Study K-401 October 3, 1996

# Memorandum 96-70

## Mediation Confidentiality: Comments on Tentative Recommendation

The Commission's tentative recommendation on mediation confidentiality drew written comments from the following sources:


| | | *Exhibit pp.* |
|---|---|---|
| 1. | California Small Claims Court Advisors Ass'n (CSCCAA) | 1 |
| 2. | California Society of CPAs (CSCPA) | 2 |
| 3. | Richard B. Chess, Jr. | 3 |
| 4. | Community Board Program | 4 |
| 5. | Terrill L. Croghan | 6 |
| 6. | John J. Fitzpatrick, Jr. | 7 |
| 7. | John A. Gromala | 8 |
| 8. | Robert A. Holtzman | 10 |
| 9. | Humboldt Mediation Services, Inc. | 12 |
| 10. | Clayton R. Janssen | 13 |
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| 12. | Kevin J. McCann | 16 |
| 13. | Dean J. Mellor | 17 |
| 14. | Southern California Mediation Ass'n | 18 |


In addition, the State Bar Committee on Administration of Justice (CAJ) will be submitting comments. The staff will supplement this memorandum upon receiving CAJ's comments or other late input.

### RECAP OF THE TENTATIVE RECOMMENDATION

The tentative recommendation seeks to eliminate significant ambiguities in the existing statutes governing mediation confidentiality (Evidence Code Sections 703.5, 1152.5, and 1152.6). In particular, the proposal would:

- Add statutes specifying how mediation confidentiality applies to written settlements and oral agreements reached through mediation

- Add definitions of "mediator" and "mediation" to the Evidence Code

• Specify whose consent is necessary to invoke the consent exception to mediation confidentiality

• Make clear that the statutory protection applies in any noncriminal proceeding, including an arbitration or administrative adjudication

• Make various other changes in the statutes governing mediation confidentiality.

(For convenient reference, the tentative recommendation is attached to Commissioners' copies of this memorandum.)

## SUPPORT

There is considerable support for the tentative recommendation. Half of the letters received simply express support for the proposal and praise or thank the Commission for preparing it. For example, Dean Mellor (private mediator, part-time court mediator, and former President, Southern California Mediation Association) says:

> I would like to commend you on the proposed revisions regarding mediation: the definition and the clarification of the extent of confidentiality of the process. The language is well-drafted, clear and concise. I have nothing but praise for the work you have done. It will be a great improvement in the law.

Other supporters in this category include Richard Chess (attorney, mediation-arbitration) (Exhibit p. 3), Terrill Croghan (attorney, mediator) (Exhibit p. 6), John Fitzpatrick, Jr. ("a first chair advocate in arbitrations and mediations, as well as an arbitrator and mediator for 22+ years, 75+ cases") (Exhibit p. 7), Bruce Johnsen (management consultant) (Exhibit p. 15), Kevin McCann (construction dispute resolution) (Exhibit p. 16), and the California Small Claims Court Advisors Association (CSCCAA) (Exhibit p. 1), which offers whatever assistance it can provide.

Most of the remaining letters also express support for the tentative recommendation, but make suggestions regarding specific aspects of the proposal or report that such suggestions are forthcoming. John Gromala of Gromala Mediation Service in Eureka thanks the Commission for its "excellent" tentative recommendation, offers three specific suggestions, and says it "is

imperative" that the concepts in the proposal "be adopted by the legislature this year." (Exhibit pp. 8-9.) Robert Holtzman, a commercial and construction mediator for Loeb & Loeb in Los Angeles, commends the tentative recommendation "as an excellent and enlightened statement." He "recommend[s] its adoption," but suggests one improvement. (Exhibit pp. 10-11.) Similarly, the Community Board Program in San Francisco generally supports the tentative recommendation:

> This organization has provided free dispute resolution services to residents of San Francisco since 1976. We have been accepted as a model for the development of hundreds of community mediation programs throughout the nation. We have trained thousands of San Franciscans as mediators, and it is these volunteers who, in groups of three or four, act as co-mediators and help their neighbors resolve a wide range of types of dispute. We provide consultation and training to school districts, local governments and other entities throughout the United States and in some foreign countries. We also publish various manuals and curriculae mostly for school dispute resolution.
>
> We have considered your Tentative Recommendations for Mediation Confidentiality of May, 1996. We support these recommendations and urge you to submit them to the legislature.
>
> ….
>
> We consider that the proposals will allow Community Boards to better accomplish its goal of empowering communities to resolve disputes effectively and without violence.
>
> [Exhibit p.4.]

Finally, Southern California Mediation Association supports the tentative recommendation "in concept," and thanks the Commission "for the good work that is being done in this area." It is "studying the recommendations closely" and will provide "more specific feedback on several confidentiality issues, including but not limited to protecting the 'intake' process of mediation, privileged communications, when a mediation is considered completed and the convening stage of a case." (Exhibit p. 18.)

## OPPOSITION

None of the letters attacks the tentative recommendation as a whole. Clayton Janssen, a Eureka attorney and mediator with 44 years of litigation experience and 4-5 years of mediation experience, strongly opposes one aspect of the

proposal, but does not comment on any other part. (Exhibit pp. 13-14.) Humboldt Mediation Services raises some specific concerns, without expressing outright support for any aspect of the tentative recommendation. It does, however, "appreciate the thought and effort" that the Commission is "putting into clarifying confidentiality protections for mediators and mediation processes." (Exhibit p. 12.) California Society of CPAs (CSCCAA) "is very interested in the improvement of the legislation which you are recommending." Its Government Relations Director "will monitor the development of the recommendation and will contact [the Commission] as appropriate." (Exhibit p. 2.)

## SPECIFIC POINTS RAISED

This section discusses specific points raised in letters received. It tracks the proposed legislation section by section, rather than consolidating all suggestions from the same source.

### § 1120(a)(1). Definition of "mediation"

*Voluntariness.* The tentative recommendation defines "mediation" as "a process in which a mediator facilitates communication between disputants to assist them in reaching a mutually acceptable agreement." Community Board Program considers that definition "appropriate because it describes the responsibility for reaching a decision as lying with the disputants, and it describes the role of the mediator as facilitative and not as evaluative." (Exhibit pp. 4-5.) Community Board Program would, however, "prefer that the definition specify that mediation be a voluntary process." (*Id.* at p. 5.)

The Commission considered that possibility in preparing its tentative recommendation, but opted for a more inclusive definition to ensure that confidentiality extends not only to a voluntary mediation but also to a court-ordered or otherwise mandatory mediation. The broad definition also conforms to current usage: the term "mediation" is widely applied to both voluntary and mandatory mediations. Limiting the definition to a voluntary process might engender confusion. The staff therefore recommends leaving the definition as is.

