CALIFORNIA LAW REVISION COMMISSION
4000 MIDDLEFIELD ROAD, ROOM D-1
PALO ALTO, CA 94303-4739
(415) 494-1335 FAX: (415) 494-1827
Email: *addressee*@clrc.ca.gov

December 2, 1996

Date: December 12, 1996	*Place:* Los Angeles
Dec. 12 (Thursday) 9:00 am – 5:00 pm	Crowne Plaza LAX 5985 West Century Boulevard (310) 642-7500
Changes may be made in this agenda, or the meeting may be rescheduled, on short notice. **If you plan to attend the meeting, please call (415) 494-1335 and you will be notified of any late changes.**	
Most Commission meeting materials are available on the Internet at: `http://www.clrc.ca.gov`	

PLEASE NOTE LOS ANGELES LOCATION

FINAL AGENDA

for meeting of the

CALIFORNIA LAW REVISION COMMISSION

1. MINUTES OF NOVEMBER 14-15, 1996, MEETING (sent 11/27/96)

2. ADMINISTRATIVE MATTERS

   Report of Executive Secretary

3. LEGISLATIVE PROGRAM

   1997 Legislative Program
   Memorandum 96-82 (NS) (to be sent)

   Unfair Competition (Study B-700)
   Memorandum 96-88 (SU) (to be sent)

4. JUDICIAL REVIEW OF AGENCY ACTION (STUDY N-200)

   Draft of Final Recommendation
   Memorandum 96-83 (RM) (sent 11/25/96)

   Local Agency Issues
   Memorandum 96-84 (RM) (to be sent)

   Conforming Revisions
   Memorandum 96-85 (RM) (sent 11/25/96)

5. MEDIATION COMMUNICATIONS (STUDY K-401)

Draft of Final Recommendation
Memorandum 96-86 (BG) (to be sent)

6. CONFIDENTIALITY OF SETTLEMENT NEGOTIATIONS (STUDY K-410)

Memorandum 96-59 (BG) (sent 10/28/96)
First Supplement to Memorandum 96-59 (to be sent)

7. SEVERANCE OF JOINT TENANCY BY DISSOLUTION OF MARRIAGE (STUDY H-603)

Memorandum 96-87 (BH) (to be sent)

MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
DECEMBER 12, 1996
LOS ANGELES

A meeting of the California Law Revision Commission was held in Los Angeles on December 12, 1996.

Commission:

Present: Allan L. Fink, Chairperson
Christine W.S. Byrd, Vice Chairperson
Dick Ackerman, Assembly Member
Arthur K. Marshall
Edwin K. Marzec
Sanford Skaggs

Absent: Robert E. Cooper
Bion M. Gregory, Legislative Counsel
Quentin L. Kopp, Senate Member
Colin Wied

Staff: Nathaniel Sterling, Executive Secretary
Stan Ulrich, Assistant Executive Secretary
Barbara S. Gaal, Staff Counsel
Brian P. Hebert, Staff Counsel
Robert J. Murphy, Staff Counsel

Consultants: Michael Asimow, Administrative Law

Other Persons:

Ken Babcock, Public Counsel, Los Angeles
Ron Kelly, Berkeley
Dan Kolkey, Governor's Office, Sacramento
Earl Lui, Consumers Union, San Francisco
Anthony Mischel, Department of Industrial Relations, Los Angeles
Thomas A. Papageorge, California District Attorneys Association and Los Angeles District Attorney's Office , Los Angeles
James C. Sturdevant, The Sturdevant Law Firm and Consumer Attorneys of California, San Francisco
Barbara Wheeler, Association for California Tort Reform, Sacramento

CONTENTS

MINUTES OF NOVEMBER 14-15, 1996, MEETING

The Minutes of the November 14-15, 1996, Commission meeting were approved as submitted by the staff.

