#K-400 1/9/85

Memorandum 85-17

Subject: Study K-400 - Mediation Privilege

The Commission's Tentative Recommendation Relating to Protection of Mediation Communications was distributed to interested persons and organizations for review and comment. We did not receive any comments from the California Trial Lawyers Association or the Judicial Council.

Exhibit 1 is a letter from Dixon Q. Dern, Chair of a committee of the Board of Governors of the State Bar of California that is studying alternative dispute resolution. You should read this letter. The letter is strongly supportive of the Commission's effort to develop an appropriate privilege for mediation, although some revisions of the Commission's proposed legislation are recommended. The specific recommendations are discussed later in this memorandum. Exhibits 2 (Michael D. Berk, Los Angeles) and 3 (Center for the Development of Mediation Law) support the concept of the privilege but urge significant revisions in the proposed legislation. Exhibit 4 (Steven M. Kipperman, San Francisco) takes the view that "this is a case of your trying to fix something that 'ain't broke.'" Exhibit 5 (Garrett H. Elmore, Redwood City) concludes that the tentative recommendation is not based on a thorough study and makes specific objections to the concept and particular provisions of the proposed legislation.

LIMITATION OF PROTECTION TO PARTIES TO CIVIL ACTION

The proposed legislation limits the protection it affords to a case where the parties to the mediation are parties to a pending civil action or proceeding. The major objection from almost every commentator was to this limitation. The staff recommends that the limitation be removed and that the protection be afforded to parties to a dispute, whether or not the dispute is the subject of a pending action. We would retain the requirement that there be a written agreement between the parties, and we think that this requirement is sufficient to identify the cases where the statute will apply.

WRITTEN AGREEMENT REQUIREMENT

Exhibit 2 (Michael D. Berk, Los Angeles) believes that the proposed statute "could have an even more beneficial effect if it were not limited

to mediation between parties to a pending civil action or proceeding and require the execution of a specific written agreement." The staff above proposes to eliminate the limitation that the statute applies only to mediation between parties to a pending civil action or proceeding. We recommend retention of the requirement of execution of a specific written agreement if the pending-action limitation is eliminated.

CONSENT TO DISCLOSURE BY PERSON FROM WHOM INFORMATION WAS OBTAINED

The proposed legislation permits admission of otherwise privileged evidence of a mediation communication if the person from whom the information was obtained consents to its disclosure. The State Bar Committee suggests that protection be broadened to permit disclosure of information only "if all persons who conducted or otherwise participated in the mediation consent to its disclosure." This revision would also deal with the concern expressed in Exhibit 4 (Steven M. Kipperman, San Francisco) and Exhibit 5 (Garrett H. Elmore, Redwood City). The staff recommends the language suggested by the State Bar Committee.

DISCLOSURE OF INFORMATION TO PREVENT DANGER OF INJURY

The proposed legislation provides that the protection for communications does not exist in a case "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." Although this is based on language of an exception to the psychotherapist-patient privilege, several persons who submitted comments found this exception of uncertain meaning and suggested that it be eliminated. See Exhibit 2 (Michael D. Berk, Los Angeles), Exhibit 5 (Garrett H. Elmore, Redwood City). The staff suggests that this exception be deleted. Consideration can be given to its restoration if the legislative process reveals a need for such an exception.

EXCEPTION FOR ADMISSIBILITY OF EVIDENCE IN CRIMINAL ACTION

The proposed legislation provides that the new privilege "does not limit the admissibility of evidence in a criminal action." The State Bar Committee suggests that this exception be limited to a "felony criminal action." This exception is included to avoid objections from law enforcement organizations. We doubt that these objections would be avoided if the exception were limited to felony criminal actions. On the merits, there is considerable merit to the suggestion of the state Bar Committee. What does the Commission wish to do with respect to this suggestion?

AMENDMENT TO SECTION 1152

Two writers who reacted negatively toward the proposed legislation also suggested that the same result might be accomplished by an appropriate amendment of Section 1152. See Exhibit 4 and Exhibit 5. The staff does not recommend this approach. It is easier to understand a new section covering mediation than would be to understand Section 1152 if that section were amended to combine the concepts of the new section with those already in Section 1152.