Nonetheless, Community Board Program makes a valuable point. Different considerations apply to a voluntary mediation as opposed to a mandatory one. In crafting legislation, it is important to keep those differences in mind and account for them where appropriate.

*Mediation format.* Purposely, the definition of "mediation" does not specify particulars about the process used to facilitate communication between disputants, such as whether the mediator is present throughout the mediation, and whether the mediation is a series of several sessions instead of one continuous meeting. The intent is to accommodate a wide variety of mediation styles.

By phone, Ron Kelly suggested expanding the Comment to Section 1120 to make more clear that the definition encompasses a broad range of approaches, such as a mediation conducted as a number of sessions, only some of which involve the mediator. He did not propose specific language, but the staff seconds his suggestion and would revise the first paragraph of the Comment to Section 1120 as follows:

> **Comment.** Subdivision (a)(1) ~~and the~~ of Section 1120 is drawn from Code of Civil Procedure Section 1775.1. To accommodate a wide range of mediation styles, the definition is broad, without specific limitations on format. For example, it would include a mediation conducted as a number of sessions, only some of which involve the mediator.
>
> The neutrality requirement of subdivision (a)(2) ~~of Section 1120 are~~ is drawn from Code of Civil Procedure Section 1775.1. An attorney or other representative of a party is not neutral and so does not qualify as a "mediator" for purposes of this chapter. A "mediator" may be an individual, group of individuals, or entity. See also Section 10 (singular includes the plural).

*Post-agreement interviews.* Chip Sharpe of Humboldt Mediation Services in Arcata is "concerned that it is not clearly stated that confidentiality protections extend from the first contact with either party to the post-agreement interviews." Exhibit p. 12. He does not explain what he means by "post-agreement interviews." Presumably, he is referring to a meeting, phone call, written questionnaire or other means by which a mediator checks on how an agreement reached in mediation has worked out for the disputants.

Such a follow-up procedure would not seem to fall within the proposed definition of "mediation," to wit, a "process in which a mediator facilitates communication between disputants to assist them in reaching a mutually acceptable agreement." Revising the definition to encompass post-agreement interviews may result in a confusing, unclear definition. Instead, the staff suggests the following revision of Section 1122(f):

(f) This section applies to communications, documents, and any writings as defined in Section 250, that are made or prepared in the course of attempts to initiate mediation, regardless of whether an agreement to mediate is reached. This section also applies to a post-mediation meeting, phone call, or other contact initiated by the mediator to assess a participant's satisfaction with the mediation.

Extending confidentiality to such a post-mediation contact may help the mediator obtain frank feedback (e.g., "I didn't like it when you told my opponent that I was filing for bankruptcy, because I told you that in confidence"), which in turn may lead to better performance in future mediations. The revision is thus consistent with the overall goal of promoting effective mediation.

**§ 1120 (a)(2). Definition of mediator**

*Observers and assistants.* The tentative recommendation defines "mediator" as "a neutral person who conducts a mediation." Importantly, the definition also specifies that a mediator "has no authority to compel a result or render a decision in the dispute."

According to Community Board Program, that definition is "appropriate because it includes any neutral person without specification of any professional qualification, and because it clarifies that a mediator has no authority to compel a result or render a decision in the dispute." (Exhibit p. 4.) Community Board Program cautions, however, that the "definition of 'mediator' needs to encompass all those who are indirectly involved in the mediation process such as case-developers, and those who may observe the mediation for the purpose of training or evaluating the neutrals or studying the process." (*Id.*)

Community Board Program maintains that "such people are an integral part of the mediation and can therefore be considered as 'conducting' the mediation." (*Id.*) That interpretation is arguable but far from ironclad. Implicitly recognizing as much, Community Board Program raises the possibility of "a clarifying amendment." (*Id.*)

The staff agrees that clarification of this point would be useful. It suggests handling a case-developer or other mediation assistant differently from a pure observer. The status of the former could be clarified by revising the first paragraph of the Comment to Section 1120 as follows:

**Comment.** Subdivision (a)(1) and the neutrality requirement of subdivision (a)(2) of Section 1120 are drawn from Code of Civil Procedure Section 1775.1. An attorney or other representative of a

> party is not neutral and so does not qualify as a "mediator" for purposes of this chapter. A "mediator" may be an individual, group of individuals, or entity. See Section 175 ("person" defined). See also Section 10 (singular includes the plural). This definition of "mediator" encompasses not only the neutral person who takes the lead in conducting a mediation, but also any neutral who assists in the mediation, such as a case-developer or secretary.

The new sentence does not mention an observer, because it is a stretch to contend that an observer is "a neutral person who *conducts* a mediation." (Emph. added.) Instead, to ensure that the presence of an educational or evaluative observer does not disrupt mediation confidentiality, the Commission could revise proposed Section 1122(g) and the corresponding part of the Comment as follows:

> 1122. (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. The protection of subdivisions (a)(1), (a)(2), and (a)(3) applies to a mediation notwithstanding the presence of a person who observes the mediation for the purpose of training or evaluating the neutral or studying the process.
>
> **Comment.** Subdivision (g) is new. ~~It~~ The first sentence is drawn from Colo. Rev. Stats. § 13-22-307(5) (Supp. 1995). In recognition that observing an actual mediation may be invaluable in training or evaluating a mediator or studying the mediation process, the second sentence protects confidentiality despite the presence of such an observer. If a person both observes and assists in a mediation, see also Section 1120(a)(2) ("mediator" defined).

*Special masters.* By phone, Ron Kelly raised the issue of whether the definition of "mediator" would include a special master. In alerting the mediation community to the tentative recommendation, he has been queried on that point.

The answer would seem to turn on whether the special master has "authority to compel a result or render a decision in the dispute." Resolving that point requires an understanding of the special master's role. But the term "special master" may be used in different ways at different times. For instance, suppose all or part of a dispute is referred to a person pursuant to Code of Civil Procedure Section 638 or 639. Although that person is technically a "referee," the title "special master" is also used. *See* Old Republic Ins. Co. v. St. Paul Fire & Marine Ins. Co., __ Cal. App. 4th __, 53 Cal. Rptr. 2d 50, 52, 53-54 (1996). Under

Code of Civil Procedure Section 645, the person's resolution of the dispute is equivalent to a decision of the court. If the reference is to report a fact, rather than decide the entire case, the special master's report is equivalent to a special verdict. In either situation, the special master has authoritative decision-making power. The proposed definition of "mediator" would not seem to apply, at least if it is modified to clarify that a "mediator" must have "no authority to compel a result or render a decision on any issue in the dispute."

