pages 15-18.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

27 Cal.App.4th 1006

1006 Donald RYAN et al., Plaintiffs
and Respondents,

v.

Ralph GARCIA, Defendant
and Appellant.

No. C016773.

Court of Appeal, Third District.

Aug. 22, 1994.

Purchasers of building sued vendor for negligent construction and fraud. Dispute was mediated, but parties later disagreed concerning terms of alleged oral settlement, and plaintiffs amended complaint by adding cause of action to enforce oral settlement agreement. The Superior Court, Placer County, No. S0003, J. Richards Couzens, J., found that parties reached oral settlement agreement, and rendered judgment in plaintiffs' favor. Defendant appealed. The Court of Appeal, Nicholson, J., held that trial court erred in admitting evidence of statements made during mediation to prove parties orally settled dispute.

Reversed.

Raye, J., dissented with opinion.

1. Compromise and Settlement ⇐21

Generally, oral settlement agreements may be enforced in the same way oral contracts are enforced; if plaintiff proves an oral settlement agreement by substantial evidence and defendant proffers no valid defense, court will enter judgment enforcing oral agreement.

2. Evidence ⇐213(1)

Public policy underlying statute precluding admission into evidence of anything said or any admission made in course of mediation is to promote mediation as a preferable alternative to judicial proceedings by providing confidentiality. West's Ann.Cal.Evid. Code § 1152.5 (1992).

3. Evidence ⇐213(1)

Evidence of statements made during mediation were inadmissible to prove that parties orally settled dispute, despite plaintiffs' contention that statements were not made "in the course of mediation" because

1. Hereafter, unspecified code citations are to the Evidence Code.

At the time of the mediation here concerned, the full text of section 1152.5 provided:

"(a) Subject to the conditions and exceptions provided in this section, when persons agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving a dispute:

"(1) Evidence of anything said or of any admission made in the course of the mediation is not admissible in evidence, and disclosure of any such evidence shall not be compelled, in any civil

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mediation was successfully completed when mediator convened parties to recite terms of settlement, as statements made among parties and mediator, at time and in place set for mediation, were well within "course of the mediation." West's Ann.Cal.Evid.Code § 1152.5 (1992).

See publication Words and Phrases for other judicial constructions and definitions.

1007 Sinclair, Wilson & Sinclair and Robert F. Sinclair, Roseville, for defendant and appellant.

Randy E. Thomas, Stockton, for plaintiffs and respondents.

NICHOLSON, Associate Justice.

May evidence of statements made during mediation be admitted in court to prove the parties orally settled the dispute? The trial 1008 court concluded it may. We disagree. Admission of such evidence violates the prohibition of Evidence Code section 1152.5 which protects statements made in mediation from use in litigation. Accordingly, we reverse.

FACTS AND PROCEDURE

In 1989, plaintiffs Donald and Richard Ryan purchased the Old Roseville Opera House from defendant Ralph Garcia. Finding defects in the building, the Ryans sued Garcia for negligent construction and fraud.

The parties privately agreed to mediate the dispute and hired a mediator. The mediator drafted a confidentiality agreement, quoting subdivisions (a) and (b) of Evidence Code section 1152.5.¹ The mediator and parties signed the agreement.

action in which, pursuant to law, testimony can be compelled to be given.

"(2) 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, and disclosure of any such document shall not be compelled, in any civil action in which, pursuant to law, testimony can be compelled to be given.

"(b) Subdivision (a) does not limit the admissibility of evidence if all persons who conducted or otherwise participated in the mediation consent to its disclosure.

Mediation began at 10 a.m. and concluded about 2:30 p.m. on March 11, 1992. It appears the mediator conferred with the parties separately. Eventually, the mediator called the parties together and announced an agreement. For the next 15 minutes, someone, it is not clear who, stated the terms of that agreement. Garcia's attorney was assigned to reduce the agreement to 1909writing, and the parties left the session feeling the case was settled. However, the parties later disagreed concerning the terms of the settlement, and no written agreement was ever executed.

The Ryans amended their pending complaint by adding a cause of action to enforce the oral settlement agreement. Recognizing a resolution of the new cause of action could eliminate the need to try the other causes of action, the parties agreed to a court trial on the oral settlement cause of action.

At trial, Garcia objected to the introduction of anything said during the March 11 meeting. He asserted it entailed statements made during mediation which are inadmissible under section 1152.5. The court overruled the objection as to statements made after the mediator announced the parties had an agreement. The court reasoned mediation ended when an agreement was reached, and the statement of the terms of the agreement was therefore not a part of mediation. Thus, the court admitted evidence of statements made at the end of the session on March 11.

After hearing the evidence, the court found the parties reached an oral settlement agreement on March 11, 1992. It further found the Ryans's evidence accurately reflected the

"(c) This section does not apply unless, before the mediation begins, the persons who agree to conduct and participate in the mediation execute an agreement in writing that sets out the text of subdivisions (a) and (b) and states that the persons agree that this section shall apply to the mediation.