ADMINISTRATIVE MATTERS

Report of Executive Secretary

Consultant contracts. The Executive Secretary reported that Judge Joseph B. Harvey is retiring from the Lassen County Superior Court, and has indicated his interest in acting as a consultant for the Commission on Evidence Code studies. Judge Harvey was the principal draftsman of the Evidence Code at the time he was employed by the Commission as Assistant Executive Secretary. Since then he was in private practice in the Bay Area and in Susanville before becoming a judge. The Executive Secretary will take the necessary steps to engage Judge Harvey's services.

Public utilities restructuring consultation. The Executive Secretary noted that the staff is monitoring the progress of the Public Utilities Commission in its effort to overhaul the Public Utilities Code in light of utilities deregulation. The Public Utilities Commission is required by statute to do the code overhaul "in consultation with" the Law Revision Commission. The Executive Secretary reported that the Public Utilities Commission has requested input from key interested and affected persons and entities, and that it is receiving the input this month. The staff has not yet seen any of the input or any drafts produced by the Public Utilities Commission.

LEGISLATIVE PROGRAM

The Commission considered Memorandum 96-82, relating to the status of the Commission's 1997 legislative program.

The Executive Secretary reported that the recommendation on administrative adjudication by quasi-public entities has now been introduced by Senator Kopp as SB 68 and the Commission's resolution of continuing authority has been introduced by Senator Kopp as SCR 3.

The two recommendations on real property covenants had previously been delivered to Senator Calderon. However, he will no longer be Chair of Senate Judiciary Committee in 1997; the Judiciary Committee staff is continuing to review the proposals, however, looking into the possibility of a committee bill that incorporates them.

STUDY B-700 – UNFAIR COMPETITION LITIGATION

The Commission considered Memorandum 96-88 and its First and Second Supplements concerning the recommendation on *Unfair Competition Litigation*. The Commission made a number of revisions in the recommendation, which will be revised before printing and introduction in the 1997 legislative session.

§ 17302. Absence of conflict of interest and adequate legal representation

This section should require the plaintiff to be an adequate representative of the general public. The Commission decided not to require the plaintiff to have sustained the injury complained of; this should be made clear in the statute. As revised, Section 17302 would read substantially as follows:

> 17302. (a) A private plaintiff in a representative action must be an adequate representative of the interests of the general public plead and may not have a conflict of interest that reasonably could compromise the good faith representation of the interests of the general public pled. The private plaintiff is not required to have sustained any injury by the defendant.
>
> (b) The attorney for a private plaintiff in a representative action must be an adequate legal representative of the interests of the general public pled.
>
> (c) On noticed motion of a party or on the court's own motion, the court shall determine by order whether the requirements of subdivisions (a) and (b) are satisfied. The determination may be based on the pleadings. ~~Discovery is not available, but the~~ The court may inquire into the matters in its discretion or may permit discovery. In making its determination, the court shall consider standards applied in class actions. If the court determines that the requirements of subdivisions (a) and (b) are not satisfied, the representative cause of action shall be stricken from the complaint.

(d) An order under this subdivision may be conditional, and may be modified before judgment in the action.

(e) This section does not preclude the court from granting appropriate preliminary relief before a determination is made under subdivision (c).

Comment. Section 17302 sets forth the prerequisites in a representative action for unfair competition or false advertising of (a) the plaintiff's adequacy to represent the general public and absence of a conflict of interest ~~on the part of the plaintiff~~ and (b) adequacy of counsel to represent the general public. Section 17302 does not require the private plaintiff to be a member of the injured group the plaintiff seeks to represent. Under subdivision (a), if a plaintiff is pursuing a cause of action as an individual and at the same time is seeking to represent the interests of the general public, it would be appropriate for the court to consider whether the plaintiff can adequately perform this dual role and represent the interests of the general public in good faith. This section does not provide a specific conflict of interest standard applicable to the plaintiff's attorney in the representative action; but lack of conflict of interest is an element of the overall adequacy of counsel standard by analogy with class action law. See, e.g., 7A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1769.1, at 383-84 (1986) & Supp. at 37 (1996).

