

Study K-401

May 3, 1996

Memorandum 96-33**Mediation Communications: Draft of Tentative Recommendation**

Attached is a staff draft of a tentative recommendation relating to mediation confidentiality. Points for discussion are raised in the staff notes. If other aspects of the proposal warrant discussion, please plan on raising them at the meeting.

Before the draft is circulated for comment, the staff intends to do further work on the conforming revisions. The staff also would consolidate the mediation confidentiality provisions into a single article.

In addition to the matters covered in the draft, the Commission may also wish to consider whether to include any revisions of Government Code Section 11420.30 (the administrative adjudication provision on mediation confidentiality) in its tentative recommendation. The staff is inclined to focus on the Evidence Code provisions and handle any revisions of Section 11420.30 as a separate project after seeing how the Evidence Code reforms fare.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

Mediation Confidentiality

May 1996

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN August 31, 1996.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
(415) 494-1335 FAX: (415) 494-1827

SUMMARY OF TENTATIVE RECOMMENDATION

This recommendation would reform evidentiary provisions governing mediation confidentiality (Evidence Code Sections 703.5, 1152.5, 1152.6), so as to eliminate ambiguities. In particular, the recommendation would clarify the application of mediation confidentiality to settlements reached through mediation. Clarification is critical to aid disputants in crafting agreements they can enforce. The

recommendation also would add definitions of “mediation” and “mediator” to the Evidence Code, and clarify other aspects of mediation confidentiality.

This recommendation was prepared pursuant to Resolution Chapter 42 of the Statutes of 1956, continued in Resolution Chapter 87 of the Statutes of 1995.

MEDIATION CONFIDENTIALITY

Mediation is an increasingly important means of dispute resolution.¹ There is broad consensus that confidentiality is crucial to effective mediation.² In recognition of the importance of confidentiality, the Legislature added Section 1152.5 to the Evidence Code in 1985, on recommendation of the Law Revision Commission.³ With limitations, Section 1152.5 protects mediation communications from admissibility and disclosure in subsequent proceedings.

The Commission deliberately drafted Section 1152.5 in a manner that would allow different mediation techniques to flourish.⁴ Since the enactment of Section 1152.5, courts and disputants have experimented with mediation in many diverse forms. There have also been significant legislative developments, including a major substantive amendment of Section 1152.5,⁵ extension of Evidence Code Section 703.5 (restricting competency to testify in subsequent proceedings) to mediators,⁶ and addition of Evidence Code Section 1152.6, which generally precludes mediators from filing declarations and findings regarding mediations they conduct.⁷

The current statutory scheme broadly protects mediation confidentiality, but has ambiguities causing confusion, including confusion regarding preparation of settlement agreements parties can enforce.⁸ Clarification of the ambiguities would benefit persons involved in mediations and further the use of mediation to resolve disputes.

EXISTING LAW

Evidence Code Section 1152.5

Evidence Code Section 1152.5 remains the main provision protecting mediation confidentiality. It currently provides:

1. See, e.g., Code Civ. Proc. § 1775; 1996 Cal. Stat. res. ch. 6

2. See, e.g., Alan Kirtleyn, *The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 J. Disp. Resol. 1; Michael A. Perino, *Drafting Mediation Privileges: Lessons from the Civil Justice Reform Act*, 26 Seton Hall L. Rev. 1 (1995).

3. 1985 Cal. Stat. ch. 731; *Recommendation Relating to Protection of Mediation Communications*, 18 Cal. L. Revision Comm'n Reports 241 (1986).

4. *Recommendation*, *supra* note 3, at 245 n.1.

5. 1993 Cal. Stat. ch. 1261, § 6.

6. 1993 Cal. Stat. ch. 1261, § 5.

7. 1995 Cal. Stat. ch. 576, § 8.

8. Compare *Regents of University of California v. Sumner*, __ Cal. App. 4th __, 50 Cal. Rptr. 2d 200 (1996) (Section 1152.5 does not protect oral statement of settlement terms) with *Ryan v. Garcia*, 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (1994) (Section 1152.5 protects oral statement of settlement terms).

1 **§ 1152.5. Communications during mediation proceedings**

2 1152.5. (a) When persons agree to conduct and participate in a mediation for the
3 purpose of compromising, settling, or resolving a dispute in whole or in part:

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

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

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

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

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

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

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

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

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

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

40 Notably, Section 1152.5 does not define the term “mediation.” This omission not
41 accidental. When the statute was originally enacted, mediation was just beginning
42 to gain acceptance. The Law Revision Commission considered it important to
43 allow use of different techniques, without legislative constraints. Thus, instead of
44 imposing a statutory definition of mediation, the Commission crafted Section
45 1152.5 to allow parties to adopt their own definition for purposes of their dispute.⁹
46 This was done by making Section 1152.5 applicable only where the parties

9. See *Recommendation*, *supra* note 3, at 245 n.1, 246 n.4 (1986).

1 executed a written agreement reciting the statutory text and stating that the statute
2 governed their proceeding.¹⁰

3 In 1993, Section 1152.5 was amended in a number of ways, including
4 elimination of the requirement of a written agreement.¹¹ Apparently, the
5 requirement was considered unduly onerous, particularly in disputes involving
6 unsophisticated persons. Although the amendment eliminated the requirement of a
7 written agreement, it left the term “mediation” undefined.

8 **Evidence Code Section 703.5**

9 As amended in 1993,¹² Evidence Code Section 703.5 makes mediators
10 incompetent to testify “in any subsequent civil proceeding” regarding any
11 mediation they conduct. The statute does not apply to mediations under the Family
12 Code. Additionally, it excepts statements and conduct that “could (a) give rise to
13 civil or criminal contempt, (b) constitute a crime, (c) be the subject of
14 investigation by the State Bar or Commission on Judicial Performance, or (d) give
15 rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of
16 Section 170.1 of the Code of Civil Procedure.” Prior to the 1993 amendment
17 extending Section 703.5 to mediators, the statute applied only to arbitrators and
18 persons presiding at judicial and quasi-judicial proceedings.

