Study K-401 November 7, 1996

Memorandum 96-75

Mediation Confidentiality: Synthesis of Comments on Tentative Recommendation

At its meeting last month in Long Beach, the Commission began considering comments on its tentative recommendation relating to mediation confidentiality. As discussed in Memorandum 96-70, almost all of the comments express support for the proposal. Many of the letters also make suggestions on specific aspects of the tentative recommendation. In addition to the points discussed in Memorandum 96-70 and its supplement, various persons offered other suggestions before, at, or after the meeting in Long Beach. To assist the Commission in resolving the issues, this memo synthesizes the suggestions received thus far and proposes means of addressing the concerns raised. A staff redraft of the proposed legislation (without the conforming revisions) is attached as Exhibit pages 1-9.

SECTION 1120: DEFINITIONS

Section 1120(a) defines "mediation" and "mediator." The following concerns relate to those definitions:

Settlement conferences and other mandatory mediations

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." (Mem. 96-70, Exhibit pp. 4-5.) Community Board Program would, however, "prefer that the definition specify that mediation be a voluntary process." (*Id.* at Exhibit p. 5.)

Along similar lines, the State Bar Committee on Administration of Justice (CAJ) is concerned about whether the definitions of "mediation" and "mediator" include a settlement conference. (First Supp. to Mem. 96-70, Exhibit p. 4.) CAJ suggests revising Section 1120 to expressly address this point. (*Id.*) As discussed

at the Commission's meeting on October 10, 1996, CAJ proposes to exclude settlement conferences from the definition of "mediation." CAJ maintains that applying the mediation confidentiality statutes to settlement conferences would disrupt existing rules and procedures governing settlement conferences. For example, CAJ points to Code of Civil Procedure Section 664.6, which provides:

> 664.6. If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement.

CAJ urges the Commission not to gut this provision by defining "mediation" to include a settlement conference.

In preparing its tentative recommendation, the Commission considered the points Community Board Program and CAJ raise, although not the interplay between mediation confidentiality and Code of Civil Procedure Section 664.6. At page 10 of the draft attached to Memorandum 96-33, the staff proposed the following definition:

> 163. "Mediator" is a neutral person who conducts a mediation. A mediator has no authority to compel a result or render a decision. A mediator shall not be a judge, commissioner, referee, judge pro tem, or salaried employee of any tribunal in which the mediated dispute is pending.
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> **Comment.** Section 163 serves to distinguish mediators from arbitrators, judges, and other persons who rule on the merits of disputes. Pursuant to the third sentence of Section 163, settlement conferences are not mediations. A settlement conference is conducted under the aura of the court, whereas a mediation is not.

The draft preliminary part explained:

> …. A "mediator" is "a neutral person who conducts a mediation." Two important restrictions apply: (1) the mediator must lack authority to compel a result or render a decision, and (2) the mediator must not be a judge, commissioner, referee, judge pro tem, or salaried employee of any tribunal in which the mediated dispute is pending. The net effect of these restrictions is to limit the term "mediator" to persons who lack coercive authority —

> apparent or actual — over the proceedings they conduct. In other words, although parties may be required to participate in a mediation, the mediator cannot force them to accept any particular resolution, either directly or by virtue of association with the adjudicatory tribunal. A settlement conference would thus fall outside the statutory definition of mediation, because a judge conducting a settlement conference would not be a "mediator."
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> [Mem. 96-33, at Exhibit p. 5.]

At its meeting on May 9, 1996 (continued by teleconference on May 15, 1996), the Commission decided to delete the third sentence from the draft definition, so as to include a settlement conference. (5/9/96 Minutes at p. 9 & Exhibit p.3.) As the staff recollects, the Commission reasoned that a settlement conference is difficult to distinguish from a mediation if the judge conducting the settlement conference has "no authority to compel a result or render a decision" in the dispute, as the definition of "mediator" would require. In both situations, a neutral person without decision-making authority is attempting to help disputants reach a mutually acceptable agreement. In both situations, assurance of confidentiality may be key to success.