Application of the definition is less clear with regard to a special master appointed pursuant to Federal Rule of Civil Procedure 53. This problem might arise if a state court litigant seeks to introduce evidence of related proceedings before a Rule 53 special master, or if a federal court applies California law on mediation confidentiality in a diversity case. Under Rule 53, federal courts have great latitude in defining the role of a special master: "The order of reference to the master may specify or limit the master's powers and may direct the master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report." The special master could have no decision-making duties at all, authority to report on all of the issues, or something in-between. Although final decision-making authority would rest with the court, often the special master's report may carry so much weight that the special master is effectively the decision-maker. Under such circumstances, the special master should not be regarded as a "mediator" within the meaning of Section 1120: That would not only conflict with the principle that a mediator must lack power to coerce a result, but would also render the special master's report a violation of Section 1123, which restricts a mediator from submitting an evaluation to the court. In other situations, however, the special master's duties may be unrelated to decision-making and entirely consistent with characterization as a mediator.

The staff therefore recommends against making any blanket assertion in the text or Comment to Section 1120 about whether a special master is a "mediator." With regard to these and other persons who help resolve disputes, it seems best to let courts examine the specific nature of the person's role and then assess whether the definition applies. It may be helpful, however, to (1) revise Section 1120(a)(2) to clarify that a mediator must have "no authority to compel a result or render a decision on any issue in the dispute," and (2) add the following paragraph to the Comment to Section 1120(a)(2):

> Under Section 1120(a)(2), a mediator must lack power to coerce a resolution of any issue. Thus, the judge assigned to a case, or any other person with control or influence over any aspect of the decision, is not a mediator within the meaning of the statute. This would include a person whose role is to make a recommendation to the court on a disputed issue. See Section 1123 (mediator evaluations), which forbids a mediator from submitting a recommendation to a court or other adjudicative body.

**§ 1120(c). Mediation-arbitration**

Clayton Janssen of Eureka, an experienced attorney and litigator, observes that the "proposed legislation implies — if not directly suggests — that if a mediation is unsuccessful, by agreement the mediator can then become an arbitrator. (Exhibit p. 13 (emph. in original).) He views this as "a terrible mistake." (*Id.*)

He explains:

> As you know, there is a tremendous difference in both form and substance between mediation and arbitration. The mediation process is advanced by candor. It is much easier to defuse the emotional issues, separate the important from the unimportant and get to a final resolution if the parties have confidence in, and are candid with, the mediator. *In my opinion, there is no way that a party is going to be totally candid with the mediator if that party knows that if the mediation fails the arbitrator is going to be a decider.*
>
> Mediation is not an adversary proceeding — arbitration is. *The notion that you can combine the two in one person is completely contrary to the underlying philosophy of a mediation procedure.*
>
> [*Id.* at 14 (emph. added).]

He urges the Commission to "propose legislation that bars the same person from being an arbitrator who has functioned as a mediator in any given dispute." (*Id.*)

In a thoughtful letter, John Gromala of Gromala Mediation Service raises similar concerns, but makes a more moderate proposal. Like Mr. Janssen, he believes that the mediation process "will be substantially impaired" if parties are allowed to agree in advance that their mediator will arbitrate the dispute if the mediation is unsuccessful. (Exhibit p. 8.) He writes:

> The parties will hesitate to be completely candid during the mediation phase even if the agreement requires the mediator, in the potential role as arbitrator, to disregard all information received in confidence. They will fear that as arbitrator he or she will be unable

> to completely ignore confidential information received as a mediator. Regardless of the integrity of the mediator / arbitrator, the parties could not be faulted for wondering if it would be in their best interest to give damaging information to a person who might become a decision maker. The parties' perception of confidentiality, not the law, will determine the degree of disclosure.
>
> [*Id.*]

He suggests incorporating the following principles into the Commission's proposal:

> An agreement to mediate may provide for arbitration in the event the parties cannot resolve the matter by mediation. The mediator shall not serve as the arbitrator unless the parties agree, after the mediation has been terminated, that the mediator shall serve as the arbitrator. Prior to deciding whether the mediator shall serve as arbitrator each party shall receive from the mediator a separate written stipulation. It shall set forth all the confidential information and documents which the mediator (prospective arbitrator) received from that party which will not be considered in reaching a decision.
>
> [*Id.* at 9.]

The staff considers the issues Messrs. Gromala and Janssen raise difficult. There is merit to their concern that parties will hesitate to be frank with a mediator who must be their arbitrator if mediation fails. But the focus of this study is on mediation confidentiality, not on arbitration or other aspects of mediation.

In the context of the instant study, it may be best to focus on the extent to which a mediator who becomes arbitrator can use information from the mediation in the arbitration. Possible approaches include:

(1) Completely banning the arbitrator from using any information from the mediation. This may be inefficient.

(2) Allowing the arbitrator to use information from the mediation only if all of the mediation participants expressly consent *after the mediation* to use of the information. Consent obtained *before* the mediation would be ineffective. The participants could grant consent as to some information and withhold it as to other mediation disclosures.

(3) Allowing the arbitrator to use information from the mediation if all of the mediation participants expressly consent *before or after the mediation* to use of the information.

All three alternatives may to some extent inhibit candid mediation communications. As Mr. Gromala points out, a party may distrust the mediator's ability to disregard mediation communications in a subsequent arbitration. This is much like use of a limiting instruction in a jury trial, which is also subject to being ignored. Although the approaches are imperfect, something along these lines may be the best we can do, at least without a new study focusing specifically on mediation-arbitration. Of the three approaches, Alternative (3) is most consistent with the Commission's general approach of allowing a variety of dispute resolution techniques to flourish. The staff tentatively leans in that direction. The approach could be implemented by deleting subdivision (c) from proposed Section 1120 and adding a new section stating:

> **§ 1121. Mediation-arbitration**
>
> 1121. (a) Section 1120 does not prohibit either of the following:
>
> (1) a pre-mediation agreement that, if mediation does not fully resolve the dispute, the mediator will then act as arbitrator or otherwise render a decision in the dispute.
>
> (2) a post-mediation agreement that the mediator will arbitrate or otherwise decide issues not resolved in the mediation.
>
> (b) Notwithstanding Section 1120, if a dispute is subject to an agreement described in subdivision (a)(1) or (a)(2), the neutral person who facilitates communication between disputants to assist them in reaching a mutually acceptable agreement is a mediator for purposes of this chapter. In arbitrating or otherwise deciding all or part of the dispute, that person may not rely on any information from the mediation, unless the protection of this chapter does not apply to that information or all of the mediation participants expressly agree before or after the mediation that the person may use the information.
>
> **Comment.** Section 1121 neither sanctions nor prohibits mediation-arbitration agreements. It just makes the confidentiality protections of this chapter available notwithstanding existence of such an agreement.