"(d) This section does not apply where the admissibility of the evidence is governed by Section 4351.5 or 4607 of the Civil Code [now section 1818 or 3177 of the Family Code] or by Section 1747 of the Code of Civil Procedure.

"(e) 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

terms of that agreement, disbelieving Garcia's version. The remaining causes of action were dismissed without prejudice, and judgment was entered in the Ryans's favor. Garcia appeals.

DISCUSSION

[1] Generally, oral settlement agreements may be enforced in the same way oral contracts are enforced. If the plaintiff proves an oral settlement agreement by substantial evidence and the defendant proffers no valid defense, a court will enter judgment enforcing the oral agreement. (*See Nicholson v. Barab* (1991) 233 Cal.App.3d 1671, 1681, 285 Cal.Rptr. 441; *Gorman v. Holte* (1985) 164 Cal.App.3d 984, 989, 211 Cal.Rptr. 34.) The issue here is whether the evidence used to prove the existence and terms of the oral settlement agreement was admissible.

[2] In 1985, the Legislature enacted section 1152.5 which provides, in relevant part: "Evidence of anything said or of any admission made in the course of the mediation is not admissible in evidence..." Section 1152.5 neither defines "mediation" nor delineates the boundaries of the process. The Law Revision Commission commented: "Section 1152.5 provides protection to information disclosed during mediation to encourage this alternative to a judicial determination of the action. The same policy that protects offers to 1910compromise (Section 1152) justifies protection to information disclosed in a mediation." (See Cal. Law Revision Com. com., Deering's Ann.Evid.Code, § 1152.5 (1986) p. 322.)² Accordingly, the public policy underlying section 1152.5 is to promote mediation

(d). Nothing in this section limits the confidentiality provided pursuant to Section 65 of the Labor Code.

"(f) Paragraph (2) of subdivision (a) does not limit either of the following:

"(1) The admissibility of the agreement referred to in subdivision (c).

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

2. Law Review Commission comments are persuasive evidence of the Legislature's intent if the Legislature adopts the commission's recommendations. (*People v. Garfield* (1985) 40 Cal.3d 192, 199, 219 Cal.Rptr. 196, 707 P.2d 258.)

as a preferable alternative to judicial proceedings by providing confidentiality.

"Confidentiality is absolutely essential to mediation. This is not simply to allow parties to keep their dispute out of the public limelight. It is essential for the parties to feel confident that anything they reveal privately to the mediator or in open mediation sessions *cannot be used against them* should the mediation fail. Otherwise, parties would be reluctant to make the kinds of concessions and admissions that pave the way to settlement." (Knight, Fannin & Disco, Cal.Practice Guide: Alternative Dispute Resolution (The Rutter Group 1993) § 3:25, p. 3-5, italics in original.)

[3] The operative phrase in section 1152.5 for our purposes is "in the course of the mediation." Statements made "in the course of the mediation" are inadmissible. (§ 1152.5, subd. (a)(1).) Adopting the trial court's reasoning, the Ryans contend the statements they introduced as evidence to prove the existence and terms of the settlement agreement were not made "in the course of mediation" because the mediation was successfully completed when the mediator convened the parties to recite the terms of the settlement. Because there was no explicit agreement between the parties to end the mediation before the recitation of the settlement, the Ryans's argument necessarily includes the notion mediation ends, as a matter of law, just before the parties state their agreement. They contend this must be so because, otherwise, settlements reached in mediation would be unenforceable.

Garcia's response is simple. He asserts the statements concerning the existence and terms of the settlement agreement were part of the mediation and, therefore, were inadmissible as evidence. He has the better argument, as we explain.

Heretofore, the appellate courts have not determined the scope of the confidentiality provided by section 1152.5 to statements made "in the course of the mediation." Hence, we must determine the intention of the Legislature. (Code Civ.Proc., § 1859.)

Using similar "in-the-course-of" language, Civil Code section 47 grants privileged status

to statements made "in the initiation or course of any . . . proceeding authorized by law . . ." "This statute protects attorneys as well as judges, jurors, witnesses and other court personnel from liability arising from publication made in the course of a judicial proceeding. The policy underlying the privilege is that of affording to our citizens utmost freedom of access to the courts. As a consequence, attorneys are given broad protection from the threat of litigation arising from the use of their best efforts on behalf of their clients." (*Younger v. Solomon* (1974) 38 Cal.App.3d 289, 300, 113 Cal. Rptr. 113.) "The privilege has been given broad application to further the public policies it is designed to serve." (*Kupiec v. American Internat. Adjustment Co.* (1991) 235 Cal.App.3d 1326, 1331, 1 Cal.Rptr.2d 371; see also *Moore v. Conliffe* (1994) 7 Cal.4th 634, 654, 29 Cal.Rptr.2d 152, 871 P.2d 204.)