Subdivision (c) provides the procedure for determining that the requirements of subdivisions (a) and (b) are met. The court is given broad discretion in making its determination, including the power to investigate any issues that arise, ~~but~~ and may make an order permitting discovery ~~is specifically forbidden in the interests of efficiency~~. The plaintiff cannot obtain a ruling on the merits of the complaint without first satisfying this section. See Section 17307(b)(3)-(4) (findings required for entry of judgment).

Subdivisions (c) and (d) are drawn in part from Rule 23(c)(1) of the Federal Rules of Civil Procedure, applicable to class actions.

See also Section 17300(c) ("representative cause of action" defined).

§ 17305. Notice of terms of judgment in contested enforcement action

This section requiring prosecutors to give 45 days' notice of the terms of a proposed judgment in contested cases was deleted from the recommendation.

§ 17308. Dismissal, settlement, compromise

Section 17308 should be revised as follows:

> 17308. A representative cause of action may not be dismissed, settled, or compromised without the approval of the court ~~and substantial compliance with the requirements of this chapter.~~ and a determination that the disposition of the representative cause of action is fair, reasonable, and adequate to protect the interests of the general public pled. The court, in its discretion, may set the matter for hearing on notice to persons who would receive notice under Section 17307.

§ 17310. Priority between prosecutor and private plaintiff

Subdivision (a) of this section should be revised to avoid any implication that it provides a priority for one kind of order over another. The Comment should note: "Under subdivision (a), the court may make any appropriate order in the interest of justice. The subdivision does not provide any preference among the various orders that the court may make."

STUDY K-401 – MEDIATION CONFIDENTIALITY

The Commission considered Memorandum 96-86, the attached staff draft recommendation, the First Supplement to Memorandum 96-86, and an electronic mail message from Nicholas Dewar (Exhibit p. 1). The staff is to prepare a new draft for the next meeting, which should track the organization proposed in the First Supplement to Memorandum 96-86 (Exhibit pp. 3-8). The new draft should incorporate the following decisions:

Definitions and scope of chapter (§ 1120 of staff draft recommendation)

The two sentences defining "mediator" should be combined: "'Mediator' means a neutral person who conducts a mediation and who has no authority to compel a result or render a decision on any issue in the dispute." As suggested by the California Dispute Resolution Council ("CDRC"), the definition should also state that "mediator" includes "any person designated by a mediator either to assist in the mediation or to communicate with the parties in preparation for a mediation."

The definition of "mediation" should be revised to read: "'Mediation' means a process in which a mediator facilitates communication between disputants to assist them in reaching a mutually acceptable agreement compromising, settling, or resolving a dispute in whole or in part." The Comment should explain that because a "mediator" must lack authority to render a decision, a nonbinding arbitration is not a "mediation."

The definitions of "mediator" and "mediation" focus on function (what happens, what role a person plays), not on label (whether a proceeding is called a "mediation" or is conducted by a person who uses the title "mediator"). The Comment should point this out.

As proposed in the First Supplement to Memorandum 96-86, the next draft should incorporate a definition of "mediation consultation." The staff is to explore ways of defining that term.

On distinguishing between a mediation and a settlement conference, the next draft should: (1) make clear in statutory text that the chapter is not limited to voluntary mediation, (2) provide that where a court has authority to order a mediation and the mediation meets the requirements of the chapter on mediation confidentiality, the protection of the chapter applies to the mediation, (3) specify that the chapter does not apply to other court programs to facilitate settlement, and (4) explain that the chapter supplements, not restricts, the means by which courts may promote settlement.