**§ 1122(a)(3). Confidentiality**

Chip Sharpe reports that persons at his organization, Humboldt Mediation Services, assume that exceptions to mediation confidentiality will be made only if

(1) "All parties agree that they wish their agreement to be disclosed, enforceable, or admissible in court," (2) "[c]redible allegation of child abuse or endangerment of some person compels a mediator to report, or confirm the existence of a report, to appropriate authorities," or (3) "[r]ecords and/or testimony is subpoenaed in a criminal proceeding." (Exhibit p. 12.) They "would appreciate knowing that these assumptions are sufficiently supported by California codes." (*Id.*)

Mr. Sharpe's three categories do not precisely track existing law or the tentative recommendation. The first category is roughly similar to Sections 1127, 1128(a)-(c), and 1129(a) of the tentative recommendation. The second category is similar to exceptions for threats of violence or criminal conduct that exist in other states. *See, e.g.*, Ariz. Rev. Stat. Ann. § 12-2238(D); Colo. Rev. Stat. § 13-22-307(2)(b) (1995). As discussed at page 11 of Memorandum 96-17, however, in initially proposing Section 1152.5 in 1985, this Commission specifically considered and rejected the possibility of an express exception along these lines. It revisited the issue in the course of this study, and again decided against inclusion of such an exception. *See generally* Memorandum 96-17 at p. 11; 4/12/96 Minutes at p. 7.

Notably, the protection of Section 1152.5 includes limitations that to some extent account for evidence of child abuse or other violence. By its terms, the statute does not apply "where the admissibility of the evidence is governed by Section 1818 [family conciliation court] or 3177 [child custody mediation] of the Family Code." Evid. Code § 1152.5(e). In addition, Sections 1152.5(a)(1) and (a)(2), which protect a mediation communication or document from admissibility and discovery, arguably apply only to a noncriminal case. The tentative recommendation would make that limitation express (consistent with Mr. Sharpe's third category).

But Section 1152.5(a)(3) complicates the situation. Whereas subdivisions (a)(1) and (a)(2) only expressly restrict admissibility and discoverability of mediation materials, subdivision (a)(3) makes such materials confidential:

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

According to Ron Kelly, when this provision was added in 1993 some persons felt quite strongly about it. Its meaning and implications are not altogether clear.

Unlike subdivisions (a)(1) and (a)(2), subdivision (a)(3) contains no language even arguably limiting its operation to a noncriminal case. Moreover, by making mediation materials "confidential" it would seem to preclude not only admissibility and discovery of such materials, but also any other type of disclosure, such as informing a fire department of a fire hazard disclosed in mediation or tipping a news reporter about an environmental threat uncovered in mediation. Further, Mr. Kelly wonders whether it creates a cause of action for violation of its requirements.

These are serious issues. Ambiguity on such important matters is undesirable. The tentative recommendation would not address them, it would leave subdivision (a)(3) essentially unchanged. But attempting to flesh out its meaning may embroil this reform in controversy and delay or jeopardize it, leaving other serious ambiguities unaddressed, such as the conflicting decisions on enforceability of an oral mediation agreement (see pages 6-7 of the tentative recommendation).

Although the staff has some misgivings, it tentatively recommends leaving the area alone for now. Alternatively, to achieve consistency with subdivisions (a)(1) and (a)(2), the Commission could expressly limit subdivision (a)(3) to criminal cases:

> (a)(3) All communications, negotiations, ~~or~~ and settlement discussions by and between participants or mediators in the mediation shall remain confidential, except for purposes of a criminal action.

Such a revision may be helpful, but it does not seem essential. Statutes are to be construed to give meaning to every part. If subdivision (a)(3) was construed to make mediation materials confidential for purposes of a criminal action, the limitation of subdivisions (a)(1) and (a)(2) to a noncriminal case (which the tentative recommendation proposes to make more explicit) would be meaningless. A better construction would read subdivision (a)(3) to include an implicit exception for a criminal action. If such an exception is already implicit, however, that reduces the importance of adding language making the exception explicit. In light of the potential for controversy, on balance the staff is inclined against attempting to expressly except a criminal action from subdivision (a)(3).

By phone, Ron Kelly suggested another reform relating to subdivision (a)(3). He proposes pointing out in the Comment to proposed Section 1122 that

mediation participants may agree before mediation to permit disclosure of evidence of potential child abuse or other violence to a person. Such a statement could be helpful, e.g., to alert Humboldt Mediation to a means of achieving its desired degree of confidentiality. The staff hesitates, however, to comment on a portion of Section 1152.5 that is not being substantively changed, particularly a potentially controversial and critical subdivision.

**§ 1122(d). Attorney's fees**

Mr. Gromala asks if the reference to "the court" in Section 1122(d) is "intended to give only 'courts' the power to award attorney fees." (Exhibit p. 9.) He wonders whether a separate court proceeding would be necessary to recover fees if testimony or a document "is sought in an administrative or arbitration proceeding and the mediator's attorney is able to persuade the hearing officer or arbitrator to quash the subpoena." (*Id.*)

He has a good point. In his hypothetical situation, requiring a separate court proceeding would be highly inefficient. The statutory language should be broadened to make clear that an administrative or arbitral tribunal may award fees, not just a court.

On re-reading Section 1122(d), the staff noticed another flaw as well. As currently phrased, the provision might be interpreted to authorize fees for an attempt to compel a mediator to testify, but not for an attempt to obtain a mediator's documents. As explained at page 9 of the preliminary part, however, a mediator may incur substantial litigation expenses in either situation. Section 1122(d) should be revised to make clear that those expenses are recoverable even if they relate to an attempt to obtain a document, not an attempt to compel testimony.

Mr. Kelly suggests still another improvement of Section 1122(d): clarifying that fees are available for seeking testimony in violation of Section 703.5 (making a mediator generally incompetent to testify), not just for attempts to compel in violation of the mediation confidentiality provision. The staff concurs that elimination of this ambiguity would be helpful.

The proposed modifications of Section 1122(d) could be implemented by replacing the current language with the following (and conforming the Comment):

> (d) 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 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.

**§ 1122(f). Intake**

Some letters mention the importance of protecting mediation intake communications. For example, Community Board Program states:

> We consider that the proposal to explicitly make all evidence of the proceedings of a mediation inadmissible as evidence is appropriate. We are especially concerned that all documentation relating to the preparation of a mediation, as well as the results of a mediation, be deemed inadmissible as evidence unless both parties agree that it should be disclosed. We have received subpoenas demanding submission of documentation of case intake records on cases which never progressed beyond the 'intake' stage. We consider it most important that even these preliminary documents be deemed inadmissible as evidence.
>
> [Exhibit p. 5.]

Similarly, Humboldt Mediation seeks assurance that confidentiality protections attach "from the first contact with either party." (Exhibit p. 12.)

Protection of intake communications was the subject of SB 1522 (Greene), which was enacted while the tentative recommendation was out for comment. 1996 Cal. Stat. ch. 174. The language of that bill (set out at Exhibit p. 19) differs from Section 1122(f) of the tentative recommendation, which reads: "This section applies to communications, documents, and any writings as defined in Section 250, that are made or prepared in the course of attempts to initiate mediation, regardless of whether an agreement to mediate is reached."