CAJ may be correct, however, that extending mediation confidentiality to a settlement conference conflicts with Code of Civil Procedure Section 664.6, even if the judge conducting the conference lacks authority to decide the dispute. Dicta in a number of cases suggest that Section 664.6 applies whenever a judge conducts a settlement conference. *See, e.g.,* In re Marriage of Assemi, 7 Cal. 4th 896, 906, 872 P.2d 1190, 30 Cal. Rptr. 2d 265 (1994) ("It is undisputed that a stipulated settlement presented orally by the party litigants or their counsel to a judge, in the course of a settlement conference supervised by that judge, satisfies the 'before the court' requirement of section 664.6"); Murphy v. Padilla, __ Cal. App. 4th __, 49 Cal. Rptr. 2d 722, 725 (1996) ("an oral agreement recited to a judge in the course of a settlement conference supervised by that judge satisfies the 'before the court' requirement"). On the other hand, in applying Section 664.6 to non-judges, courts have focused on whether the person was "empowered to act with an adjudicatory function" and "did, in fact, act in that capacity." In re Marriage of Assemi, 7 Cal. 4th at 909-910 (Section 664.6 inapplicable because court-referred mediator "was not empowered by statute to make any binding decisions in the underlying dispute and … never exercised any adjudicative authority"); Murphy v. Padilla, 49 Cal. Rptr. 2d at 725 (Section 664.6 applies to retired judge who "was empowered to act in a quasi-judicial capacity as arbiter

of the controverted issues, and was acting in that capacity in approving the stipulated settlement presented to him).

Excluding settlement conferences from the definition of "mediation" would avoid the issue of whether the mediation confidentiality statutes conflict with Section 664.6 or other law governing settlement conferences. The staff suggests following this approach, not necessarily as a permanent solution but for purposes of this reform. Other possibilities the staff considered include:

> (1) Continuing with the Commission's current approach.
>
> (2) Creating a presumption that the mediation confidentiality statutes apply to a settlement conference, at least if it is conducted by a person who lacks authority to compel a result or render a decision. The presumption is overcome if the court informs the participants before the conference that those statutes do not apply. In particular, the court must warn the participants that Section 1123 (mediator evaluations) is inapplicable and the person conducting the conference may make a recommendation to the court.
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> (3) Creating a presumption that the mediation confidentiality statutes do not apply to a settlement conference. The presumption is overcome (at least if the conference is conducted by a person who lacks authority to compel a result or render a decision) if the court informs the participants before the conference that those statutes apply, including in particular Section 1123 (mediator evaluations).
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> (4) Establishing no presumption. In each case, the court must inform the participants before the settlement conference whether the mediation confidentiality statutes apply (at least if the person conducting the conference lacks authority to compel a result or render a decision). The court would have to specifically explain the effect of Section 1123 (mediator evaluations). If the court fails to inform the participants as required, the conference would not be confidential but Section 1123 would apply and violation of Section 1123 would be an irregularity in the trial for purposes of Code of Civil Procedure Section 657.

Evaluating the pros and cons of these and other alternatives may require more in-depth study than is possible before the deadline for introducing a bill in the next legislative session. In particular, it would be helpful to obtain input from the Judicial Council, judges, and others in the court system. Rather than rushing to a conclusion or delaying the rest of the proposal, the staff suggests reserving the

issue for consideration in conjunction with its study of settlement negotiation confidentiality.

The Commission could accomplish this by amending Section 1120(a)(2) to read:

> 1120. (a) For purposes of this chapter,
> ….
> (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. A mediator shall not be a judge, commissioner, referee, temporary judge, special master, or salaried employee of any tribunal in which the mediated dispute is pending.
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> **Comment.** …. 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). Because a judge or subordinate judicial officer is not a "mediator," a judicially supervised settlement conference is not a "mediation" within the meaning of this chapter.

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.

