Study K-401 October 9, 1996

First Supplement to Memorandum 96-70

Mediation Confidentiality: Additional Comments on Tentative Recommendation

Attached are two letters that arrived by fax from the Department of Industrial Relations (DIR) (Exhibit pp. 1-2) and the State Bar Committee on Administration of Justice (CAJ) (Exhibit pp. 3-9), respectively. These letters raise a number of new points for the Commission to consider.

ISSUES RAISED BY DIR

DIR seeks assurance that the protections of the tentative recommendation would extend to mediation services provided by the State Mediation and Conciliation Service (SMCS), a division of DIR. To that end, DIR proposes addition of the following language to Section 1120: "'Mediation' includes actions taken by the Department of Industrial Relations to mediate labor disputes, pursuant to Labor Code section 65."

DIR considers such express language necessary "to avoid the possibility that if the proposed legislation is enacted it may later be argued in a court proceeding in which one party seeks disclosure of events at a mediation session conducted by SMCS that mediation services provided by SMCS were intentionally excluded from the protections provided by the new statutory provisions." (Exhibit p. 2.) Presumably, its concern stems from interplay between proposed Sections 1122-1129 and Labor Code Section 65, which includes a confidentiality provision specifically applicable to SMCS:

> 65. The department may investigate and mediate labor disputes providing any bona fide party to such dispute requests intervention by the department and the department may proffer its services to both parties when work stoppage is threatened and neither party requests intervention. In the interest of preventing labor disputes the department shall endeavor to promote sound union-employer relationships. The department may arbitrate or arrange for the selection of boards of arbitration on such terms as all of the bona fide parties to such dispute may agree upon. *Records of the department relating to labor disputes are confidential; provided, however,*

> *that any decision or award arising out of arbitration proceedings shall be a public record.*
>
> [Emph. added; see also Lab. Code § 65.]

Existing Evidence Code Section 1152.5 expressly provides that it does not limit "the confidentiality provided pursuant to Section 65 of the Labor Code." The tentative recommendation would preserve that language. See § 1122(c).

From Labor Code Section 65 and the reference to it in proposed Section 1122(c), one could infer that the Evidence Code statutes on mediation confidentiality are inapplicable to an SMCS mediation. It is also possible to conclude, however, that the confidentiality of such a mediation is protected by Labor Code Section 65 *and* the Evidence Code provisions.

Incorporating DIR's suggested language into proposed Section 1120(a) may serve to eliminate that ambiguity:

> 1120. (a) For purposes of this chapter,
>
> (1) "Mediation" means a process in which a mediator facilitates communication between disputants to assist them in reaching a mutually acceptable agreement.
>
> (2) "Mediator" is a neutral person who conducts a mediation. A mediator has no authority to compel a result or render a decision in the dispute.
>
> (b) For purposes of this chapter, "mediation" includes actions taken by the Department of Industrial Relations to mediate labor disputes, pursuant to Labor Code section 65.
>
> ~~(b)~~ (c) This chapter does not apply to any mediation under ….

The staff knows little about SMCS mediations and procedures, but is attempting to learn more. Based on the information it has now, it tentatively recommends making the change DIR requests.

ISSUES RAISED BY CAJ

CAJ's letter discusses the tentative recommendation section by section, supporting some of the reforms and opposing others. CAJ does not take a position on the Commission's proposal as a whole. The discussion below focuses on CAJ's suggestions for changes in the proposal:

§ 1120. Definitions of "mediation" and "mediator"

CAJ states that "[e]ither Section 1120 should expressly include court proceedings, or it should expressly exclude them." (Exhibit p. 4.) It "understand[s] that the Law Revision Staff intends to make it clear that court-supervised proceedings are not within the scope" of "mediation" as defined in Section 1120. (*Id.*) Pointing out that "[e]nforcement and confidentiality of court settlements is governed by a different statute and different standards than is mediation," it "encourage[s] the Commission to eliminate the present ambiguity." (*Id.*)

The staff's recollection is that the Commission deliberately drafted Section 1120 broadly enough to include a judicial settlement conference, provided that the judge conducting the conference "has no authority to compel a result or render a decision in the dispute." The staff agrees with CAJ that it may be helpful to make that intent more clear, as by adding the following sentence to the end of the first paragraph of the Comment: "A 'mediator' may be a judge conducting a settlement conference, provided that the judge 'has no authority to compel a result or render a decision in the dispute.'"