GENERAL STAFF RECOMMENDATION

The State Bar Committee has set out the Commission proposed legislation with such changes as the State Bar Committee recommends be made. See draft of statute (first two pages), following letter set out in Exhibit 1.

The staff recommends that the draft of the State Bar Committee be adopted with the following changes:

(1) Subdivision (c) should be deleted.

(2) Consideration should be given to deleting the word "felony" in subdivision (d).

(3) New subdivision (g) should be deleted with the understanding it would be restored if the other State Bar legislation attached to Exhibit 1 is enacted.

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT 1

THE STATE BAR OF CALIFORNIA

555 FRANKLIN STREET
SAN FRANCISCO, CA 94102-4498
(415) 561-8200

December 11, 1984

California Law Revision Commission
4000 Middlefield Road
Suite D-2
Palo Alto, California 94303

Re: Alternative Dispute Resolution

Gentlepersons:

We have received your Notice of November 14, 1984 relative to amending Section 1152 of the Evidence Code to provide confidentiality, in certain cases, with respect to mediation procedures.

I am a member of the Board of Governors of the State Bar of California and in that capacity have been chairing a committee dealing with alternate dispute resolution.

As a result of our work over the last fourteen months, the State Bar has decided to introduce legislation which would create funding for alternate dispute resolution centers. In the course of that, we have been dealing with the problem of confidentiality, and had concluded, as you did, that Section 1152 of the Evidence Code should be made applicable to conciliation and mediation and other forms of dispute resolution. However, we had also concluded, as you did, that the section was not broad enough and needed amending. We were tremendously pleased to see your Tentative Notice and to see that we are apparently working along the same lines.

In that regard, we believe that the proposed language outlined in your draft might well be broadened to make it clear that the confidentiality provisions would apply to any potential as well as pending action, and that they would also extend protection to the mediation centers and mediators as well as to the parties.

We have prepared a draft of Section 1152.5 encompassing our thoughts on this.

I am enclosing a copy of that draft for your review and consideration.

By the same token, I am enclosing a rough draft of our proposed legislation; you will note that there are interlineations in that draft but this is essentially the draft which the State Bar will hope to be introducing.

Thank you for your attention to this important area.

Very truly yours,

DIXON Q. DERN

DQD:pac
Enclosures

cc: Lee Petillon, Esq. w/e
Ms. Jean Herzegh
Ms. Judy Harper
Richard J. Stone, Esq. w/e

Evidence Code § 1152.5 (added). Mediation for the purpose of action or proceeding

SECTION 1. Section 1152.5 is added to the Evidence Code, to read:

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

(1) Evidence of anything said or of any admission made in the course of such a mediation ~~session~~ is not admissible in evidence, and disclosure of any such evidence shall not be compelled, in any action or in any proceeding 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, such a mediation ~~session~~, or copy thereof, is admissible in evidence, and disclosure of any such document shall not be compelled, in any action or in any proceeding in which, pursuant to law, testimony can be compelled to be given. This paragraph does not limit the admissibility of the agreement referred to in subdivision (b) nor does it limit the effect of an agreement not to take a default in ~~the~~ a pending civil action.

(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 ~~the~~ all persons ~~from whom the information was obtained~~ who conducted or otherwise participated in the mediation 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 limit the admissibility of evidence in a felony ~~criminal~~ action.

(e) This section does not apply where the admissibility of the evidence is governed by Section 4351.5 or 4607 of the Civil Code or by Section 1747 of the Code of Civil Procedure.

(f) Nothing in this section makes admissible evidence that is inadmissible under Section 1152.

(g) The term "mediation" includes mediation, conciliation or any other type of dispute resolution process covered under Sections 1143.10 ff of the Code of Civil Procedure.*

* This reference might be changed, depending upon the form which the State Bar's proposed legislation takes.

NEIGHBORHOOD DISPUTE RESOLUTION CENTERS

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

Section 1. Chapter 3.5 (commencing with Section 1143.10) is added to Title 3 of Part 3 of the Code of Civil Procedure, to read:

CHAPTER 3.5 NEIGHBORHOOD DISPUTE RESOLUTION CENTERS

Article 1. Legislative Purpose

1143.10. The Legislature hereby finds and declares:

(a) The resolution of many disputes can be unnecessarily costly, complex and inadequate in a formal proceeding where the parties involved are adversaries and are subject to formalized procedures.