19 **Evidence Code Section 1152.6**

20 Section 1152.6, enacted in 1995,¹³ provides in significant part: “A mediator may
21 not file, and a court may not consider, any declaration or finding of any kind by
22 the mediator, other than a required statement of agreement or nonagreement,
23 unless all parties in the mediation expressly agree otherwise in writing prior to
24 commencement of the mediation.” Section 1152.6 is intended to prevent a
25 mediator from coercing a party to settle by threatening to inform the assigned
26 judge that the party is being unreasonable or is pressing meritless arguments.¹⁴
27 Section 1152.5 arguably did not accomplish this, because some courts had local
28 rules stating that parties participating in mediation were deemed to have consented
29 in advance to waive Section 1152.5 with regard to having the mediator submit an
30 evaluation to the court.¹⁵

31 **Other Protections**

32 In addition to Evidence Code Sections 703.5, 1152.5, and 1152.6, there are

10. 1985 Cal. Stat. ch. 731, § 1.

11. See 1993 Cal. Stat. ch. 1261 (SB 401), § 6. The 1993 amendment of Section 1152.5 by SB 401 remains the only significant amendment of the statute, although there have been other technical changes. See 1992 Cal. Stat. ch. 163, § 73; 1993 Cal. Stat. ch. 219, § 77.7; 1994 Cal. Stat. ch. 1269, § 8.

12. 1993 Cal. Stat. ch. 1261, § 5.

13. 1995 Cal. Stat. ch. 576, § 8.

14. R. Kelly, *New Law Takes Effect to Protect Mediation Rights* (1996).

15. See, e.g., Contra Costa Superior Court, Local Rule 207 (1996).

1 specialized statutes protecting mediation confidentiality to various degrees in
2 differing contexts.¹⁶ Another source of protection is Evidence Code Section 1152,
3 which makes offers to compromise inadmissible to establish liability.¹⁷ Perhaps
4 most importantly, the constitutional right to privacy¹⁸ encompasses
5 communications “tendered under a guaranty of privacy,” and calls for balancing of
6 the interest in mediation confidentiality against competing interests.¹⁹

7 PROPOSED REFORMS

8 **Definitions**

9 Now that a writing reciting text of Section 1152.5 is no longer necessary to
10 invoke the statutory protection, clarification of what constitutes a “mediation”
11 within the meaning of the statute is in order. Without such a definition, the extent
12 of the protection is unclear.

13 For example, does Section 1152.5 apply in a proceeding that is court-ordered or
14 otherwise mandatory, or must participation be entirely voluntary to fall within the
15 statute? Likewise, is a settlement conference a “mediation” within the meaning of
16 Section 1152.5? If not, what differentiates a settlement conference from a
17 mediation?

18 Given the broad array of current dispute resolution techniques, and the
19 importance of confidentiality in promoting candor that may affect the success of
20 those techniques, participants need to be able to assess whether their particular
21 type of proceeding qualifies as a “mediation” for purposes of Section 1152.5.²⁰

22 This recommendation would add definitions of “mediation” and “mediator” to
23 the Evidence Code. It would be broad, stating simply: “‘Mediation’ means a
24 process in which a mediator facilitates communication between disputants to assist
25 them in reaching a mutually acceptable agreement.”²¹ The definition would

16. For examples of specialized mediation confidentiality provisions, see Bus. & Prof. Code §§ 467.4-467.5 (community dispute resolution programs), 6200 (attorney-client fee disputes), Code Civ. Proc. §§ 1775.10 (civil action mediation in participating courts), 1297.371 (international commercial disputes), Fam. Code §§ 1818 (family conciliation court), 3177 (child custody), Food & Agric. Code § 54453 (agricultural cooperative bargaining associations), Gov’t Code §§ 11420.20-11420.30 (administrative adjudication), 12984-12985 (housing discrimination), 66032-66033 (landuse), Ins. Code § 10089.80 (earthquake insurance), Labor Code § 65 (labor disputes), Welf. & Inst. Code § 350 (dependency mediation).

17. Evidence Code Section 1152.5(c) expressly provides that the statute does not made admissible evidence that is inadmissible under Section 1152 or another statute. “[E]ven though a communication is not made inadmissible by Section 1152.5, the communication is protected if it is protected under Section 1152.” Evid. Code § 1152.5 Comment. Unless otherwise noted, all further statutory references are to the Evidence Code.

18. Cal. Const. art. I, § 1.

19. *Garstang v. Superior Court*, __ Cal. App. 4th __, 46 Cal. Rptr. 2d 84 (1995).

20. For an example of the uncertainty in application, see *id.* (alluding to but not resolving whether sessions before an ombudsperson employed by a private educational institution constitute “mediation” within the meaning of the current version of Section 1152.5).

21. The definition of “mediation” is modeled on Code of Civil Procedure Section 1775.10, which pertains to civil action mediation in certain participating courts.

1 encompass purely voluntary mediations, as well as mediations in which
2 participation is court-ordered or otherwise mandatory. Language in Section
3 1152.5(a) arguably restricting its protection to voluntary mediations would be
4 deleted.