Likewise, section 1152.5 must be interpreted broadly to serve its purpose, that is, to encourage the use of mediation by ensuring confidentiality. Judicial sifting of statements made at a confidential mediation to select those which can be used as evidence of an agreement contravenes the legislative intent underlying adoption of section 1152.5. Indeed, the risk of this judicial sifting would deter some litigants from participating freely and openly in mediation. As quoted above, the Law Revision Commission comment states the purpose of section 1152.5 is to promote mediation as an alternative to judicial proceedings. To condone further judicial proceedings to enforce oral agreements made during mediation directly undercuts the effect of the statute intended by the Legislature.

By using the broad phrase "in the course of the mediation," the Legislature manifested its intent to protect a broad range of statements from later use as evidence in litigation. To establish arbitrary boundaries within the general process of "mediation," with a vague delineation between what is included and what is not included, is contrary to that intent and may not be inferred from the language of the statute.

Narrow interpretation of "in the course of the mediation" leads to anomalous results not

intended by the Legislature. For example, under the interpretation urged by the Ryans, if the parties here had committed their settlement agreement to writing but failed to include in the writing a waiver of confidentiality, they could prove the settlement agreement by reciting their recollections of the oral agreement but could not introduce the written agreement because it was "prepared for the purpose of, or in the course of, or pursuant to, the mediation..." (§ 1152.5, subd. (a)(2).) Common sense dictates the Legislature did not intend to allow admission of an oral agreement while excluding a written memorial of the same agreement.

Furthermore, narrow interpretation would lead the trial court to filter the mediation proceedings to determine if any portion of the proceeding crossed ¹⁰¹²the line from negotiation into agreement. This is the type of disclosure and use of statements made in mediation the confidentiality statute is meant to preclude.

Certainly, the confidentiality given to mediation must end at some point. However, in this context, we need not undertake the task of defining the boundaries of mediation. Instead, we merely determine that the statements made here among the parties and the mediator, at the time and in the place set for mediation, were well within "the course of the mediation," and, therefore, evidence of those statements was inadmissible in a later proceeding under section 1152.5.

If we interpret section 1152.5 to make inadmissible the evidence of the oral settlement agreement, the Ryans declare, our holding will "divest mediation of its effectiveness as an alternative dispute resolution technique. If [section] 1152.5 has the effect of forever cloaking a settlement agreement in the darkest secrecy and prevents a settlement contract from ever being mentioned

again, the mediation process is reduced to a meaningless exercise, a mechanical ceremony." Section 1152.5, though, provides a simple means by which settlement agreements executed during mediation can be made admissible in later proceedings. The parties may consent, as part of a writing, to subsequent admissibility of the agreement. A document prepared at mediation is inadmissible in later judicial proceedings "*unless the document otherwise provides.*" (§ 1152.5, subd. (a)(2), italics added.)³

The Ryans's apprehension that settlements reached in mediation may be unenforceable is valid only if the parties do not properly consent in writing to subsequent admissibility of the agreement.⁴ This is not a detriment to the effectiveness of mediation as the Ryans suggest; instead, it is merely a procedural condition imposed to protect confidentiality and, thereby, encourage open participation in mediation. Enforcement of this procedural condition protects the confidentiality of mediation while emphasizing what the law requires of parties and mediators who wish to produce an enforceable settlement agreement.

Indeed, if the parties to mediation sign a written settlement agreement waiving confidentiality, the agreement can be enforced in the courts by a ¹⁰¹³simple motion. (§ 1152.5, subd. (a)(2); Code Civ.Proc., § 664.6.) The alternative urged here by the Ryans is costly and time-consuming. It permits full-blown trials to determine, in each mediation case, if there was an oral agreement and, if so, on what terms. Section 1152.5, however, provides broad confidentiality in the expectation of alleviating the need for ponderous judicial proceedings. It is evident the Legislature never intended to produce the unwieldy results the Ryans suggest.

The trial court erred by admitting evidence, over Garcia's objection, of statements

3. Subdivision (a)(1) of section 1152.5, the provision making oral statements inadmissible, does not include this exception to inadmissibility. The parties also may later mutually agree to admissibility. (§ 1152.5, subd. (b).) But that was not done here.

4. Florida deals with the issue of settlements reached during mediation more directly. The

mediation confidentiality statute makes inadmissible communications made during mediation, "other than an *executed* settlement agreement." (Fla.Stat. § 44.102(3) (1994), italics added.) This provision has been interpreted to allow admission of *written* settlement agreements only. (*Hudson v. Hudson* (Fla.App.1992) 600 So.2d 7.)

made in the course of mediation. (§ 1152.5.) Without this evidence, there is no substantial evidence of an oral settlement agreement and the judgment cannot be sustained.⁵

DISPOSITION

The judgment is reversed. Garcia shall recover his costs on appeal.

BLEASE, Acting P.J., concurs.

RAYE, Associate Justice, dissenting.

I respectfully dissent.