(b) To assist in the more effective resolution of disputes in a complex society ~~composed of citizens of different ethnic, racial and socio-economic characteristics,~~ there is a compelling need for alternatives to structured judicial settings, such as conciliation and mediation. Neighborhood dispute resolution centers can meet the needs of their communities by providing forums in which persons of all ethnic, racial and socio-economic groups may voluntarily participate in the resolution of disputes in an informal atmosphere without restraint or intimidation. A non-coercive dispute resolution forum in the community may provide a valuable prevention and early intervention problem-solving resource to the community.

(c) The utilization of local resources, including volunteers and available building space, such as space in public facilities, can provide for accessible, cost-effective resolutions of disputes. While there presently exist centers where dispute resolution is available, the lack of financial

resources limits their operation. Neighborhood dispute resolution centers can serve the interests of the citizenry and promote quick and voluntary resolution of certain criminal and civil matters.

(d) The administration of justice will be improved if courts, prosecuting authorities and law enforcement agencies make referrals to neighborhood dispute resolution centers in appropriate criminal cases prior to the initiation or after the dismissal of legal action.

1143.11. It is the intent of the Legislature that programs funded pursuant to this chapter shall:

(a) Stimulate the establishment and use of neighborhood dispute resolution centers to help meet the need for nonjudicial alternatives to the courts for the resolution of certain disputes.

(b) Encourage continuing community participation in the development, administration, and oversight of local programs designed to facilitate the informal resolution of disputes between and among members of the community.

(c) Offer structures for dispute resolution that may serve as models for resolution centers in other communities.

(d) Serve a specific community or locale and resolve disputes that arise within that community or locale through a mediator or panel of mediators composed of residents of the community.

(e) Educate the residents of the community to be served on ways of using the services of the neighborhood dispute resolution center directly and in a preventive capacity.

(f) Encourage courts, prosecuting authorities and law

enforcement agencies to make referrals, in appropriate criminal cases, to neighborhood dispute resolution centers prior to the initiation or after the dismissal of legal action; and encourage courts to make referrals in appropriate civil cases.

Article 2. Definitions

1143.12 As used in this chapter:

(a) "Commission" means the Neighborhood Dispute Resolution Commission.

(b) "Director" means the person appointed by the Commission.

(c) "Center" means a neighborhood dispute resolution entity that provides conciliation, mediation, and other forms and techniques of dispute resolution within a specific neighborhood(s) or community(ies).

(d) "Mediator" means an impartial trained person who facilitates the voluntary resolution of a dispute.

(e) "Grant recipient" means any nonprofit corporation incorporated in the State that administers/or would administer a ~~neighborhood dispute resolution~~ center pursuant to this chapter.

Article 3. Establishment and Administration of Centers

1143.13 There is hereby established:

(a) The Neighborhood Dispute Resolution Centers Program, to be administered and supervised under the direction of the Commission, to provide funds pursuant to this chapter for the establishment and continuance of ~~neighborhood dispute resolution~~ centers.

(b) The ~~Neighborhood Dispute Resolution Center Advisory~~ Commission shall consist of five members: one appointed by

the Governor; one appointed by the State Attorney General; one appointed by the Secretary pro tem of the Senate; one appointed by the Speaker of the Assembly; one appointed by the Chief Justice of the State Supreme Court.

(c) The members of the Commission shall serve for a term of three years.

(d) The members of the Commission shall not receive compensation for their services under this chapter, but shall be reimbursed for their actual and necessary expenses incurred in the performance of their duties under this chapter.

(e) The Commission shall appoint the Director.

1143.14 Every Center shall be operated by a Grant Recipient.

1143.15 All Centers shall be operated pursuant to contract with the Commission and shall comply with all provisions of this chapter. The Commission shall promulgate rules and regulations to effectuate the purposes of this chapter, including provisions for periodic monitoring and evaluation of the program.