5 The proposed definition of “mediator” is also broad. A “mediator” is “a neutral
6 person who conducts a mediation.” Two important restrictions apply: (1) the
7 mediator must lack authority to compel a result or render a decision, and (2) the
8 mediator must not be a judge, commissioner, referee, judge pro tem, or salaried
9 employee of any tribunal in which the mediated dispute is pending. The net effect
10 of these restrictions is to limit the term “mediator” to persons who lack coercive
11 authority — apparent or actual — over the proceedings they conduct. In other
12 words, although parties may be required to participate in a mediation, the mediator
13 cannot force them to accept any particular resolution, either directly or by virtue of
14 association with the adjudicatory tribunal. A settlement conference would thus fall
15 outside the statutory definition of mediation, because a judge conducting a
16 settlement conference would not be a “mediator.”

17 The broad definitions of “mediation” and “mediator” would recognize and
18 embrace the variety of existing models of mediation. They would allow such
19 variety to continue by assuring confidentiality necessary for success.

20 To protect existing expectations, however, the Commission would also extend
21 the protection of Section 1152.5 and other mediation confidentiality statutes to
22 dispute resolution proceedings that fall outside the proposed definition of a
23 “mediation.” So long as the proceedings are conducted by a nondisputant and
24 denominated as “mediations,” they would be protected. Thus, the new definitions
25 would not trap unwary disputants oblivious that their so-called mediation fails to
26 qualify as such.

27 **Settlements Reached Through Mediation**

28 As currently drafted, Section 1152.5 fails to provide clear guidance regarding
29 application of the statute to oral compromises reached in mediation and documents
30 reducing those compromises to writing. Appellate courts have reached conflicting
31 decisions on whether the confidentiality of Section 1152.5 extends to the process
32 of converting such an oral compromise to a definitive written agreement.²² If
33 protection applies, then parties cannot enforce the oral compromise, because
34 evidence of it is inadmissible. If protection does not apply, the oral compromise
35 may be enforceable even if it is never reduced to writing. Resolution of this
36 uncertainty is critical: Mediation participants should know when they and their
37 opponents are effectively bound.

38 Additionally, Section 1152.5 fails to highlight a critical requirement regarding
39 written settlement agreements reached through mediation. Under Section
40 1152.5(a)(2), unless it is offered to prove fraud, duress, or illegality, a written

22. See note 8, *supra*.

1 settlement agreement is admissible only if it so provides.²³ Parties overlooking that
2 requirement may inadvertently enter into a written settlement agreements that is
3 unenforceable.

4 This recommendation would remedy these problems by consolidating in a single
5 statute all of the confidentiality requirements pertaining to settlements reached in
6 mediation. That should draw attention to the requirements and decrease the
7 likelihood that disputants will inadvertently enter into unenforceable agreements.

8 The proposed statute would explicitly make an executed written settlement
9 agreement admissible if it provides that it is “enforceable” or “binding” or words
10 to that effect. It is likely that parties intending to be bound will use words to that
11 effect, rather than saying that their agreement is “admissible,” the Commission
12 regards this as an important addition.

13 The proposed statute also would make clear that an executed written settlement
14 agreement is subject to disclosure if all of the signatories expressly consent to its
15 disclosure. To facilitate enforcement of such an agreement, consent of other
16 mediation participants, such as the mediator, would not be necessary. In contrast,
17 existing law is unclear as to precisely whose consent is required.²⁴

18 Finally, the proposed statute would codify the rule of *Ryan v. Garcia*²⁵ that
19 confidentiality extends through the process of converting an oral compromise
20 reached in mediation to an executed written settlement agreement. Difficult issues
21 can surface in that process, and confidentiality may promote frankness and
22 creativity in resolving them. The proposed approach should enhance the
23 effectiveness of mediation in promoting durable settlements. It would also spare
24 courts from adjudicating disputes over whether an oral compromise was reached in
25 mediation.

26 **Consent to Admissibility and Disclosure**

27 Section 1152.5(a)(2) now provides that no mediation document is admissible or
28 subject to discovery “unless the document otherwise provides.” The statute does
29 not spell out what is necessary for a document to “otherwise provide.” May a
30 person unilaterally specify that a document is exempt from Section 1152.5? Must
31 all parties agree in writing that the document is exempt? Is the mediator’s assent
32 necessary, or that of nonparties who attended the mediation (e.g., a spouse or
33 insurance representative)?

34 Similarly, Section 1152.5(a)(4) provides that “[a]ll or part of a communication
35 or document which may be otherwise privileged or confidential may be disclosed
36 if all *parties* who conduct or otherwise participate in mediation so consent.”
37 (Emphasis added.) Formerly, the statute called for consent of “all *persons* who

23. See *Ryan v. Garcia*, 27 Cal. App. 4th at 162 (Section 1152.5 “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”).

24. See Section 1152.5(a)(4).

25. 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 200 (1996).

1 conducted or otherwise participated in the mediation.”²⁶ The current wording is
2 arguably ambiguous as to precisely whose consent is necessary for disclosure.

3 This recommendation resolves these ambiguities by adding a statute specifically
4 addressing consent to disclosure. It would establish a general rule that consent of
5 all mediation participants is necessary to waive the protection of Section 1152.5.
6 All persons attending a mediation, parties as well as nonparties, should be able to
7 speak frankly, without fear of having their words turned against them.

8 To ensure that a party unilaterally commissioning an expert’s analysis or report
9 is not unfairly deprived of the benefits of that work, the proposed statute would
10 apply a special rule to such materials. Specifically, disclosure of a unilaterally
11 prepared expert’s analysis or report would require only the consent of the
12 mediation participants for whom the material was prepared, *provided* that the
13 material does not disclose anything said or any admission made in the course of
14 the mediation. A reports or analysis that necessarily disclose mediation
15 communications could be admitted or disclosed only upon satisfying the general
16 rule requiring consent of all mediation participants.