Mediation-arbitration (§ 1121 of staff draft recommendation)

The last sentence of the mediation-arbitration statute should be revised as suggested by CDRC: "In arbitrating or otherwise deciding all or part of the dispute, that person may not consider any information from the mediation that is subject to the protection of this chapter unless all of the mediation parties expressly agree in writing before or after the mediation that the person may use specific information from the mediation." The redraft should also provide that an oral agreement satisfying the following conditions will suffice instead of an agreement "in writing": (1) the oral agreement is recorded by a court reporter or by a tape recorder or other reliable means of sound recording, (2) the mediator recites the terms of the oral agreement on the record, and (3) the parties to the oral agreement expressly state on the record that the agreement is enforceable or binding or words to that effect. The staff should incorporate that concept throughout the chapter on mediation confidentiality.

Mediation confidentiality (§ 1122 of staff draft recommendation)

As suggested by the State Bar Litigation Section, the introductory clause of subdivision (a) should be deleted. Subdivision (g) should also be deleted. The Comment should explain that presence of an observer does not affect the confidentiality of a mediation. The attorney's fees provision should read:

> If a person subpoenas or otherwise seeks to compel a mediator to testify or produce a document, and the court or other adjudicative body finds that the testimony or document is inadmissible or protected from disclosure under Section 703.5 or this chapter, the court or adjudicative body making that finding shall award reasonable attorney's fees and costs to the mediator against the person seeking that testimony or document.

The Comment should explain that because the definition of "mediator" includes not only the neutral person who takes the lead in conducting a mediation, but also any neutral who assists in the mediation, "fees are available regardless of the role played by the person subjected to discovery."

Mediator reports and communications (§ 1123 of staff draft recommendation)

The leadline of the statute restricting communication between a mediator and the adjudicative tribunal should be "mediator reports and communications." Subdivision (a) should be revised as follows:

> (a) Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than ~~a required statement of agreement or nonagreement~~ a report that is mandated by court rule or other law and states only whether an agreement was reached, unless all parties in the mediation expressly agree otherwise in writing ~~before the mediation~~.

Consent to disclosure (§ 1127 of staff draft recommendation)

The statute governing consent to disclosure of mediation communications should be revised along the following lines:

> Notwithstanding Section 1122, a communication, document, or any writing as defined in Section 250, that is made or prepared for the purpose of, or in the court of, or pursuant to, a mediation, may be admitted or disclosed if any of the following conditions exist:
>
> (a) All persons other than the mediator who conduct or otherwise participate in the mediation expressly ~~consent~~ agree in writing to disclosure of the communication, document, or writing.
>
> (b) The communication, document, or writing ~~is an expert's analysis or report, it was prepared for the benefit~~ was prepared by or on behalf of fewer than all the mediation participants, those participants expressly ~~consent~~ agree in writing to its disclosure, and

> the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation.

Conforming revisions

The redraft should incorporate a conforming revision of Labor Code Section 65, along the lines requested by the Department of Industrial Relations:

> 65. The department may investigate and mediate labor disputes providing any bona fide party to such dispute requests intervention by the department and the department may proffer its services to both parties when work stoppage is threatened and neither party requests intervention. In the interest of preventing labor disputes the department shall endeavor to promote sound union-employer relationships. The department may arbitrate or arrange for the selection of boards of arbitration on such terms as all of the bona fide parties to such dispute may agree upon. ~~Records of the department relating to labor disputes are confidential; provided, however, that any decision or award arising out of arbitration proceedings shall be a public record.~~ Any decision or award arising out of arbitration proceedings conducted pursuant to this section shall be a public record. The provisions of Evidence Code section 703.5 and of Evidence Code Division 9, Chapter 2, beginning with section 1120, apply to all mediations conducted by the California State Mediation and Conciliation Service and to the persons presiding over those mediations.

STUDY N-200 – JUDICIAL REVIEW OF AGENCY ACTION

The Commission considered Memorandum 96-83 and attached staff draft of a recommendation on *Judicial Review of Agency Action*, and Memorandum 96-84 on local agency issues. The Commission also noted Memorandum 96-85 on conforming revisions which was presented for information only. The Commission made the following decisions and approved the recommendation for submission to the Legislature as so revised.