1143.16 A Center shall not be eligible for funds under this chapter unless:

(a) It complies with the provisions of this chapter and the applicable rules and regulations of the Commission;

(b) It provides neutral mediators who have received training in conflict resolution techniques;

(c) It provides dispute resolution without cost to indigents;

(d) It provides that, upon consent of the parties, a written agreement or decision will be provided that sets forth

the settlement of the issues and future responsibilities of each party.

1143.17 Parties shall be provided in advance of the dispute resolution process with a written statement setting forth:

(a) ~~rules and~~ procedures under which the dispute resolution will be conducted;

(b) the nature of the dispute resolution process;

(c) the right of the parties to be accompanied by their counsel, who may participate if and as permitted under the rules and procedures of the Center;

(d) that, ~~unless the parties specifically agree in writing, any~~ no agreement reached during the dispute resolution process shall ~~not~~ be deemed to be final or binding upon the parties, unless the parties specifically agree in writing.

1143.18

(a) During or after the dispute resolution process, the parties may enter into a written resolution agreement that sets forth the settlement of the issues and the future responsibilities, if any, of each party.

(b) A written resolution agreement entered into with the assistance of a Center shall not be enforceable in a court nor shall it be admissible as evidence in any judicial or administrative proceeding unless such agreement includes a provision that clearly sets forth the intent of the parties that such agreement shall be enforceable in a court or admissible as evidence.

(c) The parties may agree in writing to toll the applicable statute of limitations during the pendency of the

dispute resolution process.

1143.19 Any proceeding conducted by a Center shall be ~~deemed a settlement discussion under~~ governed by Sections ~~1151 and~~ 1152 et seq. of the California Evidence Code. ~~and any other applicable statutes.~~

1143.20 Each Center shall maintain statistical records as set forth in Section 1143.31 or as required by the Commission. Such records shall maintain the confidentiality and anonymity of the parties.

1143.21 Subject to Section 1143.17(d), nothing in this chapter shall be construed to prohibit any person who voluntarily enters such a dispute resolution process from revoking his consent, withdrawing from dispute resolution and seeking judicial or administrative redress.

Article 4. Application Procedures

1143.22 Funds appropriated or available for the purpose of this chapter may be allocated for programs proposed by eligible Centers. Nothing in this chapter shall preclude existing dispute resolution centers from applying for funds made available under this chapter; provided that such dispute resolution centers are otherwise eligible, and that there are or will be unmet needs.

1143.23. Centers shall be selected for funding by the Commission from applications submitted.

1143.24 Applications submitted for funding shall include, but need not be limited to, all of the following information:

(a) Compliance with Sections 1143.16, 1143.17 and 1143.18.

(b) A description of the proposed community area of service, cost of the principal components of operation and any

other characteristics as determined by rules of the Commission.

(c) A description of available dispute resolution services and facilities within the defined geographical area.

(d) A description of the applicant's proposed program, by type and purpose, including evidence of community support factors, the present availability of resources and the applicant's administrative capability.

(e) A description of the efforts of cooperation between the applicant and local human service and criminal justice agencies in dealing with Center operations.

(f) The demonstrated effort on the part of the applicant to show how funds that may be awarded under this program may be coordinated or consolidated with other local, state or federal funds available for the activities in Sections 1143.16, 1143.17, and 1143.18.

(g) An explanation of the methods to be used for selecting and training mediators.

(h) Such additional information as is determined to be needed by the Commission.

1143.25 Data supplied by each applicant shall be used to assign relative funding priority on the basis of criteria developed by the Commission. Such criteria may include, but are not limited to, all of the following in addition to the criteria set forth in Section 1143.16:

(a) Unit cost, according to the type and scope of the proposed program.

(b) Quality and validity of the program.

(c) Number of participants who may be served.

(d) Administrative capability.

(e) Community support factors.

Article 5. Payment Procedures

1143.26 Upon the approval of the Commission, funds appropriated or available for the purposes of this chapter shall be used for the costs of operation of approved programs. Not more than 10 percent of State funds appropriated shall be used to finance the administration by the Commission of this program. All monies appropriated pursuant to this chapter shall be apportioned and distributed for Centers among the communities of the state, taking into account the respective population, needs and existing dispute resolution facilities of each such community. The methods of payment or reimbursement for dispute resolution costs shall be specified by the Commission and may vary among Centers. All such arrangements shall conform to the eligibility criteria of this chapter and the rules and regulations of the Commission.