At a minimum, the tentative recommendation will need to be revised to incorporate the new text of Section 1152.5 in the repeal of that statute. It may also be necessary to revise the language of Section 1122(f) to better protect intake communications: There may be advantages to Senator Greene's approach that have not yet been brought to the Commission's attention. *See generally* Exhibit p. 18 (reporting that Southern California Mediation Association was involved with Senator Greene's bill and intends to comment on "protecting the 'intake' process of mediation"). As yet, however, the staff believes that the language of Section

1122(f) is adequate to accomplish its purpose, except for a point that Ron Kelly made by phone.

Specifically, Mr. Kelly considers it important for parties selecting a mediator to be able to determine whether the mediator has previously mediated a dispute involving their opponent, or has agreed to, or been approached about, mediating such a dispute. The staff agrees that availability of this type of information is critical: mediation will be an effective dispute resolution tool only if parties can be confident of their mediator's impartiality. To ensure that Section 1122 is not interpreted to preclude inquiries about a party's use of a mediator for other disputes, the staff recommends adding a new subdivision to the statute:

> (h) Nothing in this section prevents admissibility or disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as mediator in a dispute.

**§ 1123. Mediator evaluations**

Mr. Kelly has heard sentiment that the provision on mediator evaluations (existing Section 1152.6, proposed Section 1123) should be revised to make clear that it does not preclude a mediator from voicing an opinion on a party's position in the course of a mediation. Mr. Kelly does not provide such feedback in his mediations, but other mediators consider it an important feature.

This concern could be addressed by revising the Comment to Section 1123 as follows:

> **Comment.** Section 1123 continues former Section 1152.6 without substantive change, except it makes clear that (1) the statute applies to all submissions, not just filings, (2) the statute is not limited to court proceedings but rather applies to all types of adjudications, including arbitrations and administrative adjudications, and (3) the statute applies to any evaluation or statement of opinion, however denominated. This section does not prohibit a mediator from expressing an opinion on a party's position in the course of a mediation.
>
> See Section 1120 ("mediation" and "mediator" defined).

The staff does not think such a revision is necessary, however, because Section 1123 governs a mediator's contacts with "a court or other adjudicative body," not contacts with disputants. This could be made more clear by revising its first clause to read: "A mediator may not submit to a court or other adjudicative body, and a court or other adjudicative body may not consider …." Similar modifications of the parallel provisions in Government Code Section 66032 and

Insurance Code Section 10089.80 (see the conforming revisions) would also be appropriate.

**§§ 1128, 1129. Written and oral settlements reached through mediation**

*Fraud, duress, or illegality.* Sections 1128 and 1129 of the tentative recommendation set out specific rules for written and oral agreements reached through mediation. Community Board Program comments that "the exceptions to the confidentiality of agreements and settlements as described in sec. 1128 and 1129 are clear and appropriate." (Exhibit p. 5.) Chip Sharpe of Humboldt Mediation cautions, however, that "the proposed Section 1128(d) could be abused if the conditions of its use are not stringently limited." (Exhibit p. 12.)

Section 1128(d) provides:

> 1128. Notwithstanding Sections 1122 and 1127, an executed written settlement agreement prepared in the course of, or pursuant to, a mediation, may be admitted or disclosed if any of the following conditions exist:
>
> ….
>
> (d) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

Mr. Sharpe maintains that "[e]xcept in criminal proceedings, allegations of 'fraud, duress, or illegality' are best dealt with by addressing them in another mediation session." (Exhibit p. 12.)

Section 1128(d) would not be a new provision, it would merely continue existing Section 1152.5(a)(5) without substantive change. That provision, added in 1993, represents a political compromise of competing considerations. In the absence of a groundswell of sentiment for reform, the staff recommends against tampering with the provision.

*Intent of the parties.* In a well-written letter, mediator Robert Holtzman of Los Angeles comments that although Sections 1128 and 1129 would "represent a significant improvement over existing law," there "may be room for further improvement based upon practical experience." (Exhibit p. 10.) He writes:

> It is important to recognize the context in which issues may arise under these sections. Typically parties will have reached an agreement after extended and arduous mediation proceedings. They will be tired and anxious to leave. A competent mediator or attorney will insist that they remain until their agreement is reduced to writing and signed by them. Usually an instrument is

> prepared which is handwritten and informal, setting out only the principal terms of the agreement in terse language. It may be titled 'memorandum of agreement' or the like. Except in the simplest of cases, it will contemplate a subsequent and more definitive writing. But ordinarily the understanding is that if the definitive instrument is not executed the informal memorandum will constitute the statement of the agreement of the parties and will be enforceable as such. Most of the cases arise where one party gets 'buyer's remorse' and refuses to sign the definitive document.
>
> When I prepare such memoranda I include a clause acknowledging the enforceability of the informal memorandum of agreement. But I am aware that in many cases only the 'deal points' are set forth. While one may readily and correctly infer from the title of the document and the circumstances of its preparation that the matters set forth in a memorandum such as this are intended to be enforceable and binding, there may be no specific words to this effect.
>
> *I suggest that what we should look for in this instance is not an express statement in the writing that it is enforceable or binding or words to that effect but rather a basis for inferring from the instrument as a whole and the circumstances under which it was created that it was so intended. One may draw an analogy to the statute of frauds; if a memorandum is sufficient its enforcement (and by a parity of reasoning its disclosure) should not turn on the presence or absence of magic words but rather upon the determination from the language used and the circumstances that the parties intended to be bound.*
>
> [*Id.* (emph. added).]

In short, Mr. Holtzman proposes that an agreement reached through mediation should be exempt from the confidentiality provision (and thus both technically and practically enforceable) not only if it states that it is "enforceable or binding or words to that effect," but also if the agreement and the circumstances of its preparation otherwise show that the parties intended it to be enforceable and binding.

Mr. Kelly disagrees with that approach. He points out that the more bright-line approach of the current draft better preserves the ability of community programs (and others) to use a non-binding deal to resolve a dispute. In addition, the bright-line approach would help to avoid protracted disputes over enforceability of agreements reached through mediation.

The staff shares this view. Although Mr. Holtzman's comments have some appeal, the current draft would afford sufficient leeway by not requiring use of the words "enforceable" or "binding," just any "words to that effect."

**Gov't Code § 66032. Tolling of limitations period**

Government Code Section 66032, which would be the subject of a conforming revision, pertains to land use mediations and provides in part:

> (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.

Mr. Gromala comments that protection similar to subdivision (a) "would be beneficial for all mediations." (Exhibit p. 9.)

Such a reform may have merit, but it is beyond the scope of this study.