If Section 1120 encompasses judicial settlement conferences as the staff recollects, proposed Section 1121 (the staff's redraft of the Med-Arb provision, at page 11 of Memorandum 96-70) may require a new subdivision clarifying that despite the Med-Arb provision, a judge conducting a settlement conference is not a "mediator" for purposes of Sections 1120-1129 unless the judge completely lacks decisionmaking authority in the dispute. The staff will suggest precise language at the Commission's meeting.

§ 1122(a)(2). Admissibility and discoverability of mediation documents

CAJ suggests that "Section 1122(a)(2) should expressly except documents described in proposed Section 1122(a)(4)." (Exhibit p. 5.) Section 1122(a)(4) would continue existing law and provide: "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." As CAJ suggests, this requirement should limit the confidentiality afforded by Section 1122(a)(2). But the tentative recommendation already accomplishes as much. Section 1122(a)(2) states:

> 1122. (a)(2) *Except as otherwise provided by statute,* no document, or any writing as defined in Section 250, that is 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 the document or writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.
>
> [Emph. added.]

Section 1122(a)(4) is a statutory provision limiting Section 1122(a)(2). It does not seem necessary to restate it directly in Section 1122. But it may be helpful to explain the interrelationship between Section 1122(a)(2) and 1122(a)(4) in the Comment.

§ 1122(d). Attorney's fees

CAJ suggests clarifying that Section 1122(d), the attorney's fee provision, extends to production of documents, as well as attempts to compel a mediator to testify. (Exhibit p. 5.) This is a good point. The proposed revision on pages 14-15 of Memorandum 96-70 should resolve this concern.

§ 1122(g). Research

CAJ opposes proposed Section 1122(g), which provides: "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." CAJ considers the provision "overbroad." (Exhibit p. 6.) It explains:

> For example, would people gathering information about mediation be able to compel parties to mediation or the mediators to disclose details of the communications made during the mediation? Much of the information which is communicated in mediation is intended to be confidential and might be embarrassing if it became public. If the information gatherers may compel disclosure of information the parties do not want disclosed, the parties will not be candid in the mediation, for fear that the information might ultimately be leaked. Conversely, there is nothing in the proposal to require confidentiality on the part of the people who gather information about the mediation. Once confidential information is given to these people, without restrictions and without any protective laws or orders that can be enforced, they will be free to disclose the information, whether the parties or the mediators are hurt by the disclosures or not.
>
> [Exhibit p. 6.]

CAJ is perhaps correct that Section 1122(g) as currently worded is overbroad. The types of activities CAJ describes are not what the staff believes the provision is intended to protect. Rather, there is a need to allow mediators and others to discuss mediations and mediation results to some extent, so that people can learn from their experiences and develop appropriate rules for and uses of mediation. The staff has not yet thought of a good way to redraft Section 1122(g) to account for CAJ's concerns, but will try to come up with some language by the time of the Commission's meeting.

§ 1127. Consent to disclosure of mediation communications

Section 1127 of the tentative recommendation currently provides:

> 1127. Notwithstanding Section 1122, a communication, document, or any writing as defined in Section 250, that is made or prepared for the purpose of, or in the 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, document, or writing.
>
> (b) The communication, document, or writing 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, document or writing does not disclose anything said or any admission made in the course of the mediation.

CAJ proposes to replace current subdivision (b) with a provision stating: "A written statement otherwise admissible is admissible if it is not precluded by other rules of evidence and as long as it does not include statements solely made in the mediation." (Exhibit p. 7.) CAJ would support proposed Section 1127 with this amendment.

CAJ does not attempt to explain or justify its proposed revision. The staff understands that a CAJ representative will attend the Commission's meeting. Rather than speculate on CAJ's intent and reasoning in this memorandum, it seems wiser to see what CAJ has to say. For the moment, however, the staff has concerns that CAJ's proposed revision would essentially undo Section 1122(a)(2)'s protection of documents prepared for the purpose of mediation (e.g., an outline of an opening statement or a written calculations relating to possible

settlement offers) and substantially undercut protection of other mediation documents (e.g., notes taken in a mediation).

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

CAJ supports proposed Section 1128 (written settlements reached through mediation) "in principle." (Exhibit p. 8.) "However, certain members of the Committee are concerned that satellite litigation, and further costs and time, will be expended in determining whether 'magic incantations' that the agreement is 'admissible or subject to disclosure' or 'enforceable or binding' are present." (*Id.*)

Although CAJ does not propose revision of Section 1128, it does recommend a change in Section 1129. Section 1129 currently reads:

> 1129. (a) Notwithstanding Sections 1122 and 1127, an oral agreement prepared in the course of, or pursuant to, a mediation, may be admitted or disclosed, but only if all of the following conditions are satisfied:
>
> (1) The oral agreement is recorded by a court reporter, tape recorder, or other reliable means of sound recording.
>
> (2) The mediator recites the terms of the oral agreement on the record.
>
> (3) The parties to the oral agreement expressly state on the record that the agreement is enforceable or binding or words to that effect.
>
> (b) Upon recording an oral agreement pursuant to this section, the mediation ends for purposes of this chapter.