Article 6. Funding

1143.27 The Commission may accept and disburse from any public or private agency or person, any money for the purposes of this chapter.

1143.28 The Commission may also receive and disburse federal funds for purposes of this chapter, and perform services and acts as may be necessary for the receipt and disbursement of such federal funds.

(a) A Grant Recipient may accept funds from any public or private agency or person for the purposes of this chapter.

(b) The state controller, the Commission and their authorized representatives, shall have the power to inspect,

examine and audit the fiscal affairs of the Centers and the programs under this chapter.

(c) Centers shall, whenever reasonably possible, make use of public facilities at free or nominal costs.

1143.29 The State share of the cost of any Center approved under this chapter may not exceed fifty per cent of the approved estimated cost of the program; provided that a Center in its first year of operation, may, at the Commission's discretion, receive up to 100 percent of the estimated cost of the program, not to exceed $20,000.

Article 7. Rules and Regulations

1143.30 The Commission shall promulgate rules and regulations pursuant to the Administrative Procedures Act to effectuate the purposes of this chapter.

1143.31 Each Center funded pursuant to this chapter shall annually provide the Commission with statistical data regarding the operating budget, the number of referrals, categories or types of cases referred, a number of parties serviced, number of disputes resolved, nature of resolution, rate of compliance, returnees to the resolution process, duration and estimated costs of hearings and such other information as the Commission requires for quantitative and qualitative analyses. Such data shall maintain the confidentiality and anonymity of the parties to the dispute resolution process. The Commission shall thereafter report annually to the governor and the legislature regarding the operation and success of the Centers funded pursuant to this chapter. Such annual reports shall also evaluate and make recommendations regarding the operation and success of such Centers.

Section 2. Appropriation of State Funds

The sum of $2,500,000 or so much thereof as may be necessary, is hereby appropriated from any monies in the general fund to the credit of the State purposes fund and not otherwise appropriated and made immediately available to the Commission to carry out the provisions of this chapter. Such state monies shall be in addition to any federal funds otherwise available for such purposes and shall be payable out of the state treasury after audit by and on the warrant of the comptroller on vouchers certified or approved by the Commission as prescribed by law.

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MICHAEL D. BERK
DIRECT DIAL (213) 739-9136

December 13, 1984

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303

Re: Comments on Tentative Recommendation Relating to Protection of Mediation Communications (November, 1984)

Gentlepersons:

I approve the tentative recommendation, except I believe that the provision of subsection (1)(c) should be deleted as it potentially emasculates the salutory effect of the entire proposed statute. The similar exception contained in Evidence Code section 1024 is much more readily understandable, as a psychotherapist might well receive confidential information disclosed by a patient who is dangerous to himself or others. The prospect of this occurring in the context of mediation communications seems remote, while the opportunity to assert this exclusion raises uncertainty as to the prospects that such communications would be maintained in confidence.

I believe that the proposed statute could have an even more beneficial effect if it were not limited to mediation between parties to a pending civil action or proceeding and require the execution of a specific written agreement.

Thank you for the opportunity to comment on the Tentative Recommendation.

Very truly yours,

McKENNA, CONNER & CUNEO

By
Michael D. Berk

MDB:lk

THE CENTER FOR THE DEVELOPMENT OF MEDIATION IN LAW

Gary Friedman, Director 34 Forrest Street Mill Valley California 94941 Telephone (415) 383-1300

November 26, 1984

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

Re: Tentative Recommendation

Dear Mr. DeMoully:

The purpose of this letter is to reiterate in the strongest possible terms our previously stated objection to the proposed requirement that mediation communications will be protected only if there is pending litigation.

To require people who want to avoid the necessity of a lawsuit to sue each other in order to protect their communication promotes a policy of increasing rather than decreasing litigation. It also suggests that mediation is appropriate only after litigation has commenced.

We are unable to understand what useful purpose may be served by such a seemingly contradictory policy. The requirement of a signed writing by the parties would surely be more than sufficient notice to the parties that they seriously intend to avail themselves of the protection. Requiring a lawsuit can only serve to escalate rather than reduce the hostilities that the parties may be feeling. We would be more than willing to explain our views further if you would find that useful.