17 The recommendation would require that consent of mediation participants to
18 disclosure be express, not just implied. This requirement should help ensure the
19 existence of true, uncoerced consent, as opposed to mere acquiescence in a judge’s
20 referral to a court’s mediation program.²⁷

21 **Types of Subsequent Proceedings in Which Confidentiality Applies**

22 As originally enacted, the protection of Section 1152.5 applied in “any civil
23 action” in which testimony could be compelled.²⁸ When Section 1152.5 was
24 amended in 1993, the reference to “civil action” was changed to “civil action or
25 proceeding.”²⁹ The meaning of this change is unclear.³⁰

26 It can be argued that the term “civil” modifies “action” and not proceeding, with
27 the result that the protection of Section 1152.5 extends to criminal cases. It is also
28 unclear whether the protection applies to arbitral and administrative matters.

29 This recommendation would resolve that ambiguity by making explicit that
30 Section 1152.5’s confidentiality extends to any subsequent “arbitration,
31 administrative adjudication, civil action, or other noncriminal proceeding.” The
32 recommendation also proposes a similar amendment of Section 703.5.

26. 1985 Cal. Stat. ch. 731, § 1.

27. *See generally*, R. Kelly, *supra* note 14.

28. 1985 Cal. Stat. ch. 731, § 1.

29. 1993 Cal. Stat. ch. 1261, § 6.

30. Arguably, “civil” modifies “action” but not “proceeding,” and the protection of Section 1152.5 now extends to criminal cases as well as civil matters. That argument draws support from Section 120’s definition of “civil action.” Using that definition, the reference to “proceeding” in Section 1152.5 is redundant unless it encompasses more than just civil proceedings.

If, however, the intent of the 1993 amendment was to encompass criminal cases, it would have been clearer to eliminate the word “civil,” instead of adding the word “proceeding.” The failure to follow that approach suggests that Section 1152.5 currently applies only in the civil context.

1 As in its original recommendation proposing Section 1152.5,³¹ the Commission
2 does not propose to extend Section 1152.5 to subsequent criminal cases. Such an
3 extension might unduly hamper the pursuit of justice.

4 **Intake Communications**

5 Section 1152.5 is unclear as to how much protection extends to intake
6 communications, such as discussions regarding whether to mediate at all or
7 whether a particular mediator is willing to mediate a dispute. Issues regarding
8 confidentiality of intake communications often occur if one party has consulted a
9 mediator about a dispute and the other party refuses to mediate.

10 Protection of intake communications may promote openness in such exchanges
11 and help mediations get off to a good start.³² Accordingly, the Commission
12 proposes to amend Section 1152.5 to make clear that it “applies to
13 communications and documents made or prepared in the course of attempts to
14 initiate mediation, regardless of whether an agreement to mediate is reached.”

15 **Attorneys’ Fee Provision**

16 Section 1152.5(d) is an attorneys’ fee provision that was added in 1993. It
17 provides for an award of attorneys’ fees and costs to a mediator if the mediator is
18 subpoenaed to testify “as to *anything said or any admission made* in the course of
19 the mediation that is inadmissible and not subject to disclosure under this section.”
20 (Emphasis added.) The reference to “anything said or any admission made”
21 encompasses communications protected under Section 1152.5(a)(1), but would
22 appear not to cover an improper attempt to compel disclosure of documents
23 protected under Section 1152.5(a)(2).³³

24 A mediator may, however, incur substantial litigation expenses regardless of
25 whether a subpoena violates paragraph (a)(1), (a)(2), or (a)(3). Thus, the
26 recommendation conforms the scope of the attorneys’ fee provision to the scope of
27 protected communications.

28 **Agreements To Mediate**

29 As originally enacted, Section 1152.5 included an express exception for
30 agreements to mediate a dispute.³⁴ The exception facilitated enforcement of such
31 agreements, as by a mediator seeking to collect an unpaid fee.

32 The express exception for agreements to mediate was eliminated in 1993,³⁵ but
33 the change may well have been inadvertent. This recommendation would reinstate

31. *Recommendation Relating to Protection of Mediation Communications*, 18 Cal. L. Revision Comm’n Reports 241, 245 n.1, 246 n.4 (1986); *see also* 1985 Cal. Stat. ch. 731, § 1.

32. *See, e.g.*, Alan Kirtleyn, *supra* note 2, at ____.

33. Consider also the protection for “all communications, negotiations, or settlement discussions” in Section 1152.5(a)(3).

34. *See Recommendation, supra* note 3; 1985 Cal. Stat. ch. 731, § 1.

35. 1993 Cal. Stat. ch. 1261, § 6.

1 the exception.

2 **Limited Exception for Research Purposes**

3 Colorado's mediation confidentiality statute has a limited exception allowing
4 gathering of mediation information for research purposes, provided that mediation
5 participants and their disputes remain unidentifiable. Section 1152.5 should
6 contain similar language. This would be consistent with, and in furtherance of, the
7 goal of encouraging experimentation with different mediation techniques.

8 **Reforms of Section 1152.6**

9 Recently enacted Section 1152.6, which restrict mediators from filing case
10 evaluations with courts, could benefit from clarification in a number of respects. In
11 particular, it should be made clear that (1) the statute applies to all submissions,
12 not just filings, (2) the statute is not limited to court proceedings, but rather applies
13 to all types of adjudications, including arbitrations and administrative
14 adjudications, and (3) the statute applies to any evaluation or statement of opinion,
15 however denominated. These changes would help ensure that courts interpret the
16 statute in a manner consistent with its goal of preventing coercion by mediators.³⁶

17 **COMMISSION RECOMMENDATION**

18 Mediation is a valuable and widely used technique in which candor is often
19 crucial to success. Sections 703.5, 1152.5, and 1152.6 promote candor by
20 protecting the confidentiality of mediation proceedings, albeit with limitations. To
21 further the effective use of mediation, the rules regarding confidentiality should be
22 as unambiguous as possible. The Commission recommendations to that end would
23 be effectuated by enactment of the following measure.