Evidence Code section 1152.5 provides in relevant part that "evidence of anything said or of any admission in the course of the mediation is not admissible. . . ." The issue presented is whether the oral settlement agreement in this case occurred "in the course of mediation." The majority disclaim any intent to "undertake the task of defining the boundaries of mediation" but nonetheless suggests the boundaries are both temporal and spatial; an oral settlement agreement reached "at the time and in the place set for mediation" is unenforceable. Therefore, one supposes that parties to mediation who reach agreement must either adjourn to a different place and/or time before expressing the agreement, or must reduce the agreement to writing before it can be enforced.

While I recognize the value of "bright line" formulations and the evil of "judicial sifting" in this context, the majority goes too far in imposing limits on the ability of parties to enter into enforceable oral agreements. It might make sense to require settlement agreements for certain types of disputes to be in writing or to impose other safeguards to insure the parties have in fact reached agreement and to discourage "buyer's remorse" the morning after. However, it is inappropriate to impose such rules under the guise of statutory construction.

¹¹⁰¹⁴Proof of an oral settlement agreement necessarily precludes a finding that mediation was ongoing. Mediate means "to negotiate a compromise of hostile or incompatible

viewpoints." (Websters Third New International Dictionary.) Mediation can thus be viewed as a process for negotiating a compromise. As recognized by section 26 of the Judicial Administration Standards relating to child custody mediation, an agreement (including, "under certain circumstances, an oral agreement") "should be the end product of the mediation process." (Cal.Standards Jud.Admin., § 26 [Deerings Cal. Ann. Codes, Rules (Appen.) (1994 Supp.) p. 334].) Once a compromise is reached the mediation process is over. An oral agreement cannot be crafted until after compromise has been reached. Therefore an oral statement of the terms of the agreement does not fall within Evidence Code 1152.5.

The majority correctly perceives the challenge to confidentiality created when a party seeks to enforce an oral settlement agreement arising out of mediation. The majority's resolution, to require any settlement agreement entered into at the conclusion of a single continuous mediation session to be in writing, may be a good idea; however, it is not required by section 1152.5. I would affirm the judgment of the trial court.

5. Given this conclusion, we need not determine whether the statements establishing an agreement were also made inadmissible by the confi-

**The REGENTS OF the UNIVERSITY
OF CALIFORNIA et al., Plaintiff
and Respondent,**

v.

**Burnet Barnes SUMNER et al.,
Defendant and Appellant.**

No. A068759.

Court of Appeal, First District,
Division 5.

Feb. 26, 1996.

Certified for Partial Publication *

Regents of the University of California and various individuals brought actions to enforce terms of dictated settlement agreement from prior sexual harassment lawsuit. The Superior Court, San Francisco County, Nos. 954991 and 955555, William J. Cahill, J., granted summary judgment in favor of the Regents and individuals. Plaintiffs in prior sexual harassment lawsuit appealed. The Court of Appeal, Peterson, P.J., held that statute prohibiting admission into evidence of anything said or of any admission made in course of mediation did not bar admission of transcript of dictated oral settlement as evidence of settlement agreement between the parties.

Affirmed.

1. Evidence — 213(1), 219(3)

Statute prohibiting admission into evidence of anything said or of any admission made in course of mediation did not bar admission of transcript of dictated oral settlement as evidence of settlement agreement between the parties, where such transcript was created after the parties concluded their mediation session. West's Ann.Cal.Evid. Code § 1152.5.

* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of sections II.A. through II.E. and section II.G.

2. Trial ⇐105(4)

Defendants' introduction into evidence of transcript of dictated oral settlement and their subsequent failure to timely object to introduction or consideration of such transcript constituted waiver of objection that the transcript was inadmissible under statute prohibiting admission of anything said or any admission made in course of mediation. West's Ann.Cal.Evid.Code § 1152.5.

3. Evidence ⇐219(3)

Statute prohibiting admission into evidence of anything said or any admission made in course of mediation does not bar evidence of oral statements defining terms of settlement agreement reached after mediation. West's Ann.Cal.Evid.Code § 1152.5.

Superior Court of San Francisco County;
William J. Cahill, Judge.

Dan Siegel, Siegel, Yee & Jonas, Oakland, CA, for appellant.

James E. Holst, John F. Lundberg, Marcia J. Canning, Marianne Schimelfenig, Office of General Counsel, Regents of University of California, Oakland, CA, Judith Droz Keyes, Monna R. Radulovich, Philip Obbard, Corbett & Kane, Emeryville, CA, Alan Berkowitz, Schachter, Kristoff, Orenstein & Berkowitz, San Francisco, CA, for respondent.

PETERSON, Presiding Justice.

Appellants, Dr. Burnet Barnes Sumner and Dr. Christine Wood McGill, contend the trial court improperly granted a summary judgment which enforced a previous settlement between appellants and respondents, the Regents of the University of California and Robert W. Surber, in a sexual harassment action brought by appellants. We affirm.