§ 1121. Proceedings to which title does not apply

The Commission considered the staff recommendation to exempt ordinances and resolutions of a county board of supervisors or a city council from the draft statute. The Commission noted that a resolution may be used for action that is not legislative, and did not want a resolution used for non-legislative action to be exempt. The Commission wanted to limit the exemption to legislative action

where the power to act derives from original jurisdiction granted by the California Constitution. See Cal. Const. art. XI (local government).

§ 1121.240. Agency action

The Commission did not adopt the statutory language suggested by staff. Rather the Commission suggested putting language in the Comment substantially as follows:

> Judicial review of an agency's failure to perform a duty, function, or activity contemplates, of course, that the agency is authorized by law to perform the duty, activity, or function.

§ 1121.260. Local agency

The Commission approved the staff recommendation to add the following to the Comment:

> Under Government Code Section 54951, "local agency" means "a county, city, whether general law or chartered, city and county, town, school district, municipal corporation, district, political subdivision, or any board, commission or agency thereof, or other local public agency."

§ 1122.030. Concurrent agency jurisdiction

The Commission approved the staff recommendation to delete the words "only" and "clearly" from subdivision (a).

§ 1123.140. Exception to finality and ripeness requirements

The Commission approved the staff recommendation to revise the introductory clause of Section 1123.140 as follows:

> 1123.140. ~~A~~ Notwithstanding Sections 1123.120 and 1123.130, a person may obtain judicial review of agency action that is not final or, in the case of an agency rule, that has not been applied by the agency, if all of the following conditions are satisfied:

§ 1123.160. Condition of relief

The Commission revised Section 1123.160 as follows:

> 1123.160. (a) The court may grant relief under this chapter only on grounds specified in Article 4 (commencing with Section 1123.410) for reviewing agency action.
>
> (b) The court may grant relief under this chapter from procedural error only if the error was prejudicial.

§ 1123.310. Exhaustion required

The Commission approved the staff recommendation not to include a general requirement of a demand on the agency to correct its action as a condition of judicial review in every case.

§ 1123.350. Exact issue rule

The Commission asked the staff to get from local agency representatives citations to statutes requiring notice before deciding whether to include a provision that notice of a proceeding given in compliance with a statute is adequate notice for the purpose of the exact issue rule.

§ 1123.410. Standards of review of agency action

The Commission approved the staff recommendation to add the following to the Comment:

> The appropriate review standard of this article to be applied by the court depends on the issue being considered. For example, in exercising discretion, an agency may be called upon to interpret a statute, to determine basic facts, to apply the law to the facts, and to make the discretionary decision. In reviewing this action, the court would use the standard of Section 1123.420 (independent judgment with appropriate deference) in reviewing the statutory interpretation and the application of the law to the facts, the standard of Section 1123.430 (substantial evidence) or 1123.440 (substantial evidence or independent judgment) in reviewing the determination of basic facts, and the standard of Section 1123.450 (abuse of discretion) in reviewing the exercise of discretion.

§ 1123.420. Review of agency interpretation or application of law

The Commission thought subdivision (a)(5) ("[w]hether the agency has erroneously applied the law to the facts") was satisfactory and should not be revised. The Commission approved the staff recommendation to revise the first sentence of the ninth paragraph of the Comment as follows:

> Agency application of law to facts <u>(see subdivision (a)(5))</u> should not be confused with an exercise of discretion that is based on a choice or judgment.

§ 1123.630. Notice to parties of last day to file petition for review

The Commission asked the staff to replace the single notice of the last day for judicial review with a more finely-tuned notice to reflect the limitations period applicable in the particular type of proceeding.

The staff should recheck to see if there are special limitation periods shorter than 30 days, such as 15 days.