## THE NEXT STEP

There is much support for the tentative recommendation. Although some concerns have been raised, they do not seem insurmountable. The staff hopes and expects, based on the input received thus far, that a draft recommendation can be prepared for and approved (with revisions) at the Commission's next meeting, so that the proposal can be introduced in the upcoming legislative session.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

# CSCCAA

## CALIFORNIA SMALL CLAIMS COURT ADVISORS ASSOCIATION

*Established 1985*



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Small Claims Legal Advisor
President
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Small Claims Division
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CECILIA LOWE
Superior and Municipal Court
Small Claims Advisory
Center for Dispute Resolution
San Bernardino
Vice-President

PATTI McRAE
Office of the District Attorney
Consumer Protection Unit
Santa Clara
Secretary

MELODIANNE DUFFY
Office of the District Attorney
Consumer Protection Unit
Ventura County
Treasurer

To: California Law Revision Commission

From: Jeanne F. Stott, President
California Small Claims Court Advisors Association

**Re: Tentative Proposals For Mediation Confidentiality And Enforceability of Agreements Reached in Mediation.**

Date: September 20, 1996

The California Small Claims Court Advisors Association supports the tentative proposals for the Mediation Confidentiality And Enforceability Of Agreements. Your Commission has our full support and we urge your Commission to proceed with the proposal.

The proposal you present is greatly needed to clarify where the lines are drawn. They also serve as guidelines for those who are unfamiliar with Alternative Dispute Resolution. We commend your efforts and encourage your Commission to continue its valuable work.

If the California Small Claims Court Advisors Association can be of service to your organization, please let us know how we can be of assistance.

Kinsel Accountancy
CORPORATION

Certified Public Accountants
433 California Street, Suite 520
San Francisco, California 94104
Phone: (415) 982-4704
Fax: (415) 982-3736



19 September, 1996

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Tentative recommendation on Mediation Confidentiality

I am a Director of the Alternative Dispute Resolution Operating Committee of the California Society of CPAs (CSCPA). At a recent meeting of our Committee the CSCPA was made aware of your tentative recommendation on mediation confidentiality and is very interested in the improvement of the legislation which you are recommending. We have informed Mr. Bruce Allen, our Government Relations Director, of your work in this area and expect that he will monitor the development of the recommendation and will contact you as appropriate.

Yours truly,

Nicholas Dewar, CPA
Director, ADR Operating Committee
California Society of CPAs

cc: Bruce Allen, Director of Government Relations, CSCPA
Howard Thomas, Chair of ADR Operating Committee, CSCPA
John Costello, Vice-Chair of ADR Operating Committee, CSCPA

CSCPA1.DOC

**RICHARD B. CHESS, JR.**
Attorney at Law

300 Esplanade Dr., Suite 1900
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Mediation - Arbitration

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September 25, 1996

California Law Revision Commission
4000 Middlefield Road
Room D-1
Palo Alto, CA 94303-4739

Re: Tentative Recommendation
Mediator Confidentiality

Dear Commission Members:

Having had the opportunity to review the above matter in some detail, as a professional mediator and attorney, I wish to heartily endorse the Tentative Recommendation.

It is my opinion that the additions and changes proposed therein will eliminate many confusing matters and provide clarity and guidance to the issue of Mediator Confidentiality and thereby benefit the Mediation process as a whole.

Please accept my appreciation for the professional review and analysis you have prepared.

Sincerely,

Richard B. Chess, Jr.

RBC:cam

Conflict Resolution Resources

# THE COMMUNITY BOARD PROGRAM

— 1540 Market Street, Suite 490 · San Francisco, CA 94102 · (415) 552-1250 · Fax (415) 626-0595 —



19 September, 1996

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Tentative recommendation on Mediation Confidentiality

This organization has provided free dispute resolution services to residents of San Francisco since 1976. We have been accepted as a model for the development of hundreds of community mediation programs throughout the nation. We have trained thousands of San Franciscans as mediators, and it is these volunteers who, in groups of three or four, act as co-mediators and help their neighbors resolve a wide range of types of dispute. We provide consultation and training to school districts, local governments and other entities throughout the United States and in some foreign countries. We also publish various manuals and curriculae mostly for school dispute resolution.

We have considered your Tentative Recommendations for Mediation Confidentiality of May, 1996. We support these recommendations and urge you to submit them to the legislature.

In particular we support the following aspects of the tentative recommendations:

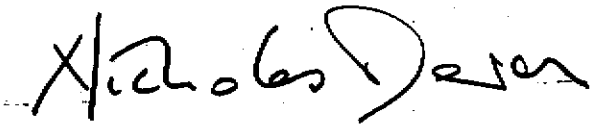
1. We consider the proposed definition of "mediator" as appropriate because it includes any neutral person without specification of any professional qualification, and because it clarifies that a mediator has no authority to compel a result or render a decision in the dispute. This last point is especially significant because the definition of "mediation" does not specify that the process must be voluntary. This definition of "mediator" needs to encompass all those who are indirectly involved in the mediation process such as case-developers, and those who may observe the mediation for the purpose of training or evaluating the neutrals or studying the process. It is our belief that such people are an integral part of the mediation and can therefore be considered as "conducting" the mediation. However, if you believe that such people are not clearly included within the terms of your definition, you may wish to make a clarifying amendment.
2. We consider the proposed definition of "mediation" as appropriate because it describes the responsibility for reaching a decision as lying with the disputants, and it describes

the role of the mediator as facilitative and not as evaluative. We would prefer that the definition specify that mediation be a voluntary process.

3. We consider that the proposal to explicitly make all evidence of the proceedings of a mediation inadmissible as evidence is appropriate. We are especially concerned that all documentation relating to the preparation of a mediation, as well as the results of a mediation, be deemed inadmissible as evidence unless both parties agree that it should be disclosed. We have received subpoenas demanding submission of documentation of case intake records on cases which never progressed beyond the "intake" stage. We consider it most important that even these preliminary documents be deemed inadmissible as evidence. We consider that the exceptions to the confidentiality of agreements and settlements as described in sec. 1128 and 1129 are clear and appropriate.

We consider that the proposals will allow Community Boards to better accomplish its goal of empowering communities to resolve disputes effectively and without violence.

Yours truly,



Nicholas Dewar, CPA
Chair of the Board of Directors
Community Boards Program, Inc.

CBPI2.DOC

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July 30, 1996

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Commission's Tentative Recommendation To Revise Current Laws

Dear Commission Members:

Please accept my thanks for the work that you are doing in connection with recommending changes to certain statutes pertaining to mediation. I have read the proposed legislation pertaining to revisions to the Evidence Code and support them as written. Again, thank you for your very important work.

Very truly yours,

Terrill L. Croghan
Attorney/Mediator

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John J. Fitzpatrick, Jr.
575 Market Street, Room 984
San Francisco, California 94105

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739



Dear Commissioners,

As a joint chair advocate in arbitrations and mediations, as well as an arbitrator and mediator for 22+ years, 75+ cases, I commend your efforts and support revisions to Evidence Code Sections 703.5 and 1120-1129.