We look forward to your response.

Yours truly,

Gary J. Friedman

Steve Neustadter

GJF:sls

EXHIBIT 4

STEVEN M. KIPPERMAN
LAW CORPORATION
415 MERCHANT STREET, SUITE 200
SAN FRANCISCO, CALIFORNIA 94111
(415) 397-8600

November 26, 1984

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303

Re: Tentative Recommendation Relating to Protection of Mediation Communications

Dear Sir or Madam:

My comments on the above-referenced tentative recommendation are as follows:

First, it strikes me that this is a case of your trying to fix something that "ain't broke". I do a considerable amount of civil litigation in both State and Federal Court. In the course of my practice I have had numerous occasions to discuss with other lawyers in several contexts the possibility of some kind of informal mediation as an aid in trying to resolve the disputes. Also, I have actually participated in such endeavors. Never, ever, on any occasion in the course of those discussions has there been reticence to proceed or participate expressed by any attorney because of the so-called conclusion that "legislation is needed" or that such legislation would make mediation "more useful".

Second, the enactment of your proposed Evidence Code § 1152.5 is going to cast grave doubt on what I suspect is the assumption of many that mediation has always been protected by § 1152's "statements made in negotiation" of offers of settlement. I suspect that if you really feel mediation has to be expressly covered under § 1152, that a simple addition to that provision is "the way to go" rather than create a separate scheme with special provisions as you seem to be proposing. Actually, enacting § 1152.5 might be fuel for arguments that mediation prior to its enactment was never covered by § 1152 and hence is admissible when the expectations of the parties was exactly to the contrary.

Third, I am flabbergasted by what is either an absolutely incorrect or incredibly sloppy statement of the law which I find in footnote 2 of your tentative recommendation. I am sure it will come as startling news to all practitioners that "evidence code provisions relating to privileges . . . relate only to the admission of evidence . . . [and] not . . . [to] the duty of a lawyer . . . not to disclose confidential communications in other situations, such as in casual conversation." I presume that the reference to "privileges" is inadvertent in the footnote and that what you meant to say was "the evidence code provisions [of § 1152]". I find nothing in Evidence Code Sections 901 or 910 that supports your extraordinary proposition that I am free at casual conversation to divulge all confidential communications of my clients.

Fourth, if for some mysterious reason you want to enact such a Section such as 1152.5, I should think you would wish to deal expressly with what will unquestionably be a problem arising immediately. It is this: Supposing a multi-party case; two (or less than all) parties enter into mediation governed by § 1152.5. In the course of that mediation, one or more of those parties makes admissions that are particularly helpful to the non-participating parties who may, for example, be cross-complaining for indemnity against one or more of the participating parties. Is your Subsection (a) to be construed when it uses the word "parties" to mean "all parties"? If not, have you really given adequate thought to the policy reasons why as to a non-participating party, admissions made by participating parties should not be admissible in favor of the non-participating party? Literally read, that would seem to be the effect of § 1152.5(a)(1), and personally I think the result "stinks".

In conclusion, I am distressed at footnote 2, find no empirical evidence that any such legislation as is proposed is necessary, think instead you should do nothing or at the most expressly bring mediation within § 1152, and should give some thought to the multi-party situation where not all participate.

Very truly yours,

STEVEN M. KIPPERMAN

SMK/lbs

STEVEN M. KIPPERMAN
LAW CORPORATION
415 MERCHANT STREET, SUITE 200
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(415) 397-8800

December 3, 1984

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

Re: Mediation Communications

Dear Mr. DeMoully:

Thank you for your letter of November 29, 1984. I could not agree more with you that the Evidence Code will prevent admission in "proceedings" even of otherwise privileged matters improperly disclosed in casual conversation.

My only objection was the implication in the footnote that nothing even in the Evidence Code would apply to casual conversation or that no other restrictions on casual conversation exist.

Do not get me wrong -- you wrote a fine Evidence Code!

Very truly yours,

STEVEN M. KIPPERMAN

SMK/lbs

November 29, 1984

Steven M. Kipperman
415 Merchant Street, Suite 200
San Francisco, CA 94111

Re: Tentative Recommendation Relating to Protection of Mediation Communications

Dear Mr. Kipperman:

Your thoughtful letter to the Commission concerning the above subject will be very useful to the Commission in determining whether or not a recommendation should be made to the Legislature on this subject and the substance of the recommendation if one is made. We appreciate your taking the time to send us your views.