If the Commission adopts the staff's proposal on the previous issue, the answer to that question would be clear. The definition of "mediator" would expressly exclude a special master.

If instead the Commission retains the current definition, the answer would 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. See Mem. 96-70 at pp. 7-8; see also Murphy v. Padilla, 49 Cal. Rptr. 2d at 725-26.

Thus, if the Commission continues its current approach extending mediation confidentiality to settlement conferences, the staff 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 (e.g., ombudspersons) 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 within the definition. *But see* Section __ (mediation-arbitration). 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.

The first of these changes would be useful even if the Commission excludes judges and other court personnel from the definition of "mediator." A modification of the second suggestion may also be helpful:

> Under Section 1120(a)(2), a mediator must lack power to coerce a resolution of any issue. Thus, an arbitrator who has heard evidence but not rendered a decision, or any other person with control or influence over any aspect of the decision, is not within the definition. *But see* Section __ (mediation-arbitration). 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.

Mediation format

To accommodate a wide variety of mediation styles, 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. By phone, Ron Kelly suggested expanding the Comment to Section 1120 to make more clear that the definition encompasses a broad range of approaches. 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." (Mem. 96-70, 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.

Inclusion of 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." (First Supp. to Mem. 96-70, 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.*
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> [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 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.

Observers and assistants

According to Community Board Program, the definition of "mediator" in Section 1120(a)(2) 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." (Mem. 96-70, 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).

Estate planning

Mediator John Gromala recently sent the staff an interesting article on using mediation in estate planning. (Exhibit pp. 10-12.) That prompted the staff to consider whether such mediation would satisfy proposed Section 1120(a)(1), defining "mediation" as "a process in which a mediator facilitates communication between *disputants* to assist them in reaching a mutually acceptable agreement." (Emph. added.) Conceivably, a court might interpret the

term "disputants" narrowly, excluding potential heirs with differing concerns relating to an estate that does not yet exist.

Although that is a possibility, the staff has not thought of a good substitute for the term "disputant." The staff also has concerns about inadvertently extending confidentiality too far by using a more expansive term. Thus, it may be best not to address this point until a problem actually materializes.

SECTION 1120: MEDIATION-ARBITRATION

Section 1120(c) of the tentative recommendation provides that notwithstanding the definitions of "mediator" and "mediation" in subdivision (a), "if mediation is unsuccessful and by agreement the mediator then conducts a further dispute resolution proceeding, this chapter applies to the mediation unless the agreement expressly provides that confidentiality does not apply." The Comment explains:

> Subdivision (c) governs mediation-arbitration (Med-Arb) agreements and similar contractual arrangements in which the person who mediates a dispute serves in another capacity if the mediation is unsuccessful. The protection of this chapter extends to information disclosed in the mediation phase unless the agreement manifests intent to allow subsequent use of such information.

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. (Mem. 96-70, 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. (Mem. 96-70, 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.
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> [*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.
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> [*Id.* at 9.]

As an alternative, he suggests allowing parties to agree in advance that the mediator will be the arbitrator, but "giving either party, at the conclusion of mediation, the right to require a third person to arbitrate." (Exhibit p. 13.) That "would allow the parties to agree to med/arb but with the security of knowing that either party could veto the mediator as arbitrator without giving a reason." (*Id.*)

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. The reforms they propose are more sweeping than mere evidentiary issues.

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.
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> (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 , during, 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 [other than a court decision,] in the dispute.

(2) A post-mediation agreement that the mediator will arbitrate or otherwise decide issues[, other than in court,] 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 consider 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, during, or after the mediation that the person may use specific 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.

The bracketed language would be in order only if the definition of "mediation" includes a settlement conference.

SECTION 1122: MEDIATION CONFIDENTIALITY

§ 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)." (First Supp. to Mem. 96-70, 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).