36. See R. Kelly, *supra* note 14.

PROPOSED LEGISLATION

Evid. Code § 162 (added). Mediation

SEC. 1. Section 162 is added to the Evidence Code, to read:

162. “Mediation” means a process in which a mediator facilitates communication between disputants to assist them in reaching a mutually acceptable agreement.

Comment. Section 162 is modeled on Code of Civil Procedure Section 1775.1. “Mediator” is defined in Section 163. See also Section 1152.9 (proceedings referred to as mediations).


Evid. Code § 163 (added). Mediator

SEC. 2. Section 163 is added to the Evidence Code, to read:

163. “Mediator” is a neutral person who conducts a mediation. A mediator has no authority to compel a result or render a decision. A mediator shall not be a judge, commissioner, referee, judge pro tem, or salaried employee of any tribunal in which the mediated dispute is pending.

Comment. Section 163 serves to distinguish mediators from arbitrators, judges, and other persons who rule on the merits of disputes. Pursuant to the third sentence of Section 163, settlement conferences are not mediations. A settlement conference is conducted under the aura of the court, whereas a mediation is not.

“Mediation” is defined in Section 162. See also Sections 10 (singular includes the plural), 75 (“person” defined), 1152.9 (proceedings referred to as mediations).

 **Staff Note.** In recognition that settlement conference participants may feel court pressure to settle, Section 163 attempts to draw a distinction between settlement conferences and mediations. Does the Commission agree with this approach?

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

SEC. 3. Section 703.5 of the Evidence Code is amended to read:

703.5. No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil arbitration, administrative adjudication, civil action, or other noncriminal proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure. However, this section does not apply to a mediator with regard to any mediation under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

Comment. Section 703.5 is amended to make explicit that it precludes testimony in a subsequent arbitration or administrative adjudication, as well as in any civil action or proceeding. See also Section 120 (“civil action” includes civil proceedings).

For purposes of Section 703.5, the term “mediator” includes both a mediator as defined in Section 163, and a nondisputant who conducts a dispute resolution proceeding that is referred to

1 as a mediation. See Section 1152.9. See also Section 162 (“mediation” defined).

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

3 SEC. 4. Section 1152.5 of the Evidence Code is amended to read:

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

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

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

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

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

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

28 (6) (4) Evidence otherwise admissible or subject to discovery outside of
29 mediation shall not be or become inadmissible or protected from disclosure solely
30 by reason of its introduction or use in a mediation.

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

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

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

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

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

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

(f) This section 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.

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

Comment. Subdivision (a) of Section 1152.5 is amended to delete the reference to an agreement to mediate. The protection of Section 1152.5 extends to mediations in which participation is court-ordered or otherwise mandatory, as well as purely voluntary mediations.

Subdivisions (a)(1) and (a)(2) are amended to make explicit that their protection applies in a subsequent arbitration or administrative adjudication, as well as in any civil action or proceeding. See also Section 120 ("civil action" includes civil proceedings).

Subdivisions (a)(1) and (a)(2) are also amended to reflect the addition of Sections 1152.7 (settlements reached through mediation) and 1152.8 (consent to disclosure of mediation communications). 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)(3) is amended to achieve internal consistency and delete surplus language.

Former subdivision (a)(4) is superseded by Section 1152.8 (consent to disclosure of mediation communication).

Former subdivision (a)(5) is continued without substantive change in Section 1152.7(d).

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

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

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

See also Sections 162 ("mediation" defined), 163 ("mediator" defined), and 1152.9 (proceedings referred to as mediations).

For examples of specialized mediation confidentiality provisions, see Bus. & Prof. Code §§ 467.4-467.5 (community dispute resolution programs), 6200 (attorney-client fee disputes), Code Civ. Proc. §§ 1775.10 (civil action mediation in participating courts), 1297.371 (international commercial disputes), Fam. Code §§ 1818 (family conciliation court), 3177 (child custody), Food & Agric. Code § 54453 (agricultural cooperative bargaining associations), Gov't Code §§ 11420.20-11420.30 (administrative adjudication), 12984-12985 (housing discrimination), 66032-66033 (landuse), Ins. Code § 10089.80 (earthquake insurance), Labor Code § 65 (labor disputes), Welf. & Inst. Code § 350 (dependency mediation). See also Cal. Const. art. I, § 1 (right to privacy); *Garstang v. Superior Court*, __ Cal. App. 4th __, 46 Cal. Rptr. 2d 84, 88 (1995) (constitutional right of privacy protected communications made during mediation sessions before an ombudsperson).

☞ **Staff Note.** (1) Existing Section 1152.5 and the amendment proposed here use the term "document" in a number of places. Is that term sufficiently inclusive to account for recent technological advances? The term is used elsewhere in the Evidence Code but not defined. The Evidence Code does define "writing" in Section 250 to mean "handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof." See also Code Civ. Proc. § 2016 (defining "document" to mean "writing" as defined in Evidence Code Section 250). Legislation is pending to change the definition in Section 250. Rather than get into the issue at this point in the context of Section

1 1152.5, the staff recommends addressing it in the future if necessary.

2 (2) Subdivision (a)(2) protects documents prepared for the purpose of a mediation, but
3 subdivision (a)(1) does not expressly protect oral communications made in preparation for a
4 mediation (e.g., a meeting to develop a mediation strategy). Other existing protections, such as
5 the attorney-client privilege and Evidence Code Section 1152 (offers to compromise) may be
6 sufficient to cover this situation. If the Commission thinks that further protection is necessary
7 (e.g., to protect mediation preparation sessions involving some but not all parties in a multi-party
8 dispute), proposed subdivision (f) could be modified to read: “This section applies to
9 communications and documents made or prepared in preparation for a mediation, or in the course
10 of attempts to initiate mediation, regardless of whether an agreement to mediate is reached.”