I. FACTS AND PROCEDURAL HISTORY

The parties agreed at the time of the settlement that the details of their agreement would be confidential. They have filed under seal in this court their briefs and other documents concerning the settlement. Since this opinion is a public document, we will

attempt to avoid disclosure of the confidential details of the settlement agreement in so far as possible. We granted authority, however, for the parties to discuss the settlement agreement in open court during oral argument, rejecting a motion to close oral argument to the public.

Appellants brought a prior action in San Francisco Superior Court, No. 941711, alleging sexual harassment and other torts against their employer, the Regents, and certain named individual defendants, including Surber. The previous action was the subject of scheduled voluntary mediation sessions organized by the Judicial Arbitration & Mediation Services (JAMS) in an attempt to settle the matter. The mediation sessions were presided over by a retired judge, the Honorable Rebecca Westerfield. Appellants were represented by their then counsel, Paul Monziona. The Regents, Surber, and individual defendants were also represented by counsel. The mediation sessions ended after two days when the parties announced they had reached an agreement to settle the matter amicably.

The terms of the settlement were dictated into a tape recorder by appellant's counsel, with clarifications by Judge Westerfield, the attorneys for the parties, and appellants; and a transcript was prepared. We need not reveal the confidential details of the agreement here; it is sufficient to note that the agreement is very detailed, and both appellants indicated they agreed to the terms of the settlement.

The deal was struck on June 3. This June 3 settlement is the only one respondents sought to enforce. While there was correspondence thereafter which appellants characterize as a "counteroffer," it is clear from the record that the June 3 deal was final and binding, and that subsequent events and correspondence were merely intended to effectuate the terms of the June 3 agreement.

The settlement required the formal approval of the Regents. It was agreed between the parties that the counsel for the Regents would recommend to the Regents that they approve the settlement, and they subsequently did so. It was also agreed that

the terms of the dictated settlement would be incorporated by counsel for the Regents into a more formal typed release document, and counsel for the Regents did so after the Regents formally approved the settlement.

However, after the dictated settlement was concluded and before the typed release was prepared, appellants began to have second thoughts about the matter. They discussed the matter with their husbands, who are medical doctors. Appellants then began to feel uneasy about various terms of the settlement. They informed their counsel that they could not agree to go through with the terms of the settlement. Appellants' counsel then wrote to counsel for respondents, stating in relevant part as follows: "Both Ms. McGill and Ms. Sumner have informed me they wish to rescind this agreement at this time, and have provided me their authority to do so. Accordingly, you are hereby notified the settlement agreement is rescinded and will not be executed by [appellants]."

Respondents then brought these actions to enforce the terms of the dictated settlement agreement. The parties filed cross-motions for summary judgment as to the legal validity of the dictated settlement agreement. The trial court after hearing argument and considering the evidence granted respondents' motion for enforcement of the settlement and denied the motion of appellants; the trial court also adhered to this result on appellants' motion for new trial.¹ Appellants then brought this timely appeal.²

II. DISCUSSION

We affirm the trial court's ruling. Appellants entered into a final, binding, and legally enforceable settlement agreement according

1. The trial court did grant a partial new trial on respondents' second cause of action, which presented the issue of whether appellants' failure to perform according to the terms of the dictated settlement agreement constituted a breach of the covenant of good faith and fair dealing. The Regents then dismissed their second cause of action, and the trial court entered a final judgment which is properly appealable.

2. Surber brought an additional cause of action against appellants for fraud, alleging that they had no intention of complying with the settlement agreement. This cause of action for fraud

to the terms dictated by the parties after the conclusion of their mediation and settlement conference.

A.-E.**

F. Evidence of the Settlement

[1] Appellants contend the trial court erred in considering the transcript of the dictated oral settlement as evidence of a settlement agreement. They assert this violates the provisions of Evidence Code section 1152.5 (section 1152.5),⁵ which were interpreted by a majority of a panel of the Third District to bar evidence of a settlement reached *during* the course of mediation sessions. (See *Ryan v. Garcia* (1994) 27 Cal. App.4th 1006, 1013, 33 Cal.Rptr.2d 158 (*Ryan*).)

[2] Appellants waived this point in the trial court when they themselves introduced the transcript of the dictated settlement into evidence, and did nothing to timely object to the introduction or consideration of such evidence. The matter was not raised by appellants at all; it was the trial court which raised this issue at the hearing on the motion for new trial, by which time the matter was already waived.

Further, *Ryan* is distinguishable. In the present case, the parties *concluded* their mediation session, and then created a transcript of the settlement they had reached in order to memorialize the agreement they had reached. The transcript of the settlement was not a part of the mediation session, where section 1152.5 would bar introduction into evidence of concessions of liability made only for purposes of mediation or settlement discussions. No valid purpose would be

and Surber's cause of action for breach of the covenant of good faith and fair dealing were tried to a jury, which we are informed returned a defense verdict.

** See footnote *, *ante*.

5. Section 1152.5 provides, in pertinent part: "(a) 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 the mediation* is not admissible in evidence...." (Italics added.)