Section 1122(a)(2) is already drafted accordingly:

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. It may, however, be helpful to explain the interrelationship between Section 1122(a)(2) and 1122(a)(4) in the Comment:

> **Comment.** …Subdivision (a)(4) continues former Section 1152.5(a)(6) without change. It limits the scope of subdivisions (a)(1)-(a)(3), preventing parties from using mediation as a pretext to shield materials from disclosure.

§ 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." (Mem. 96-70, 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 a mediation or tipping a news reporter about an environmental threat uncovered in a 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 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." (Mem. 96-70, 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.

CAJ suggests another change in the attorney's fee provision: clarifying that it extends to production of documents, as well as attempts to compel a mediator to testify. (First Supp. to Mem. 96-70, Exhibit p. 5.) As explained at page 9 of the preliminary part, a mediator may incur substantial litigation expenses in either situation. As currently worded, however, Section 1122(d) might be interpreted to

authorize fees only for an attempt to compel a mediator to testify. CAJ's proposed clarification is in order.

Mr. Kelly suggests still another improvement. He would clarify 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:

> (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.
>
> **Comment.** Subdivision (d) continues former Section 1152.5(d) without substantive change, except to clarify that (1) fees and costs are available for violation of subdivision (a)(1), (a)(2), or (a)(3), (2) either a court or another adjudicative body (e.g., an arbitral or administrative tribunal) may award the fees and costs, and (3) an award is in order for seeking discovery from a mediator in violation of this chapter or Section 703.5.

§ 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.
>
> [Mem. 96-70, Exhibit p. 5.]

Similarly, Humboldt Mediation seeks assurance that confidentiality protections attach "from the first contact with either party." (Mem. 96-70, 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 Mem. 96-70, 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 must 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 less concise wording that have not yet been brought to the Commission's attention. *See generally* Mem. 96-70, 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, particularly if the Comment is revised to state that subdivision (f) "continues without substantive change the protection for intake communications provided by 1196 Cal. Stat. ch. 174, which amended former Section 1152.5."

Although intake communications should be protected, Ron Kelly pointed out by phone that parties selecting a mediator need 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.
>
> **Comment.** Subdivision (h) makes clear that Section 1122 does not preclude a disputant from obtaining basic information about a mediator's track record, which may be significant in selecting an impartial mediator.

§ 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." (First Supp. to Mem. 96-70, 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.
>
> [First Supp. to Mem. 96-70, 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. In response to CAJ's concern, the staff suggests revising Section 1122(g) to read: "This section does not prevent a mediation participant from voluntarily discussing a mediation for research or educational purposes, so long as the parties and their dispute are not identified or identifiable."

SECTION 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.

In Memorandum 96-70, the staff suggested addressing this concern by revising the Comment to state that "Section 1123 does not prohibit a mediator from expressing an opinion on a party's position in the course of a mediation." The staff also pointed out that such a revision might be unnecessary because Section 1123 governs a mediator's contacts with "a court or other adjudicative body," not contacts with disputants. (Mem. 96-70 at p. 19.) The staff suggested making that more clear by revising Section 1123 to read: "A mediator may not submit to a court or other adjudicative body, and a court or other adjudicative body may not consider …." (*Id.*)

Mr. Kelly has since informed the staff that such steps may not go far enough. Satisfying the concern raised may require revising Section 1123 to explicitly state that it does not prohibit a mediator from expressing an opinion on a disputant's position to a mediation participant in the course of a mediation.

The staff considers that approach another acceptable way of addressing the problem. In light of Mr. Kelly's comments, the staff suggests revising Section 1123 as follows:

> 1123. ~~A mediator may not submit,~~ (a) Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a required statement of agreement or nonagreement, unless all parties in the mediation expressly agree otherwise in writing ~~prior to commencement of the mediation. However, this~~ before the mediation.
>
> (b) Nothing in this section prohibits a mediator from expressing an opinion on a person's position to a mediation participant in the course of a mediation.
>
> (c) This section does not apply to mediation under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.
>
> **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, and (4) the statute does not prohibit a mediator from providing a mediation participant with feedback on the dispute in the course of the mediation.