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

12 SEC. 5. Section 1152.6 of the Evidence Code is amended to read:

13 ~~1152.6. A mediator may not file, and a court may not consider, any declaration~~
14 ~~or finding of any kind by the mediator, A mediator may not submit, and a court or~~
15 ~~other adjudicative body may not consider, any assessment, evaluation,~~
16 ~~recommendation, or finding of any kind by the mediator concerning a mediation~~
17 ~~conducted by the mediator, other than a required statement of agreement or~~
18 nonagreement, unless all parties in the mediation expressly agree otherwise in
19 writing prior to commencement of the mediation. However, this section shall not
20 apply to mediation under Chapter 11 (commencing with Section 3160) of Part 2 of
21 Division 8 of the Family Code.

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

26 See also Sections 162 (“mediation” defined), 163 (“mediator” defined), and 1152.9
27 (proceedings referred to as mediations).

28 **§ 1152.7 (added). Settlements reached through mediation**

29 SEC. 6. Section 1152.7 is added to the Evidence Code, to read:

30 1152.7. (a) Notwithstanding Section 1152.5, an executed written settlement
31 agreement prepared in the course of, or pursuant to, a mediation, may be admitted
32 or disclosed if any of the following conditions exist:

33 (1) The agreement provides that it is admissible or subject to disclosure, or
34 words to that effect.

35 (2) The agreement provides that it is enforceable or binding or words to that
36 effect.

37 (3) All signatories to the agreement expressly consent to its disclosure.

38 (4) The agreement is used to show fraud, duress, or illegality that is relevant to
39 an issue in dispute.

40 (b) Except as provided in this section, evidence of a compromise reached in
41 mediation may be admitted or disclosed only pursuant to Section 1152.8.

42 **Comment.** Section 1152.7 is added to consolidate and clarify provisions governing settlements
43 reached through mediation.

44 As to executed written settlement agreements, paragraph (a)(1) continues language formerly
45 found in Section 1152.5(a)(2). See also *Ryan v. Garcia*, 27 Cal. App. 4th 1006, 1012, 33 Cal.

Rptr. 2d 158 (1994) (Section 1152.5 “provides a simple means by which settlement agreements executed during mediation can be made admissible in later proceedings,” i.e., the “parties may consent, as part of a writing, to subsequent admissibility of the agreement”).

Paragraph (a)(2) is new. It is added due to the likelihood that parties intending to be bound will use words to that effect, rather than saying their agreement is intended to be admissible or subject to disclosure.

As to fully executed written settlement agreements, paragraph (a)(3) supersedes Section 1152.5(a)(4). To facilitate enforceability of such agreements, disclosure pursuant to paragraph (a)(3) requires only consent of the signatories. Consent of other mediation participants, such as the mediator, is not necessary. Paragraph (a)(3) is thus an exception to the general rule governing consent to disclosure of mediation communications. See Section 1152.8.

Paragraph (a)(4) continues former Section 1152.5(a)(5) without substantive change.

Subdivision (b) codifies the rule of *Ryan v. Garcia*, 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (1994), that confidentiality extends through the process of converting an oral compromise to a definitive written agreement. The contrary approach of *Regents of University of California v. Sumner*, __ Cal. App. 4th __, 50 Cal. Rptr. 2d 200 (1996), is rejected.

☞ **Staff Note.** To draw attention to the rules regarding settlement agreements, the staff consolidated them in a single statute. The staff also added language explicitly addressing the issue discussed in *Ryan v. Garcia*, 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (1994), and *Regents of University of California v. Sumner*, __ Cal. App. 4th __, 50 Cal. Rptr. 2d 200 (1996): whether confidentiality extends through the process of converting an oral compromise to a definitive written agreement. See First Supplement to Memorandum 96-17 at pages 1-5. Although the Supreme Court might resolve the conflict in appellate decisions before the Commission issues a recommendation, the staff recommends addressing the point in the tentative recommendation, so that the Commission is prepared to act if the Supreme Court does not fully resolve the matter.

Evid. Code § 1152.8 (added). Consent to disclosure of mediation communications

SEC. 7. Section 1152.8 is added to the Evidence Code, to read:

1152.8. Notwithstanding Section 1152.5, a communication or document made or prepared for the purpose of, or in the course of, or pursuant to, a mediation, may be admitted or disclosed if any of the following conditions exist:

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

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

Comment. Section 1152.8 supersedes former Section 1152.5(a)(4) and a portion of Section 1152.5(a)(2), which were unclear regarding precisely whose consent was required for admissibility or disclosure of mediation communications and documents.

Subdivision (a) states the general rule that mediation documents and communications may be admitted or disclosed only upon consent of all participants, including not only parties but also the mediator and other nonparties attending the mediation (e.g., a disputant not involved in litigation, a spouse, an accountant, an insurance representative, or an employee of a corporate affiliate). Consent must be express, not implied. For example, parties cannot be deemed to have consented in advance to disclosure merely because they agreed to participate in a particular dispute resolution program. *Cf. Contra Costa Superior Court, Local Rule 207* (1996) (“EASE conferences shall constitute mediations governed by California Evidence Code Section 1152.5 *except that, unless prior arrangements have been made with the Court in writing or on the record, by*

1 *agreeing to participate in the EASE Program, the parties are deemed to have consented in*
2 *advance that the evaluator may share any information he or she learns with the assigned judge*
3 *and with other court personnel.” (emph. in original)).*

4 Subdivision (b) facilitates admissibility and disclosure of unilaterally prepared experts’ reports,
5 but it only applies so long as those materials may be produced in a manner revealing nothing
6 about the mediation discussion. Reports and analyses that necessarily disclose mediation
7 communications may be admitted or disclosed only upon satisfying the general rule of
8 subdivision (a).