PEOPLE v. STRIPE

Cite as 50 Cal.Rptr.2d 203 (Cal.App. 3 Dist. 1996)

served here by misinterpreting section 1152.5 to bar introduction of evidence regarding the settlement agreed to by the parties.

We also recognize that certain language in the majority opinion in *Ryan, supra*, seems inconsistent with our ruling. Our views are indeed more closely in accord with Justice Raye's dissenting opinion in *Ryan, supra*, which properly recognized that evidence of oral statements defining the scope of a settlement agreement reached after mediation is admissible to enforce the settlement, since the Legislature's enactment of section 1152.5 shields only statements made "in the course of" mediation from admission in subsequent proceedings, and section 1152.5 does not affect the admissibility of evidence of an oral settlement which is reached after mediation has successfully concluded: "Once a compromise is reached the mediation process is over. An oral agreement cannot be crafted until after compromise has been reached. Therefore an oral statement of the terms of the agreement does not fall within [section] 1152.5." (*Ryan, supra*, 27 Cal.App.4th at p. 1014, 33 Cal.Rptr.2d 158 (dis. opn. of Raye, J.))

[3] The majority opinion in *Ryan* has never been cited or followed in a published opinion before today, and we respectfully decline to follow it. We conclude section 1152.5 does not bar evidence of oral statements defining the terms of a settlement agreement reached after mediation. The trial court properly enforced the settlement agreement according to the terms stated in the transcript which the parties created in order to memorialize their agreement, after the mediation sessions were successfully concluded.

G.***

III. DISPOSITION

The judgment is affirmed.

KING and HANING, JJ., concur.



*** See footnote *, ante.

Gromala Mediation Service

April 1, 1996

Law Revision Commission
RECEIVED

APR 03 1996

File: _____

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

Dear Ms Gaal:

Success in mediation is dependent upon confidentiality and flexibility. To protect the growing use of mediation it is necessary to guarantee that all proceedings in mediation will be privileged until an agreement is signed by the parties. If alleged oral agreements in mediation are honored, and confidentiality terminates at that point, the result will be to increase litigation instead of decreasing it. Ambiguity about when confidentiality ceases will jeopardize the use and success of mediation. People will be reluctant to make conditional agreements, while continuing negotiations, if there is risk that such action can be construed as a binding contract.

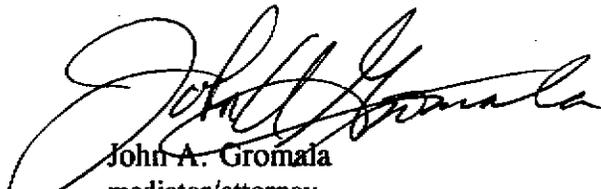
I have had many cases in which tentative oral "deals" have been struck, then discarded after further consideration, and replaced with an agreement which better satisfied the interests of all parties. Participants are encouraged to seek resolution by agreeing to segments, with the understanding that nothing is binding until there is total agreement on all issues.

The participants must have the freedom to experiment with various options for settlement. Any limitation on, or ambiguity about, the scope of privileged communications prior to the signing of a written agreement would seriously compromise the process.

I respectfully request the Commission to recommend appropriate legislation which would guarantee confidentiality of all proceedings in mediation until a written agreement is signed by all the parties.

Enclosed is a summary of the experience upon which my recommendation is based. If you, other staff or members of the Commission have questions I would be pleased to discuss this matter with you.

Sincerely,



John A. Gromala
mediator/attorney

JAG:hs
enclosure

10

Gromala Mediation Service

John A. Gromala has mediated a wide range of conflict including commercial claims, construction disputes, crisis management (large and small organizations), dissolution of corporations and partnerships, employment discrimination and harassment, environmental concerns, facilitation of private and public conferences, labor disputes, personal and property damage claims, public access problems, will and trust contests. He is pioneering the use of mediation in Estate Planning as a means to prevent future conflict and litigation.

He is a member of the California and American Bar Associations and the Society of Professionals in Dispute Resolution. He limits his practice to mediation, facilitation and consultation. He is an instructor in Conflict Resolution at Humboldt State University and gives advanced training seminars at conferences of professional mediators.

John Gromala's private law practice concentrated on advising small businesses and estate planning. He has served as: member -- executive committee of the California Bar's section on Estate Planning, Probate and Trust Law; Fellow -- American College of Trust and Estate Counsel; president -- Humboldt County Bar Association.

During this time he also served as Board Chairman for a premier performing Northern California bank (Bank of Loleta). At the time of the bank sale, in 1988, he left his law firm to accept a temporary position as executive vice president and general counsel with a private holding company (Humboldt Group).

Its subsidiaries were engaged in publishing, printing, construction and other ventures in California and New England. During three and a half years of reorganization he became acutely aware of how frustrating and debilitating the adversarial process can be on a business. Upon completing his assignment at Humboldt Group, he elected to set up his own mediation service.