CAJ "endorses § 1120 if subsection (a)(3) is deleted." (Exhibit p. 9.) It explains that "recitations of specific words or 'magic language' are unnecessary in those circumstances, and the requirements of (a)(3) will serve only to bar enforcement of obviously valid agreements."

This is much like Mr. Holtzman's suggestion that an agreement reached through mediation should be exempt from the confidentiality provision 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. See Memorandum 96-70 at pp. 18-19 & Exhibit pp. 10-11. For essentially the same reasons set forth in

Memorandum 96-70, the staff recommends against deleting subdivision (a)(3) from Section 1129.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

STATE OF CALIFORNIA
PETE WILSON, GOVERNOR

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October 3, 1996

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

Sent by FAX to (415) 494-1827

Re: Proposed Legislation- Mediation Confidentiality

Dear Ms. Gaal,

The Department of Industrial Relations suggests the following addition to the proposed legislation. The purpose of this addition is to assure that mediation services provided by the State Mediation and Conciliation Service, a division of the Department of Industrial Relations, receive the same protection as that which would be provided to other mediators and mediation processes.

We suggest adding to section 1120(a) of the proposed legislation an additional paragraph, as follows:

> (3) "Mediation" includes actions taken by the Department of Industrial Relations to mediate labor disputes, pursuant to Labor Code section 65.

As alternatives, the same or similar language could be added to paragraph (a)(1), or to subdivision (b) or could be added as subdivision (d).

Labor Code section 65 includes references to arbitration proceedings as well as to mediation; for that reason, any reference to Labor Code section 65 without a specific reference to "mediate" could be taken to refer to both arbitration procedures and mediation procedures. To avoid that result, it appears to be necessary to include the word "mediate" in the new language.

The State Mediation and Conciliation Service (SMCS) of the Department of Industrial Relations includes a staff of 15 mediators, in San Francisco, Los Angeles, Fresno and San Diego. We frequently provide mediation services to assist collective bargaining between public agencies - cities, counties, school districts, transit districts and special purpose districts - and unions of their employees. From time to time we provide mediators in collective bargaining disputes involving small private employers and their employees; some of these disputes concern

procedures for elections to determine whether employees of a particular employer are to be represented by a union.

We urge addition of the sentences suggested here to avoid the possibility that if the proposed legislation is enacted it may later be argued in a court proceeding in which one party seeks disclosure of events at a mediation session conducted by SMCS that mediation services provided by SMCS were intentionally excluded from the protections provided by the new statutory provisions.

Very truly yours,

Martin Fassler
Counsel for Director of Industrial Relations

THE COMMITTEE ON ADMINISTRATION OF JUSTICE
THE STATE BAR OF CALIFORNIA

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October 8, 1996

VIA FACSIMILE (415) 494 1827

California Law Revision Commission
Attention: Nat Sterling, Executive Secretary
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303

Re: CALIFORNIA LAW REVISION COMMISSION'S TENTATIVE RECOMMENDATION ON MEDIATION CONFIDENTIALITY (MAY, 1996) ("RECOMMENDATIONS")

Dear Ladies and Gentlemen:

The Committee on Administration of Justice ("CAJ" or "the Committee") has considered the recommendations at several meetings. The following are CAJ's views:

Brief Description of What the Bill is Intended to Accomplish.

The California Law Revision Commission is recommending a substantial amendment to Evidence Code sections 703.5, 1152.5, and 1152.6 dealing with mediation confidentiality, and conforming revisions in Business and Professions Code section 467.5, Code of Civil Procedure section 1775.10., Government Code sections 66032 and 66033, Insurance Code sections 10089.80 and 10089.82, and Welfare and Institutions Code section 350. The purpose of the amendments is to clarify definitions, make it clear that a mediator may not be forced to testify regarding events that took place during the mediation, to protect the confidentiality of mediation proceedings, and to add protections for the mediator.

Amendment to Evidence Code § 703.5

Section 703.5 prohibits a person presiding at a judicial or quasi-judicial proceeding, arbitrator, or mediator from testifying in any subsequent civil proceeding about any statement, conduct, decision, or ruling at or in conjunction with the prior proceeding, with

some limited exceptions. This amendment would expand the prohibition from testimony in any subsequent civil proceeding to any subsequent ". . . arbitration, administrative adjudication, civil action, or other non-criminal proceeding." The Committee supports the proposal.