9 For other special rules, see Sections 1152.6 (mediator evaluations) and 1152.7 (settlements
10 reached through mediation).

11 See also Sections 162 (“mediation” defined), 163 (“mediator” defined), and 1152.9
12 (proceedings referred to as mediations).


13 **Evid. Code § 1152.9 (added). Proceedings referred to as mediations**

14 SEC. 8. Section 1152.9 is added to the Evidence Code, to read:

15 1152.9. (a) The protection of Section 703.5 and Sections 1152.5 to 1152.9,
16 inclusive, extends to:

- 17 (1) A “mediation” as defined in Section 162.
18 (2) A “mediator” as defined in Section 163.
19 (3) A dispute resolution proceeding that satisfies both of the following
20 conditions:
21 (i) A nondisputant assists in resolving the dispute.
22 (ii) The proceeding is referred to as a mediation.
23 (4) A nondisputant who conducts a dispute resolution proceeding that is referred
24 to as a mediation.

25 **Comment.** Section 1152.9 is added in recognition of the fact that the term “mediation” is
26 broadly used. Proceedings may be referred to as mediations even though they do not meet the
27 definition of Section 162. Section 1152.9 upholds expectations of confidentiality that may exist
28 under such circumstances.

29  **Staff Note.** If a statutory definition of “mediation” is adopted, over time it will become
30 increasingly unreasonable to apply the term to proceedings that fail to meet the definition, and
31 (setting aside the effect of proposed Section 1152.9) increasingly unreasonable to expect
32 mediation confidentiality to extend to such proceedings. Perhaps Section 1152.9 should be a
33 temporary provision. That could be accomplished by adding a subdivision stating: “This section
34 shall remain in effect only until January 1, [year], and as of that date is repealed, unless a later
35 enacted statute, which is enacted before January 1, [year], deletes or extends that date.”

36 **CONFORMING REVISIONS**

37 **Bus. & Prof. Code § 467.5 (amended). Communications during funded proceedings**

38 467.5. Notwithstanding the express application of ~~Section 1152.5~~ Sections
39 1152.5 to 1152.9, inclusive, of the Evidence Code to mediations, all proceedings
40 conducted by a program funded pursuant to this chapter, including, but not limited
41 to, arbitrations and conciliations, are subject to ~~Section 1152.5~~ Sections 1152.5 to
42 1152.9, inclusive, of the Evidence Code.

43 **Comment.** Section 467.5 is amended to reflect the addition of new Evidence Code statutes
44 governing mediation confidentiality.

Code Civ. Proc. § 1775.10 (amended). Evidence Code provisions applicable to statements made in mediation

1775.10. All statements made by the parties during the mediation shall be subject to Sections 1152 and ~~1152.5~~ to 1152.9, inclusive of the Evidence Code.

Comment. Section 1775.10 is amended to reflect the addition of new Evidence Code statutes governing mediation confidentiality.

Gov't Code § 66032 (amended). Procedures applicable to land use mediations

66032. (a) Notwithstanding any provision of law to the contrary, all time limits with respect to an action shall be tolled while the mediator conducts the mediation, pursuant to this chapter.

(b) Mediations conducted by a mediator pursuant to this chapter that involve less than a quorum of a legislative body or a state body shall not be considered meetings of a legislative body pursuant to the Ralph M. Brown Act (Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5), nor shall they be considered meetings of a state body pursuant to the Bagley-Keene Open Meeting Act (Article 9 (commencing with Section 11120) of Chapter 1 of Part 1 of Division 3 of Title 2).

(c) Any action taken regarding mediation conducted pursuant to this chapter shall be taken in accordance with the provisions of current law.

(d) Ninety days after the commencement of the mediation, and every 90 days thereafter, the action shall be reactivated unless the parties to the action do either of the following:

(1) Arrive at a settlement and implement it in accordance with the provisions of current law.

(2) Agree by written stipulation to extend the mediation for an another 90-day period.

(e) A mediator shall not file, and a court shall not consider, any declaration or finding of any kind by the mediator, other than a required statement of agreement or nonagreement, unless all parties in the mediation expressly agree otherwise, in writing.

(f) Sections 703.5 and ~~1152.5~~ to 1152.9, inclusive, of the Evidence Code shall apply to any mediation conducted pursuant to this chapter.

Comment. Section 66032 is amended to reflect the addition of new Evidence Code statutes governing mediation confidentiality.

Gov't Code § 66033 (amended). Land use mediator's report

66033. (a) At the end of the mediation, the mediator shall file a report with the Office of Permit Assistance, consistent with ~~Section 1152.5~~ Sections 1152.5 to 1152.9, inclusive, of the Evidence Code, containing each of the following:

(1) The title of the action.

(2) The names of the parties to the action.

(3) An estimate of the costs avoided, if any, because the parties used mediation instead of litigation to resolve their dispute.

(b) The sole purpose of the report required by this section is the collection of information needed by the office to prepare its report to the Legislature pursuant to Section 66036.

Comment. Section 66033 is amended to reflect the addition of new Evidence Code statutes governing mediation confidentiality.

Ins. Code § 10089.80 (amended). Disclosures and communications in earthquake insurance mediations

10089.80. (a) The representatives of the insurer shall know the facts of the case and be familiar with the allegations of the complainant. The insurer or the insurer's representative shall produce at the settlement conference a copy of the policy and all documents from the claims file relevant to the degree of loss, value of the claim, and the fact or extent of damage.