§ 1123.640. Time for filing petition for review in adjudication of state agency and formal adjudication of local agency

§ 1123.650. Time for filing petition for review in other adjudication

The Commission approved the staff recommendation to revise paragraph (2) of subdivision (c) of Section 1123.640, and paragraph (2) of subdivision (b) of Section 1123.650, as follows:

> (2) If, within 15 days after the decision is effective, the party makes a written request to the agency to prepare all or any part of the record and pays the fee provided in Section 1123.910, until 30 days after the record is delivered to the party.

The Commission asked the staff to recheck the reference to Government Code Section 65907 in the Comment to Section 1123.640 to make sure it is still appropriate in light of revisions to Government Code Section 65009. In the Comment to Section 1123.650, the citation to Government Code Section 65009 should refer also to setting aside a zoning ordinance.

§ 1123.730. Type of relief

The Commission approved the staff recommendation to revise subdivision (b) as follows:

> (b) The court may award damages or compensation, subject to any of the following that are applicable:
>
> (1) Division 3.6 (commencing with Section 810) of the Government Code~~, if applicable, and to other~~ .
>
> (2) The procedure for a claim against a local agency prescribed in a charter, ordinance, or regulation adopted pursuant to Section 935 of the Government Code.
>
> (3) Other express statute.

§ 1123.810. Administrative record exclusive basis for judicial review

The Commission decided not to revisit the question of whether open record review should be provided for non-CEQA quasi-legislative action of a local

legislative body. The Commission thought the action should be reviewed in the context of facts available to the decisionmaker at the time of the decision, and not justified in court by constructing a rationale after the fact. However, there was concern that the provision is drafted largely with state agencies in mind, and that the staff should consider whether it works well in the context of local agency proceedings. The staff should invite local agency representatives to a Commission meeting to present their views on this.

§ 1123.820. Contents of administrative record

The Commission revised subdivision (a) as follows:

> 1123.820. (a) Except as provided in subdivision (b), the administrative record for judicial review of agency action consists of all the following:
>
> . . . .
>
> (6) ~~A table of contents that identifies each item contained in the record and includes an~~ An affidavit of the agency official who has compiled the administrative record for judicial review specifying the date on which the record was closed and that the record is complete.
>
> (7) Any other matter prescribed by rules of court adopted by the Judicial Council.

§ 1123.830. Preparation of record

The Commission approved the staff recommendation to revise subdivision (b) as follows:

> (b) Except as otherwise provided by statute, the administrative record shall be delivered to the petitioner as follows:
>
> (1) Within 30 days after the request and payment of the fee provided in Section 1123.910 in an adjudicative proceeding involving an evidentiary hearing of 10 days or less.
>
> (2) Within 60 days after the request and payment of the fee provided in Section 1123.910 in a nonadjudicative proceeding, or in an adjudicative proceeding involving an evidentiary hearing of more than 10 days.

The Commission asked the staff to consider whether there should be a provision for the court to order the agency to produce the record, or to require the agency to refund the fee, when the agency fails to do so in a timely manner.

§ 1123.850. New evidence on judicial review

The Commission approved the staff recommendation to revise subdivision (c) of Section 1123.850 as follows:

> (c) Whether or not the evidence is described in subdivision (a), the court may receive evidence in addition to that contained in the administrative record for judicial review without remanding the case ~~if no~~ in either of the following circumstances:
>
> (1) No hearing was held by the agency, and the court finds that ~~(i)~~ remand to the agency would be unlikely to result in a better record for review and ~~(ii)~~ the interests of economy and efficiency would be served by receiving the evidence itself. This ~~subdivision~~ paragraph does not apply to judicial review of rulemaking.
>
> (2) Judicial review is sought solely on the ground that agency action was taken pursuant to a statute or ordinance that is unconstitutional.

Dan Siegel of the Attorney General's Office supported this provision, and Professor Asimow thought it was fine.