Thank you for your careful attention to these important ADR matters.

Sincerely,

John J. Fitzpatrick

# Gromala Mediation Service

July 29, 1996



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

RE: Mediation Confidentiality

Dear Ms Gaal:

I thank you, your colleagues and the Commissioners for the excellent "tentative recommendation" regarding MEDIATION CONFIDENTIALITY dated May 1996. I urge you to press forward with your efforts to clarify and improve our statutory provisions governing the practice of mediation in California.

The following three comments address questions which came to mind as I read your report.

Page 11, § 1120 ( c )

An agreement which requires the parties to arbitrate if the mediation does not produce a satisfactory result is a viable approach. However, if the parties agree in advance that the mediator will become the successor arbitrator the mediation process will be substantially impaired.

The parties will hesitate to be completely candid during the mediation phase even if the agreement requires the mediator, in the potential role as arbitrator, to disregard all information received in confidence. They will fear that as arbitrator he or she will be unable to completely ignore confidential information received as a mediator. Regardless of the integrity of the mediator/arbitrator, the parties could not be faulted for wondering if it would be in their best interest to give damaging information to a person who might become a decision maker. The parties' perception of confidentiality, not the law, will determine the degree of disclosure.

Success in mediation is directly proportional to each party's inclination to trust the mediator. Attorneys have difficulty getting their own clients to be completely truthful with them. Parties have an even greater reluctance to make full disclosure to a mediator who is not their advocate. Before they will confide in the mediator they must be absolutely certain that their information cannot, and will not, be used against them.

As a mediator, I always place great emphasis on the fact that I am not a decision maker and thus they cannot be injured by anything they tell me. How secure would they feel if I followed with "if you cannot reach agreement I will decide for you but, don't worry, I will not use anything you tell or give me in confidence when making my decision."

I recommend the following concept be incorporated into the appropriate codes. It will give each party a feeling of security and control over her or his fate and increase the probability of a successful mediation. Without it, a great number of agreements that authorize the mediator to serve as arbitrator will propel the parties into arbitration.



*701 Fifth Street, Suite 300 Eureka, California 95501*
*(707) 441-0499 fax 444-9529*

An agreement to mediate may provide for arbitration in the event the parties cannot resolve the matter by mediation. The mediator shall not serve as the arbitrator unless the parties agree, after the mediation has been terminated, that the mediator shall serve as the arbitrator. Prior to deciding whether the mediator shall serve as arbitrator each party shall receive from the mediator a separate written stipulation. It shall set forth all the confidential information and documents which the mediator (prospective arbitrator) received from that party which will not be considered in reaching a decision.

Page 12 § 1122 ( d )

Is the reference to "the court" in line 36 intended to give only "courts" the power to award attorney fees? If the testimony or document is sought in an administrative or arbitration proceeding and the mediator's attorney is able to persuade the hearing officer or arbitrator to quash the subpoena, would a separate court proceeding be necessary to recover fees?

Page 18 § 66032

Tolling of the Statute of Limitations could be an important matter in many conflicts submitted to mediation. This is a point that I usually discuss with counsel or the parties and cover in the agreement to mediate. Protection similar to that offered by this Government Code section would be beneficial for all mediations.

Thank you, again, for understanding and promoting the importance of confidentiality and impartiality in mediation. Please let me know if I may be of assistance to you. It is imperative that the concepts incorporated in your "Tentative Recommendation" be adopted by the legislature this year.

Sincerely,

John A. Gromala

JAG:hs

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INCLUDING PROFESSIONAL CORPORATIONS

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August 23, 1996

California Law Revision Commission
4000 Middlefield Road, Rm. D-1
Palo Alto, CA 94303-4739

Re: Tentative Recommendation - Mediation Confidentiality - May, 1996

Gentlemen:

I write from the standpoint of a commercial and construction mediator. The views expressed below are my own and represent neither the opinion of my firm or of any dispute resolution organization with which I am affiliated.

I have reviewed the tentative recommendation and commend it as an excellent and enlightened statement. I recommend its adoption. I comment only on proposed Evidence Code Sections 1128 and 1129. While as drafted they represent a significant improvement over existing law, I suggest that there may be room for further improvement based upon practical experience.

It is important to recognize the context in which issues may arise under these sections. Typically parties will have reached an agreement after extended and arduous mediation proceedings. They will be tired and anxious to leave. A competent mediator or attorney will insist that they remain until their agreement is reduced to writing and signed by them. Usuaally an instrument is prepared which is handwritten and informal, setting out only the principal terms of the agreement in terse language. It may be titled "memorandum of agreement" or the like. Except in the simplest of cases, it will contemplate a subsequent and more definitive writing. But ordinarily the understanding is that if the definitive instrument is not executed the informal memorandum will constitute the statement of the agreement of the parties and will be enforceable as such. Most of the cases arise where one party gets "buyer's remorse" and refuses to sign the definitive document.

When I prepare such memoranda I include a clause acknowledging the enforceability of the informal memorandum of agreement. But I am aware that in many cases only the "deal points" are set forth. While one may readily and correctly infer from the title of the document and the circumstances of its preparation that the matters set forth in a memorandum such as this are intended to be enforceable and binding, there may be no specific words to this effect.

I suggest that what we should look for in this instance is not an express statement in the writing that it is enforceable or binding or words to that effect but rather a basis for inferring from the instrument as a whole and the circumstances under which it was created that it was so intended. One may draw an analogy to the statute of frauds; if a memorandum is sufficient its enforcement (and by a parity of reasoning its disclosure) should not turn on the presence or absence of magic words but rather upon the determination from the language used and the circumstances that the parties intended to be bound.

I appreciate the opportunity to place these thoughts before you and trust that they may be of some assistance.

Sincerely,

Robert A. Holtzman

RAH:rs1
666666666
HOB20374.L02

# Humboldt Mediation Services, Inc.

940 Samoa Blvd., Room 205 Arcata, California 95521 Phone: (707) 826-1066


August 7, 1996





California Law Revision Commission
4000 Middlefield Rd. Room D-1
Palo Alto CA 94303-4739

Dear Friends:

I want you to know that we appreciate the thought and effort which you are putting into clarifying confidentiality protections for mediators and mediation processes. Recent reports have left some of us feeling quite confused as to how evidence code protections are going to be interpreted.

We at Humboldt Mediation Services work from the assumption that the entire mediation process (from the first telephone intake call through the follow-up interviews months later) is confidential, meaning that mediators promise not to reveal information gained in confidence, and that parties make the same promise at the start of joint sessions. We further assume that exceptions to confidentiality will be made only if one or more of the following conditions is true:

1) All parties agree that they wish their agreement to be disclosed, enforceable, or admissible in court.