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.

SECTION 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." (Mem. 96-70, Exhibit p. 7.) CAJ would support proposed Section 1127 with this amendment. (*Id.*)

At the Commission's meeting on October 10, 1996, Jerome Sapiro, Jr., explained CAJ's suggested amendment by stating that without it Section 1127 could be interpreted to override Section 1122(a)(4), which provides that 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." Mr. Sapiro also said that just because a document such as a photograph was created for a mediation should not make that document inadmissible.

In the staff's opinion, CAJ's proposed revision would essentially undo Section 1122(a)(2)'s protection of documents prepared for the purpose of a mediation, such as a party's outline of an opening statement or written calculations relating to possible settlement offers. Loss of that protection could inhibit mediation participants from preparing such materials, which in turn could adversely affect

the mediation process. Notably, none of the other sources commenting on the tentative recommendation objected to Section 1127 or proposed reducing the existing protection of documents prepared for a mediation. Thus, the staff recommends against adopting CAJ's approach.

CAJ's comments did, however, cause the staff to consider whether Section 1127(b) should be limited to an expert's analysis or report. Perhaps the following wording would be better:

> 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.
>
> **Comment.** …. Subdivision (b) facilitates admissibility and disclosure of unilaterally prepared ~~experts' reports~~ materials, but it only applies so long as those materials may be produced in a manner revealing nothing about the mediation discussion. ~~Reports and analyses~~ Materials that necessarily disclose mediation communications may be admitted or disclosed only upon satisfying the general rule of subdivision (a).

This revision may alleviate some of CAJ's concerns. For example, it would allow a mediation participant to introduce a photograph that participant took for a mediation but later decided would be useful at trial. Although in many instances it would be possible to take another photo, in some cases that could not be done, as when a building has been razed or an injury has healed. Under the current version of Section 1127, the photo could not be introduced without consent of all of the mediation participants, some of whom might withhold consent. The staff's proposed revision would give the participant who took the photo control over whether it is used, so long as it can be admitted without disclosing anything said or any admission made in the course of the 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." (Mem. 96-70, 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." (Mem. 96-70, 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." (Mem. 96-70, Exhibit p. 12.)

In contrast, CAJ comments that proposed Section 1122 "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." (First Supp. to Mem. 96-70 at Exhibit p. 4.) CAJ acknowledges that this is "substantially the same as existing law." Although CAJ does not propose to change this rule, the comment in its letter and Mr. Sapiro's similar comments at the Commission's meeting in Long Beach suggest that at least some CAJ members strongly disagree with Mr. Sharpe's view regarding fraud in a mediation.

As Mr. Kelly explained in Long Beach, proposed Section 1128(d) merely continues existing Section 1152.5(a)(5), which reflects a political compromise of competing considerations. Under that compromise, if a representation made in a mediation induces assent to an agreement, the participant relying on the representation should have it incorporated into the written agreement. Then the

representation is admissible under Section 1152.5(a)(5). Otherwise, mediation confidentiality protects the representation and there is no relief if it turns out to be fraudulent.

The staff recommends against tampering with that compromise, which was reached only three years ago. It seems like a reasonable way to balance the competing concerns in a controversial area. To avoid reopening a can of worms, the Commission should leave Section 1128(d) as it is.

Intent of the parties

Under proposed Section 1128(b), an executed written settlement agreement reached through mediation is admissible only if the agreement "provides that it is enforceable or binding or words to that effect. Section 1129 incorporates a similar requirement for an oral agreement reached through mediation.

CAJ and mediator Robert Holtzman suggest removing those requirements and focusing instead on the intent of the parties. (Mem. 96-70, Exhibit pp. 10-11; First Supp. to Mem. 96-70, Exhibit pp. 8-9.) Mr. Holtzman explains:

> 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.*
>
> [Mem. 96-70 at Exhibit pp. 10-11(emph. added).]