Evidence Code § 1120

Proposed Evidence Code section 1120 would define "mediation" and "mediator." "Mediation" would mean "a process in which a mediator facilitates communication between disputants to assist them in reaching a mutually acceptable agreement."

These definitions are reasonable. However, they are broad enough that they apply to more than traditional mediation. For example, the definition of mediation and of mediator are broad enough to cover settlement conferences in pretrial, trial, and post-trial court proceedings. Enforcement and confidentiality of court settlements is governed by a different statute and different standards than is mediation. See, e.g., Code Civ. Proc. § 664.6 and Evid. C. § 1152. Courts have broad powers to enforce court-supervised settlement agreements which powers are not available in the usual mediation. Either Section 1120 should expressly include court proceedings, or it should expressly exclude them. We understand that the Law Revision Staff intends to make it clear that court-supervised proceedings are not within the scope of "meditation" as defined have. We encourage the Commission to eliminate the present ambiguity.

Evidence Code § 1122

Proposed Evidence Code section 1122 would revise some aspects of mediation confidentiality. If persons "conduct and participate" in mediation ". . . for the purpose of compromising, settling, or resolving a dispute in whole or in part . . .," in substance:

a. Anything said or any admission made during the mediation is not admissible in evidence or subject to discovery, and disclosure shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding. This is substantially the same as existing law. Note, however, that this precludes an action for rescission of the settlement which results from mediation if the ground for rescission is fraud committed by means of statements made during the mediation that induced the agreement.

b. No document or writing as defined in Evidence Code section 250 which is prepared for the purpose of, in the course of, or pursuant to the mediation, or copy thereof, would be admissible in evidence or subject to discovery, and disclosure of it could not be compelled. Under the new proposal, the writing prepared for or during the mediation could not be used in evidence later unless all of the parties to the mediation agree. But a document otherwise admissible should not become inadmissible only because it was prepared for or used in a mediation. Proposed Section 1122(a)(2) should expressly except documents described in proposed Section 1122(a)(4).

c. All communications, negotiations, or settlement discussions by and between participants or mediators during the mediation shall remain confidential. This is broader than existing Section 1152.5(a)(3). That section now provides that confidentiality only applies 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 . . . ." The Committee supports this change. The parties to mediation should feel free to be candid.

d. Evidence otherwise admissible or subject to discovery outside a mediation does not become inadmissible or protected from disclosure merely by being used in the mediation. This is substantially the same as current Evidence Code section 1152.5(a)(6).

Proposed Section 1122(c) provides that this section does not make admissible evidence that is inadmissible under Evidence Code section 1152 or any other statutory provision and does not limit the confidentiality provisions of Labor Code section 65. This is substantially the same as current Section 1152.5(C).

Proposed Section 1122(d) provides that, if a mediator is forced to testify with respect to any communication, document, or writing in the mediation that is inadmissible and not subject to disclosure under Section 1122, the court must award reasonable fees and costs to the mediator against the person or persons seeking that testimony. This is substantially the same as existing Section 1152.5(d). For clarity's sake and to be complete, the Committee recommends adding "or the production of documents" on line 32 following "testimony."

Proposed Section 1122(e)(1) provides that this section does not limit the admissibility of an agreement to mediate a dispute. This provision is new and is reasonable.

Proposed Section 1122(e)(2) provides that the section does not limit the effect of an agreement not to take a default in a pending civil action. This is identical with existing law.

Proposed Section 1122(f) would make this confidentiality section applicable to communications, documents, and any writings (as defined in Evidence Code 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 is new. It would protect from discovery discussions about whether or not to mediate, contacts with potential mediators to see whether they would be willing to act as mediators, and the like, even if no agreement to mediate results from those discussions. Since this will promote frankness in discussions about potential mediation, the provision is reasonable, and the Committee supports it.

Proposed Section 1122(g) provides that nothing in proposed Section 1122 prevents gathering information for research or educational purposes, so long as the parties and the specific circumstances of the controversy are not identified or identifiable. This has no counterpart in existing law. The Law Revision Commission states that it is copied from a Colorado statute which allows gathering of information about mediation for research purposes.