The tentative recommendation was prepared at the suggestion of persons who devote a substantial portion of their time to mediation. They advised the Commission that a specific protective provision was needed. We distributed the tentative recommendation so that others involved in the field can give us the benefit of their experience. We wanted to get the reaction of others involved in mediation before we made any final decisions.

The idea that the Evidence Code privileges are not limited to proceedings where testimony can be compelled is a common one. The codes of ethics of various professions, including some not covered by an Evidence Code privilege, preclude disclosure of communications, for example, in casual conversations. Even though so disclosed, the statutory privilege will still apply to prevent disclose of the communication in a proceeding where testimony can be compelled. The footnote was included to avoid any implication that, for example, the mediator could disclose a mediation communication in a casual conversation merely because the requirements of the statutory provision were not met (such as the written agreement that the communication be kept confidential). This is really a collateral matter, however, and it might be best to eliminate the the discussion in view of the concern you express. I have some familiarity with the matter because I was the primary draftsman of the Evidence Code that was enacted in 1965.

Sincerely,

John H. DeMoully
Executive Secretary

JHD/vvm

Cal. State
Bar # 3747

GARRETT H. ELMORE

777 Marshall Street

Redwood City, Calif. 94063-1818 Tel.367-0554

December 12, 1984

California Law Revision Commission
and John H. DeMoully, Esq.
4000 Middlefield Road D-2
Palo Alto, Ca. 94303

Re: Tentative Recommendation-Mediator Communications

Dear Members and Mr. DeMoully:

The purpose of this letter is to call attention to what I consider to be pitfalls and shortcomings in proposed new Evid. C 1152.5 and to request that action be delayed until the proposal can be more fully aired and commented upon.

As one who has long been observant of proposals affecting civil procedure and practice,I do not believe it appropriate for your Commission to let loose its very considerable legislative influence on this unusual type of code change.

In all candor, the study itself (Tentative Recommendation) consisting of only 5 pages, first, does not go into what the recommendation is all about in terms of impact or "tilt" in the conduct of civil litigation, and, second, has form problems.

In present form, the Act would give official state (California) recognition to the policy of having"mediators" (whose qualifications are not prescribed) take a hand in disposing of civil actions in state courts (at what stage -trial or appellate or both is not stated). Though the Act does not so state, the Recommendation makes clear that the thrust of the Act on "evidence" is to make mediation a more useful means of resolving civil litigation and thereby reduce court congestion. See Recommendation (11/14/84) , p. 1.

The proposal can be objected to on the ground that it is a "special interest" approach placed in the Evidence Code.If there is to be a system of "mediators" whose use is "encouraged" by the State, the proper placement is in the CCP; any lack in the present statutes on non prejudice of statements can be covered by amendment of Evid C 1152, as a minor amendment.

It should not be possible to present half or one quarter of a proposal to the Legislature, on the promise that more will be added or on the excuse that there are too many types of mediation or med-

iators to draft a statute (see Recommendation, p. 2, fn.3).

Since the proposal is aimed at relieving court congestion- a broad argument that has no supporting studies or analysis as to how the system would work or encroach on existing practice-at least some outline of what the proponents have in mind is needed.Who will pay the mediators? Will there be a staff mediator or mediators attached to a superior court? Will mediation be"promoted" by master calendar or presiding judges? May mediators solicit employment from parties to pending civil actions or only from counsel of record? To what extent may mediators exclude attorneys in the mediation services. It is not necessarily true that the mediation service provided in child custody and visitation contests (Civ. C 1747) is appropriate for business litigation, personal injury and other tort cases, or in contested probate matters.Where are the mediators that as independent contractors or as a new judicial officer can perform the difficult services with fairness to the members of the public and to the attorneys (who have the primary responsibility).

It is somewhat disturbing that the Tentative Recommendation does not mention the existing settlement calendars that have done much in reducing court time and expense. See Cal. Rule of Court 207.5, also local rules on settlement conferences and pre trial rules (Cal. Rule of Court 211 (d). Each cited rule has its own "non prejudice" provisions; they differ markedly from that proposed by the new Act.