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 better safeguards mediation confidentiality. Under it, a mediation participant can readily determine when confidentiality does and does not apply: either an agreement includes language indicating that it is enforceable or binding, or such words are lacking. In contrast, if the focus were on the intent of the parties, it would be harder to assess whether confidentiality attaches. That may inhibit communications and decrease the effectiveness of mediation as a dispute resolution tool. Focusing on intent may also result in protracted disputes over enforceability of alleged agreements, which would be avoided under the Commission's current bright-line approach. For those reasons, the staff recommends leaving Sections 1128 and 1129 as is. 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." (Mem. 96-70, Exhibit p. 9.) Such a reform may have merit, but it is beyond the scope of this study.

THE NEXT STEP

Although some of the comments on the tentative recommendation raise challenging issues, there is strong support for the Commission's proposal. For example, Mr. Gromala considers it "imperative" that the concepts incorporated in the tentative recommendation be enacted this coming year. (Mem. 96-70 at Exhibit p. 9.) If the staff prepares a draft of a final recommendation for its next meeting, the Commission should be able to finalize its proposal in time for the next legislative session.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

PROPOSED LEGISLATION

☞ **Staff Note.** The statutory part of the tentative recommendation is reproduced below (without the conforming revisions). Modifications recommended in Memorandum 96-75 and minor technical modifications are italicized.

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

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

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

Comment. Section 703.5 is amended to make explicit that it precludes testimony in a subsequent arbitration or administrative adjudication, as well as in any civil action or proceeding. See Section 120 ("civil action" includes civil proceedings). See also Sections 1120-1129 (mediation).

Evid. Code §§ 1120-1129 (added). Mediation

SEC. ____. Chapter 2 (commencing with Section 1120) is added to Division 9 of the Evidence Code, to read:

CHAPTER 2. MEDIATION

§ 1120. "Mediation" and "mediator" defined

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 *on any issue* in the dispute. *A mediator shall not be a judge, commissioner, referee, temporary judge, special master, or salaried employee of any tribunal in which the mediated dispute is pending.*

(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 Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

~~*(c) Notwithstanding subdivision (a), if mediation is unsuccessful and by agreement the mediator then conducts a further dispute resolution proceeding, this chapter applies to the mediation unless the agreement expressly provides that confidentiality does not apply*~~.

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 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. Because a judge or subordinate judicial officer is not a "mediator," a judicially supervised settlement conference is not a "mediation" within the meaning of this chapter.*

Under Section 1120(a)(2), a mediator must lack power to coerce a resolution of any issue. Thus, an arbitrator who has heard evidence but not rendered a decision, or any other person with control or influence over any aspect of the decision, is not within the definition. But see Section 1121 (mediation-arbitration). 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.

Subdivision (b) makes clear that the protection of this chapter applies to mediation services provided by the State Mediation and Conciliation Service.

As recognized in subdivision ~~*(b)*~~ *(c)*, special confidentiality rules apply to mediation of child custody and visitation issues. See Section 1040; Fam. Code §§ 1818, 3177.

~~*Subdivision (c) governs mediation-arbitration (Med-Arb) agreements and similar contractual arrangements in which the person who mediates a dispute serves in another capacity if the mediation is unsuccessful. The protection of this chapter extends to information disclosed in the mediation phase unless the agreement manifests intent to allow subsequent use of such information*~~.

§ 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 consider 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, during, or after the mediation that the person may use specific 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. Mediation confidentiality

1122. (a) When persons conduct and participate in a mediation for the purpose of compromising, settling, or resolving a dispute in whole or in part *the following principles apply*:

(1) Except as otherwise expressly provided by statute, evidence of anything said or of any admission made for the purpose of, or in the course of, or pursuant to the mediation is not admissible in evidence or subject to discovery, and disclosure of this evidence 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.

(2) Except as otherwise expressly 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.

(3) All communications, negotiations, or settlement discussions by and between participants or mediators in the mediation shall remain confidential.