The Commission approved the staff recommendation to add the following to the first paragraph of the Comment to Section 1123.850:

> For rulemaking, no evidence is admissible that was not in existence at the time of the agency proceeding. Gov't Code § 11350 (state agency rulemaking under the Administrative Procedure Act); Western States Petroleum Ass'n v. Superior Court, 9 Cal. 4th 559, 578, 888 P.2d 1268, 1278, 38 Cal. Rptr. 2d 139, 149 (1995) (quasi-legislative action generally).

§ 1123.950. Attorney fees in action to review administrative proceedings

The Commission thought the hourly rate for attorneys' fees for arbitrary and capricious action should probably be increased, with no statutory maximum. However, the Commission thought this should be the subject of a separate study, and should not be revised in the judicial review recommendation. The separate study of attorneys' fees should also include the provision for attorneys' fees for acting as a private attorney general (Code of Civil Procedure Section 1021.5).

Selected Conforming Revisions

The Commission approved the staff recommendation to revise Public Resources Code Section 21168 (California Environmental Quality Act) as follows:

21168. ~~Any~~ (a) Except as provided in subdivision (b), an action or proceeding to attack, review, set aside, void or annul a determination, finding, or decision of a public agency~~, made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in a public agency~~, on the grounds of noncompliance with ~~the provisions of~~ this division shall be ~~in accordance with the provisions of Section 1094.5~~ under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure.

~~In any such action, the court shall not exercise its independent judgment on the evidence but shall only determine whether the act or decision is supported by substantial evidence in the light of the whole record~~.

(b) Sections 1123.630, 1123.640, and 1123.650 of the Code of Civil Procedure do not apply to judicial review of proceedings under this division.

The Commission also approved the revisions to Government Code Section 65009 in selected conforming revisions in the staff draft to preserve the special time limits and other special provisions in that section.

☐ APPROVED AS SUBMITTED

☐ APPROVED AS CORRECTED
(for corrections, see Minutes of next meeting)

_____
Date

_____
Chairperson

_____
Executive Secretary

Nicholas Dewar CPA,12/11/96 1:40 PM,Mediation Confidentiality 1

Date: Wed, 11 Dec 1996 13:40:17 -0800 (PST)
X-Sender: ndewar@pop.igc.org (Unverified)
Mime-Version: 1.0
To: sulrich@clrc.ca.gov
From: Nicholas Dewar CPA <ndewar@igc.apc.org>
Subject: Mediation Confidentiality
Cc: ronkelly@igc.org
Sender: ndewar@igc.org
Sender: ndewar@igc.org

For attention of Ms. Barbara S. Gall, Staff Counsel, California Law Revision Commission.

Many thanks for sending me the Agenda, Minutes and Memoranda regarding Mediation Confidentiality. I appreciate the effort which the Commission is making to improve the practice of mediation through this proposal for clarifying legislation, and am grateful to have been included in this process.

I have previously written to the Commission both as Chair of the Community Board Program and as Director of the ADR Operating Committee of the California Society of CPAs. I received your memorandum 96-86 very recently and wish to respond to it before tomorrow's meeting despite the fact that I have not had the opportunity to discuss the matters with either of the organizations with which I am associated. I therefore write at this time on my own behalf.

I am very pleased to see the direction in which the recommendation appears to be headed. I wish to draw attention to a few issues which I believe are of critical importance. The practice of mediation will be improved by:

1. Being clearly identified as a distinctive process in which the neutral has no authority to compel or coerce the principals towards any resolution, nor to make recommendations about the resolution to any authorized adjudicator;

2. An inclusive definition of mediator which does not limit this role only to members of any particular profession;

3. Protection of the activity of mediation case developers and intake staff from subpoenas;

4. Clarification of the admissibility or inadmissibility of expert testimony and experts' reports which are used in the process of a mediation.

Yours truly,

Nicholas Dewar, CPA