The insured shall produce, to the extent available, all documents relevant to the degree of loss, value of the claim, and the fact or extent of damage.

The mediator may also order production of other documents that the mediator determines to be relevant to the issues under mediation. If a party declines to comply with that order, the mediator may appeal to the commissioner for a determination of whether the documents requested should be produced. The commissioner shall make a determination within 21 days. However, the party ordered to produce the documents shall not be required to produce while the issue is before the commissioner in this 21-day period. If the ruling is in favor of production, any insurer that is subject to an order to participate in mediation issued under subdivision (a) of Section 10089.75 shall comply with the order to produce. Insureds, and those insurers that are not subject to an order to participate in mediation, shall produce the documents or decline to participate further in the mediation after a ruling by the commissioner requiring the production of those other documents. Declination of mediation by the insurer under this section may be considered by the commissioner in exercising authority under subdivision (a) of Section 10089.75.

The mediator shall have the authority to protect from disclosure information that the mediator determines to be privileged, including, but not limited to, information protected by the attorney-client or work-product privileges, or to be otherwise confidential.

(b) The mediator shall determine prior to the mediation conference whether the insured will be represented by counsel at the mediation. The mediator shall inform the insurer whether the insured will be represented by counsel at the mediation conference. If the insured is represented by counsel at the mediation conference, the insurer's counsel may be present. If the insured is not represented by counsel at the mediation conference, then no counsel may be present.

(c) Sections 703.5 and 1152.5 to 1152.9, inclusive, of the Evidence Code apply to a mediation conducted under this chapter.

(d) A mediator may not file, and a court may not consider, a declaration or

1 finding of any kind by the mediator other than a required statement of agreement
2 or nonagreement, unless all parties to the mediation expressly agree otherwise in
3 writing.

4 (e) The statements made by the parties, negotiations between the parties, and
5 documents produced at the mediation are confidential. However, this
6 confidentiality shall not restrict the access of the department to documents or other
7 information the department seeks in order to evaluate the mediation program or to
8 comply with reporting requirements. This subdivision does not affect the
9 discoverability or admissibility of documents that are otherwise discoverable or
10 admissible.

11 **Comment.** Section 10089.80 is amended to reflect the addition of new Evidence Code statutes
12 governing mediation confidentiality.

13 **Welf. & Inst. Code § 350 (amended). Conduct of proceedings**

14 350. (a)(1) The judge of the juvenile court shall control all proceedings during
15 the hearings with a view to the expeditious and effective ascertainment of the
16 jurisdictional facts and the ascertainment of all information relative to the present
17 condition and future welfare of the person upon whose behalf the petition is
18 brought. Except where there is a contested issue of fact or law, the proceedings
19 shall be conducted in an informal nonadversary atmosphere with a view to
20 obtaining the maximum cooperation of the minor upon whose behalf the petition is
21 brought and all persons interested in his or her welfare with any provisions that the
22 court may make for the disposition and care of the minor.

23 (2) Each juvenile court in Contra Costa, Los Angeles, Orange, Sacramento, San
24 Diego, Santa Clara, and Tulare Counties is encouraged to develop a dependency
25 mediation program to provide a problem-solving forum for all interested persons
26 to develop a plan in the best interests of the child, emphasizing family preservation
27 and strengthening. The Legislature finds that mediation of these matters assists the
28 court in resolving conflict, and helps the court to intervene in a constructive
29 manner in those cases where court intervention is necessary. Notwithstanding any
30 other provision of law, no person, except the mediator, who is required to report
31 suspected child abuse pursuant to the Child Abuse and Neglect Reporting Act
32 (Article 2.5 (commencing with Section 11164) of Chapter 2 of Title 1 of Part 4 of
33 the Penal Code), shall be exempted from those requirements under ~~Section 1152.5~~
34 Sections 1152.5 to 1152.9, inclusive, because he or she agreed to participate in a
35 dependency mediation program established in one of these juvenile courts.

36 If a dependency mediation program has been established in one of these juvenile
37 courts, and if mediation is requested by any person who the judge or referee deems
38 to have a direct and legitimate interest in the particular case, or on the court's own
39 motion, the matter may be set for confidential mediation to develop a plan in the
40 best interests of the child, utilizing resources within the family first and within the
41 community if required.

42 (b) The testimony of a minor may be taken in chambers and outside the presence

1 of the minor's parent or parents, if the minor's parent or parents are represented by
2 counsel, the counsel is present and any of the following circumstances exist:

3 (1) The court determines that testimony in chambers is necessary to ensure
4 truthful testimony.

5 (2) The minor is likely to be intimidated by a formal courtroom setting.

6 (3) The minor is afraid to testify in front of his or her parent or parents.

7 After testimony in chambers, the parent or parents of the minor may elect to
8 have the court reporter read back the testimony or have the testimony summarized
9 by counsel for the parent or parents.

10 The testimony of a minor also may be taken in chambers and outside the
11 presence of the guardian or guardians of a minor under the circumstances specified
12 in this subdivision.

13 (c) At any hearing in which the probation department bears the burden of proof,
14 after the presentation of evidence on behalf of the probation department and the
15 minor has been closed, the court, on motion of the minor, parent, or guardian, or
16 on its own motion, shall order whatever action the law requires of it if the court,
17 upon weighing all of the evidence then before it, finds that the burden of proof has
18 not been met . That action includes, but is not limited to, the dismissal of the
19 petition and release of the minor at a jurisdictional hearing, the return of the minor
20 at an out-of-home review held prior to the permanency planning hearing, or the
21 termination of jurisdiction at an in-home review. If the motion is not granted, the
22 parent or guardian may offer evidence without first having reserved that right.

23 **Comment.** Section 350 is amended to reflect the addition of new Evidence Code statutes
24 governing mediation confidentiality.
25