2) Credible allegation of child abuse or endangerment of some person compels a mediator to report, or confirm the existence of a report, to appropriate authorities.

3) Records and/or testimony is subpoenaed in a criminal proceeding.

We would appreciate knowing that these assumptions are sufficiently supported by California codes.

After reading through the California Law Revision Commission's tentative recommendations, I am still concerned that it is not clearly stated that confidentiality protections extend from the first contact with either party to the post-agreement interviews. I hope this can be specified.

In addition, I am concerned that the proposed Section 1128(d) could be abused if the conditions of its use are not stringently limited. Except in criminal proceedings, allegations of "fraud, duress, or illegality" are best dealt with by addressing them in another mediation session.

Thank you for the care with which you are attending to all of these matters.

Sincerely,

Chip Sharpe
Trainer and Chair of the Board of Directors

12

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July 30, 1996

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

Dear Ms. Gaal:

This is in reference to the Commission's tentative recommendations regarding mediation and, particularly, the suggested legislation.

The proposed legislation implies -- if not directly suggests -- that if a mediation is unsuccessful, by agreement the mediator can then become an arbitrator.

I think this is a terrible mistake.

I write from the vantage point of 44 years as an active trial lawyer and, over the last 4 or 5, having participated as an attorney representing clients in mediation. Despite negative comments at the outset, I am now a true believer in the system. Moreover, in the past year I have started a mediation practice and am now serving relatively frequently as a mediator.

At the outset of every mediation I explain to the parties the difference between mediation and arbitration. Specifically, I explain that I act as a facilitator and try to encourage the

parties to agree. It is further explained that I am not a decider and will not make any decisions regarding their matter.

As you know, there is a tremendous difference in both form and substance between mediation and arbitration. The mediation process is advanced by candor. It is much easier to defuse the emotional issues, separate the important from the unimportant and get to a final resolution if the parties have confidence in, and are candid with, the mediator. In my opinion, there is no way that a party is going to be totally candid with the mediator if that party knows that if the mediation fails the arbitrator is going to be a decider.

Mediation is not an adversary proceeding -- arbitration is. The notion that you can combine the two in one person is completely contrary to the underlying philosophy of a mediation procedure.

In short, I suggest that you propose legislation that bars the same person from being an arbitrator who has functioned as a mediator in any given dispute.

Very truly yours,

Clayton R. Janssen

CRJ:cm

BRUCE JOHNSEN
Management Consultant



August 12, 1996

California Law Revision Commission
4000 Middlefield Rd., Room D-1
Palo Alto, CA. 94303-4739

Dear Commission Members:

I support and am very appreciative of your efforts to revise current laws concerning Mediation Confidentiality and Enforceability of Agreements reached in Mediation.

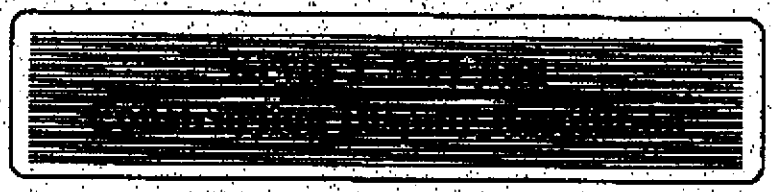
It is important that we have clear laws in these areas, or the mediators' hands will be tied in helping parties to reach fair and long-lasting agreements when resolving disputes.

Thank you for your continuing service to the public of California, as well as those of us in the mediation profession.

Sincerely,

Bruce Johnsen

824 Munras Avenue, Suite G • Monterey, California 93940 • 408-373-5969 • Fax 408-373-4604



September 18,1996

Law Revision Commission
RECEIVED
SEP 18 1996
File:

California Law Revision Commission
4000 Middlefield Road
Room D-1
Palo Alto, CA 94303-4739

Re: Mediation Confidentiality Revision
(May 96#K-401-TR)

Transmitted via FAX

Dear Commissioners:

I have reviewed the proposed recommedations to revise the current laws on confidentiality and urge to you to approve the recommendations at stated.

Sincerely,

Kevin J. McCann



P.O. Box 982, Healdsburg, CA 95448 707.433.7450 / FAX 707.433.7980 / Calif.: 1.800.750.7450

FAX

*From* **Dean J Mellor • Mediation • 1337 Ocean Ave. • Santa Monica, CA 90401**
*A Peaceful Means of Conflict Resolution* **310.451.1004**

**DATE:** Monday, September 2, 1996 **PAGES:** 1

**TO:** **Calif. Law Revision Commiss.**

Law Revision Commission
RECEIVED
AUG 3 0 1996
File: K-401

**FAX:** **415 494 1827**

I would like to commend you on the proposed revisions regarding mediation: the definition and the clarification of the extent of confidentiality of the process. The language is well-drafted, clear and concise. I have nothing but praise for the work you have done. It will be a great improvement in the law.

For your information, I am a private mediator, part-time court mediator, and former President, Southern California Mediation Association. My views here are my own.

SCMA
Southern California Mediation Association



September 16, 1996



California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

RE: Mediation Confidentiality

Dear Commissioners:

The Southern California Mediation Association ("SCMA") is a trade association formed in 1989 and consists of approximately 550 individual members and 40 organizations involved in and supportive of mediation in Southern California. The association provides a forum for communication between mediators and facilitates exposure to the mediation process for many communities. The SCMA actively engages in projects aimed at improving the theoretical understanding and practice skills of mediation practitioners, while educating the public about the nature, availability and use of mediation to resolve conflicts.

Our association supports in concept the tentative recommendations of the California Law Revision Commission, and would like to participate in ongoing dialogue and hearings in which mediation confidentiality is discussed. To this end, we have formed a Public Policy committee to provide feedback to the legislature with respect to the important issues related to mediation, and would like to offer our resources to the commission. For your information, we were involved in the recent amendment to 1152.5 of the Evidence code which extends confidentiality to those that consult with mediators.

Our members have more specific feedback on several confidentiality issues, including but not limited to protecting the "intake" process of mediation, privileged communications, when a mediation is considered completed and the convening stage of a case. To this end, we are studying the recommendations closely and will provide additional feedback under separate cover.

In the meantime, we would like to thank you for the good work that is being done in this area. Please keep us advised of further developments so we can participate in the process of revising these laws.

Sincerely,

Jeffrey Krivis
President-Elect



POST OFFICE BOX 15982, LONG BEACH, CA 90815-0982
TELEPHONE 310/425-1721 • FAX 310/425-0199 • EMAIL: SCMA@IGC.APC.ORG

**Evid. Code § 1152.5 (as amended by 1996 Cal. Stat. ch. 174). Communications during mediation proceedings**

(a) When a person consults a mediator or mediation service for the purpose of retaining the mediator or mediation service, or when persons agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving a dispute in whole or in part:

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

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

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

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

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

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

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

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

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

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