Introduced by Senator Greene

February 13, 1996

An act to amend Section 1152.5 of the Evidence Code, relating to mediation.

LEGISLATIVE COUNSEL'S DIGEST

SB 1522, as introduced, Greene. Mediation services: confidentiality.

Under existing law, when persons agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving a civil dispute, anything said in the course of the mediation is not admissible in evidence nor subject to discovery, and all communications, negotiations, and settlement discussions by and between participants or mediators are confidential. If the testimony of a mediator is sought to be compelled in any civil action or proceeding regarding anything said in the course of a mediation, the court is required to award reasonable attorney's fees and costs to the mediator against the person seeking the testimony.

This bill would make these provisions applicable when a person consults a mediator or mediation service for the purpose of retaining mediation services.

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

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

- 1 SECTION 1. Section 1152.5 of the Evidence Code is
- 2 amended to read:

1 1152.5. (a) When a person consults a mediator or
2 mediation service for the purpose of retaining the
3 mediator or mediation service, or when persons agree to
4 conduct and participate in a mediation for the purpose of
5 compromising, settling, or resolving a dispute in whole or
6 in part:

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

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

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

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

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

39 (6) Evidence otherwise admissible or subject to
40 discovery outside of mediation shall not be or become

1 inadmissible or protected from disclosure solely by reason
2 of its introduction or use in a mediation.

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

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

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

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

1 SYNTHESIS OF PROPOSED REVISIONS

2 Evid. Code § 1152.5 (amended). Communications during mediation

3 1152.5. (a) When persons agree to conduct and participate in a mediation for the
4 purpose of compromising, settling, or resolving a dispute in whole or in part:

5 (1) Except as otherwise ~~provided in this section~~ expressly provided by statute,
6 evidence of anything said or of any admission made in the course of the mediation
7 is not admissible in evidence or subject to discovery, and disclosure of this
8 evidence shall not be compelled, in any civil action or proceeding in which,
9 pursuant to law, testimony can be compelled to be given.

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

16 (3) ~~When persons agree to conduct or participate in mediation for the sole~~
17 ~~purpose of compromising, settling, or resolving a dispute, in whole or in part, all~~
18 All communications, negotiations, or settlement discussions by and between
19 participants or mediators in the mediation shall remain confidential.

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

23 (5) ~~A~~ (4) An executed written settlement agreement, or part thereof, is
24 admissible to show fraud, duress, or illegality if relevant to an issue in dispute.

25 (6) (5) Evidence otherwise admissible or subject to discovery outside of
26 mediation shall not be or become inadmissible or protected from disclosure solely
27 by reason of its introduction or use in a mediation.

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

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

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

40 (e) Paragraph (2) of subdivision (a) does not limit either of the following:

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

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

43 (f) This section applies to communications and documents made or prepared in
44 the course of attempts to initiate mediation, regardless of whether an agreement to
45 mediate is reached.

46 (g) Nothing in this section prevents the gathering of information for research or
47 educational purposes, so long as the parties or the specific circumstances of the
48 parties' controversy are not identified or identifiable.

49 **Comment.** Subdivisions (a)(1) and (a)(2) are amended to make clear that their protection is not
50 limited to civil actions and proceedings, but also extends to other contexts, such as arbitral,
51 administrative, and criminal adjudications.

52 Subdivisions (a)(1) and (a)(2) are also amended to reflect the addition of Section 1152.7
53 (consent to disclosure of mediation communication). To "expressly provide" an exception to
54 subdivisions (a)(1) or (a)(2), a statute must explicitly be aimed at overriding mediation
55 confidentiality. See, e.g., Section 1152.7 ("Notwithstanding Section 1152.5 ...").

56 Subdivision (a)(2) is amended to make a technical change.

57 Subdivision (a)(3) is amended to achieve internal consistency and delete surplus language.

58 Former subdivision (a)(4) is superseded by Section 1152.7 (consent to disclosure of mediation
59 communication).

60 Former subdivision (a)(5), now subdivision (a)(4), is amended to make clear that it applies only
61 to fully executed written settlement agreements, not drafts or unsigned documents.

62 Subdivision (c) is amended to eliminate an erroneous cross-reference.

63 Subdivision (d) is amended to conform its scope with the scope of subdivisions (a)(1)-(a)(3).

64 To facilitate enforcement of payment terms and other aspects of agreements to mediate,
65 subdivision (e) is amended to make explicit that Section 1152.5 does not restrict admissibility or
66 disclosure of such agreements.

67 Subdivision (f) is added to make clear that the protection of this section applies to intake notes
68 and other documents and communications relating to bilateral or unilateral attempts to initiate
69 mediation, regardless of whether those attempts are successful.