The background, prestige and skill of the judge presiding at settlement conferences all contribute.Will a"semi forced"settlement (if brought about by the practices of mediators)have the same public satisfaction as judge-supervised settlements? What will be mediator "ethics"?

It is not suggested that the present judge's settlement calendar is sufficient or that practices started almost 20 years ago cannot be improved. It may be a worked out mediation "chapter" can be done.

Unfortunately,once a Commission bill is authorized, events can rapidly occur at the Legislature.It has been my experience that proposed legislation and studies have to be brought to the special attention of groups that traditionally are active in the general field.

It therefore is suggested that the Commission seek the comments of the Administrative Office of the Courts/Judicial Council, California State Bar or a committee, California Trial Association, defense counsl groups, before going ahead with the proposal. It is believed a little more background than is reflected by the Tentative Recommendation should be supplied.

Any general system of the wide spread use of mediation to reduce civil court congestion, in my opinion, will require (1) enabling legislation, and (2) implementing rules by the Judicial Council, to mark limits, procedures, expense payment/shifting, and a method of establishing qualifications.The mandatory arbitration statute/rules of a few years ago were worked out this way.

Objections To Form

1. The Act is ambiguous as to the "non prejudice" presently given by Cal. Rule of Court 211 (d) (pre trial-except for pre trial order, the conference shall not be referred to at trial or otherwise used, with a limited exception), and Cal.Rule of Court 207.5 (if case is not settled, no reference may be made thereafter to any settlement discussion, except in subsequent settlement discussion). See Act, subd. (e), (f)-omitting any reference to the above rules.Also, there may be other statutes or rules to be preserved, expressly.

2. The Act creates an overlap. In excluding present Evid C 1152 (subd. (f)) and leaving it in effect, the party or attorney may be inclined to rely on §1152 as sufficient and as not containing the new wording and exceptions of proposed 1152.5. Though no decision in California was found stating that a mediation is a process for compromise and therefore within §1152, it seems reasonably clear that the purpose of mediation ordinarily is to obtain a compromise; therefore, Evid. C. 1152.5 is duplicative.The careful practitioner, however, might opt to take the more cumbersome and less protective § 1152.5, to be on the safe side.

3. Par. (c) of the Act creating an exception to the rule of nonadmissibility where "there is reasonable cause to believe that admission is necessary to prevent or minimize the danger of injury to person or damage to property "is vague in this context. Likewise, the express exception of a criminal action use of the evidence may well deter free speaking in the mediation sessions. It may depend upon warnings (in addition to the agreement stating the law itself) or upon the degree of formality or in the mediator's style.

These factors emphasize the need for rules doverning this type of mediation if such is to be the state policy.

4.In (b), the provision that one party, i.e, the person from whom the information was obtained, may consent to disclosure is undesirable. It permits unilateral action and piecemeal publicity favorable to the party releasing the information. Generally, according to public accounts of mediation, the mediator requires privacy by the parties until announcement of agreement. See also Labor C.65,66 (mediation under Department of Industrial Relations records of department are confidential except for the decision).

5. Addition of §1152.5 in present form will present a confusing network of statutes and rules on the same subject matter, to wit, statements and records in mediation proceedings and settlement calendar in court. The test in Evid. C. 1040 (official information "privilege") is adopted in Civ. C 1747 and for the court conciliator; court settlement rules have another test, and it seems Evid C.1152 also applies.

6. There seems no logical distinction between mediation to avoid filing a civil suit and mediation after one is filed.Why should a provision relating to evidence not be of general application?Note present § 1152.

Suggestion

It is submitted the present Tentative Recommendation should be withdrawn in effect or substantially changed, so that the Recommendation clarifies the evidence law as to statements made or writings produced for mediation of civil disputes, in or out of court.

That is the framework of present Evid. C. 1152. Section 1152 can be re-worked within narrow limits.

The problem of the role, if any, of a substantial body of mediators in attempting to help resolve civil actions (including contested probabe matters) , in addition to or in lieu of present court supervised settlement discussions, should be left to other entities.

Yours very truly,

Garrett H. Elmore

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