The Committee opposes this provision. The Law Revision Commission offers no evidence it is needed. The proposal is overbroad. For example, would people gathering information about mediation be able to compel parties to mediation or the mediators to disclose details of the communications made during the mediation? Much of the information which is communicated in mediation is intended to be confidential and might be embarrassing if it became public. If the information gatherers may compel disclosure of information the parties do not want disclosed, the parties will not be candid in the mediation, for fear that the information might ultimately be leaked. Conversely, there is nothing in the proposal to require confidentiality on the part of the people who gather information about the mediation. Once confidential information is given to these people, without restrictions and without any protective laws or orders that can be enforced, they will be free to disclose the information, whether the parties or the mediators are hurt by the disclosures or not.

Proposed Section 1123

Existing Evidence Code section 1152.6 provides, in substance, that a mediator may not file, and a court may not consider, any declaration or finding of any kind by the mediator, other than a required statement of agreement or non-agreement, unless all parties expressly agree otherwise in writing before the mediation commenced. This prevents a mediator from coercing a party to settle by threatening to inform the assigned judge that the party is being

unreasonable or presents meritless arguments. The existing law has been diluted because some courts have adopted local rules stating that a party participating in mediation is deemed to have consented in advance to waive Section 1152.5. The Law Revision commission cites Contra costa superior Court Local Rule 207 (1996).

Proposed new Section 1123 expands the protection in Section 1152.6 and prohibits a mediator from submitting, or a court or other adjudicative body from considering, any assessment, evaluation, recommendation, or a finding "of any kind" by the mediator other than a required statement of agreement or non-agreement, unless all parties in the mediation expressly agree otherwise in writing prior to the commencement of the mediation. (It exempts from this section mediation under Family Code sections 3160, et seq.)

The Committee supports this proposal.

Proposed Evidence Code § 1127

Existing Evidence Code section 1152.5(a)(4) and part of Section 1152.5(a) contain provisions regarding disclosure of mediation communications. The proposed new Section 1127 would provide that communications, documents, or any writings prepared for the purpose of or in the course of a mediation may be admitted or disclosed if (a) all persons who conduct or otherwise participate in the mediation expressly consent; or (b) the communication, document, or writing is an expert's analysis or a report prepared for the benefit of less than all of the participants in the mediation, and those participants expressly consent to the disclosure, and the communication, document, or writing does not disclose anything said or any admission made in the course of the mediation.

However, § 1127(b) should be changed to read:

> A written statement otherwise admissible is admissible if it is not precluded by other rules of evidence and as long as it does not include statements solely made in the meditation.

The proposed new section is more precise than its predecessor, and the Committee would support it with this amendment.

Proposed Sections 1128 and 1129

Existing decisional law under current Section 1152.5 is inconsistent. Regents of the University of California v. Sumner, 50 Cal. Rptr. 2d 200 (1996), held that Section 1152.5 does not protect an oral statement of settlement terms. Ryan v. Garcia, 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (1994), held that Section 1152.5 protects an oral statement of settlement terms. If the parties reach an oral compromise in a mediation session and thereafter try to reduce it to writing, and the confidentiality rules apply, the parties cannot enforce the oral compromise, because evidence of the oral compromise is inadmissible under existing law.

The current proposals provide that an executed written agreement resulting from mediation would be admissible if it expressly provides that it is admissible or subject to disclosure, or words to that effect (proposed Section 1128(a)); or if it provides that it is "enforceable" or "binding" or words to that effect (proposed Section 1128(b)); or if all signatories to the agreement expressly consent to disclosure (proposed Section 1128(c)); or if the agreement is used to show fraud, duress, or illegality that is relevant to any issue in dispute (proposed Section 1128(d)).

The Committee supports these proposals in principle. However, certain members of the Committee are concerned that satellite litigation, and further costs and time, will be expended in determining whether "magic incantations" that the agreement is "admissible or subject to disclosure" or "enforceable or binding" are present.

Proposed Section 1129(b) also provides that, upon recording an oral agreement pursuant to section 1129, the mediation ends for the purpose of this chapter. This is appropriate because the parties may thereafter get into disputes when they attempt to memorialize an oral agreement in written form. The conduct of the parties after the oral agreement is recited should not be protected from disclosure in proceedings either to enforce, to seek damages for breach, or to rescind. Otherwise, the parties will not be able to offer evidence which would provide courts with the basis for enforcing or terminating the rights and duties under the oral agreement.

The Committee endorses § 1129 if subsection (a)(3) is deleted. The recitations of specific words or "magic language" are unnecessary in those circumstances, and the requirements of (a)(3) will serve only to bar enforcement of obviously valid agreements.

Very truly yours,

Curtis E.A. Karnow
For The Committee on Administration of Justice

cc: Denis T. Rice
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