70 Subdivision (g) is new. It is modeled on Colo. Rev. Stats. § 13-22-307(5) (Supp. 1995).

71 **Evid. Code § 1152.7 (added). Consent to disclosure of mediation communications**

72 1152.7. Notwithstanding Section 1152.5, a communication or document made or
73 prepared for the purpose of, or in the course of, or pursuant to, a mediation, may
74 be admitted or disclosed if any of the following conditions exist:

75 (a) All persons who conduct or otherwise participate in the mediation expressly
76 consent to disclosure of the communication or document.

77 (b) The document is an executed written settlement agreement, and either of the
78 following conditions is satisfied:

79 (1) The agreement provides that it is admissible and subject to disclosure.

80 (2) All signatories to the agreement expressly consent to its disclosure.

81 (c) The communication or document is an expert's analysis or report, it was
82 prepared for the benefit of fewer than all the mediation participants, those
83 participants expressly consent to its disclosure, and the communication or
84 document does not disclose anything said or any admission made in the course of
85 the mediation.

86 **Comment.** Section 1152.7 supersedes former Section 1152.5(a)(4) and a portion of Section
87 1152.5(a)(2), which were unclear regarding precisely whose consent was required for
88 admissibility or disclosure of mediation communications and documents.

89 Subdivision (a) states the general rule that mediation documents and communications may be
90 admitted or disclosed only upon consent of all participants, including not only parties but also the
91 mediator and other nonparties attending the mediation (e.g., a disputant not involved in litigation,
92 a spouse, an accountant, an insurance representative, or an employee of a corporate affiliate).
93 Consent must be express, not implied. For example, parties cannot be deemed to have consented
94 in advance to disclosure merely because they agreed to participate in a particular dispute
95 resolution program. Cf. Contra Costa Superior Court, Local Rule 207 (1996) ("EASE conferences
96 shall constitute mediations governed by California Evidence Code Section 1152.5 *except that,*
97 *unless prior arrangements have been made with the Court in writing or on the record, by*
98 *agreeing to participate in the EASE Program, the parties are deemed to have consented in*
99 *advance that the evaluator may share any information he or she learns with the assigned judge*
100 *and with other court personnel."* (emph. in original)).

101 Subdivision (b) is a special rule to facilitate enforceability of fully executed written settlement
102 agreements. It provides for admissibility and disclosure of such agreements without requiring
103 signatures or consent from mediation participants who are not parties to the agreement (e.g., the
104 mediator).

105 Subdivision (c) facilitates admissibility and disclosure of unilaterally prepared experts' reports,
106 but it only applies so long as those materials may be produced in a manner revealing nothing
107 about the mediation discussion. Reports and analyses that necessarily disclose mediation
108 communications may be admitted or disclosed only upon satisfying the general rule of
109 subdivision (a).

110 **Evid. Code § 1152.6 (amended). Mediator evaluations**

111 ~~1152.6. A mediator may not file, and a court may not consider, any declaration~~
112 ~~or finding of any kind by the mediator, A mediator may not submit, and a court or~~
113 ~~other adjudicatory tribunal may not consider, any assessment, evaluation,~~
114 ~~recommendation, or finding of any kind by the mediator concerning a mediation~~
115 ~~conducted by the mediator, other than a required statement of agreement or~~
116 ~~nonagreement, unless all parties in the mediation expressly agree otherwise in~~
117 ~~writing prior to commencement of the mediation. However, this section shall not~~
118 ~~apply to mediation under Chapter 11 (commencing with Section 3160) of Part 2 of~~
119 ~~Division 8 of the Family Code.~~

120 **Comment.** Section 1152.6 is amended to clarify three points: (1) the statute applies to all
121 submissions, not just filings, (2) the statute is not limited to court proceedings but rather applies
122 to all types of adjudications, including arbitrations and administrative adjudications, and (3) the
123 statute applies to any evaluation or statement of opinion, however denominated.

124 **Evid. Code § 703.5 (amended). Competency of judges, arbitrators, and mediators**

125 703.5. No person presiding at any judicial or quasi-judicial proceeding, and no
126 arbitrator or mediator, shall be competent to testify, in any subsequent civil
127 ~~proceeding action, arbitration, or administrative proceeding,~~ as to any statement,
128 conduct, decision, or ruling, occurring at or in conjunction with the prior
129 proceeding, except as to a statement or conduct that could (a) give rise to civil or
130 criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the
131 State Bar or Commission on Judicial Performance, or (d) give rise to
132 disqualification proceedings under paragraph (1) or (6) of subdivision (a) of
133 Section 170.1 of the Code of Civil Procedure. However, this section does not

134 apply to a mediator with regard to any mediation under Chapter 11 (commencing
135 with Section 3160) of Part 2 of Division 8 of the Family Code.

136 **Comment.** Section 703.5 is amended to make explicit that it precludes testimony in a
137 subsequent arbitration or administrative proceeding, as well as in any civil action or proceeding.
138 The prohibition is not limited to administrative adjudications, but also includes other types of
139 administrative proceedings, such as licensing and regulatory decisions. See also Section 120
140 ("civil action" includes civil proceedings).