#K-400 9/24/84

Memorandum 84-86

Subject: Study K-400 - Mediation Privilege

The attached letter expresses concern about the staff draft and suggests a different draft of the proposed legislation on the mediation privilege. We will consider this item at the September meeting.

Respectfully submitted,

John H. DeMoully
Executive Secretary

THE CENTER FOR THE DEVELOPMENT OF MEDIATION IN LAW
Gary Friedman, Director 34 Forrest Street Mill Valley California 94941 Telephone (415) 383-1300

September 21, 1984

John H. DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road
Suite D-2
Palo Alto, California 94303

Dear John:

Those of us at the Center have finally had an opportunity to review the proposed statute relating to mediation privilege. We are all in accord that in its present form, the proposed code would be a disaster unless at least two changes are made.

First: The requirement of a pending civil action would require litigation, which is often antithetical to the very purpose of mediation: to resolve disputes before they reach that stage.

This requirement would undermine what I am certain your Commission would agree would be an important emerging public policy, that of reducing rather than increasing the number of lawsuits. This would be particularly onerous in business mediations where the drafting of a complaint is not a simple ministerial act, and where the privacy afforded by mediation would be undermined.

Second: The choice to have the proposed statute immediately follow Evidence Code Section 1152 could easily be construed to be a limitation on the protection that already exists in Section 1152, rather than an expansion. We suggest that at the very least this can be remedied by adding the phrase:

> "Nothing that is otherwise admissible pursuant to the provisions of Evidence Code Section 1152 shall be made admissible by virtue of the presence of a mediator."

This would give protection to those negotiations which do not quite conform to the classic structure of mediation, although clearly with the same purposes in mind.

We regard these two changes as absolutely necessary for the statute to have any real, beneficial effect in giving the parties to a mediation some protection.

Our other comments which follow are of a lower priority but we hope useful to the Commission. The following comments set out those concerns.

1. With regard to proposed Section 1152.5(a)(2), temporary agreements or agreements not to take a default, as well as the ultimate agreement, should be made expressly admissible.

2. In Section 1152.5(b), if the mediator is considered to be one of the parties to the mediation session, then this section seems overbroad as the parties, rather than the mediator, should hold this privilege.

3. Section 1152.5(c) seems to be overbroad, particularly by the inclusion of minimizing damage to property. While some limitation is necessary, preventing or minimizing damage to property could cover such a broad range of statements that the protection offered by the privilege would be illusory and give the mediator unnecessary power.

4. Section 4800.9 should not be included as it pertains to arbitration rather than mediation.

We have included our own view of what the optimum code would look like that would take all of our concerns into consideration, and enclose it herewith. We do this in the spirit of knowing that only over time, as in any other law, will the specific applications of this law refine its use, and at this time the highest priority is to protect the public's interest through allowing mediation to grow until we have a clear basis on which to regulate it. I believe that this was the conclusion of the Commission when I appeared last year, and I hope that it remains the conclusion of the Commission.

We would be pleased to provide additional comments in any way you think might be useful.

Very truly yours,

Gary Friedman
Steve Neustadter

for the Center

GF,SN/jh

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THE CENTER FOR THE DEVELOPMENT OF MEDIATION IN LAW

PROPOSED EVIDENCE CODE SECTION 1152.5

(a) Subject to the conditions and exceptions provided in this section when parties to a potential or pending civil action mediate for the purpose of compromising, settling, or resolving all or a part of the potential or pending civil action:

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

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

(3) The provisions of subsections (a)(1) and (2) of this section do not apply to any written agreements signed by the parties to the mediation.

(b) This section does not apply unless 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 such an agreement, this section does not limit the admissibility of evidence if all the parties to the mediation consent to the disclosure of the evidence.

(c) This section does not limit the admissibility of statements made pursuant to a mediation or in a mediation in which a party threatens physical harm to any person or physical 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 and Section 4607 of the Civil Code;
(2) Section 1747 of the Code of Civil Procedure.

(e) Nothing that is otherwise admissible pursuant to provisions of Evidence Code Section 1152 shall be made admissible by virtue of the presence of a mediator.