(4) 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*~~ *when* 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. 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 any communication, document, or any writing as defined in Section 250, that is made or prepared for the purpose of, pursuant to, 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*~~. *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.*

(e) Subdivision (a) does not limit either of the following:

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

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

(f) This section applies to communications, 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.*

(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.*~~ *This section does not prevent a mediation participant from voluntarily discussing a mediation for research or educational purposes, so long as the parties and their dispute 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.*

(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.

Comment. The introductory clause of Section 1122(a) continues without change the introductory clause of former Section 1152.5(a), except that the reference to an agreement to mediate is deleted. The protection of Section 1122 extends to mediations in which participation is court-ordered or otherwise mandatory, as well as purely voluntary mediations.

Subdivision (a)(1) continues without substantive change former Section 1152.5(a)(1), except that its protection explicitly applies in a subsequent arbitration or administrative adjudication, as well as in any civil action or proceeding. See Section 120 ("civil action" includes civil proceedings). In addition, the protection of Section 1122(a)(1) extends to oral communications made for the purpose of or pursuant to a mediation, not just oral communications made in the course of the mediation. Subdivision (a)(1) also reflects the addition of Sections 1127 (consent to disclosure of mediation communications), 1128 (written settlements reached through mediation), and 1129 (oral agreements reached through mediation). To "expressly provide" an exception to subdivision (a)(1), a statute must explicitly be aimed at overriding mediation confidentiality. See, e.g., Section 1127 ("Notwithstanding Section 1122 ….").

Subdivision (a)(2) continues without substantive change former Section 1152.5(a)(2), except that its protection explicitly applies in a subsequent arbitration or administrative adjudication, as well as in any civil action or proceeding. See Section 120 ("civil action" includes civil proceedings). In addition, subdivision (a)(2) expressly encompasses any type of "writing" as defined in Section 250, regardless of whether the representations are on paper or on some other medium. Subdivision (a)(2) also reflects the addition of Sections 1127 (consent to disclosure of mediation communications), 1128 (written settlements reached through mediation), and 1129 (oral agreements reached through mediation). To "expressly provide" an exception to subdivision (a)(2), a statute must explicitly be aimed at overriding mediation confidentiality. See, e.g., Section 1127 ("Notwithstanding Section 1122 ….").

Subdivision (a)(3) continues former Section 1152.5(a)(3) without substantive change.

Subdivision (a)(4) continues former Section 1152.5(a)(6) without change. *It limits the scope of subdivisions (a)(1)-(a)(3), preventing parties from using mediation as a pretext to shield materials from disclosure.*

Subdivision (b) continues former Section 1152.5(b) without change.

Subdivision (c) continues former Section 1152.5(c) without substantive change.

Subdivision (d) continues former Section 1152.5(d) without substantive change, except ~~that its scope is conformed to the scope of subdivisions (a)(1)-(a)(3)~~ *to clarify that (1) fees and costs are available for violation of subdivision (a)(1), (a)(2), or (a)(3), (2) either a court or another adjudicative body (e.g., an arbitral or administrative tribunal) may award the fees and costs, and (3) an award is in order for seeking discovery from a mediator in violation of this chapter or Section 703.5*.

Subdivision (e) continues former Section 1152.5(e) without substantive change, except it makes explicit that Section 1122 does not restrict admissibility of agreements to mediate.

~~*Subdivision (f) is new*~~ *The first sentence of subdivision (f) continues without substantive change the protection for intake communications provided by 1996 Cal. Stat. ch. 174, which amended former Section 1152.5. The second sentence is a new provision to enable mediators to obtain frank feedback from mediation participants.*

Subdivision (g) is new. ~~*It is drawn from*~~ *The first sentence is comparable to* 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).*

Subdivision (h) makes clear that Section 1122 does not preclude a disputant from obtaining basic information about a mediator's track record, which may be significant in selecting an impartial mediator.

See Section 1120 ("mediation" and "mediator" defined). See also Sections 703.5 (competency of judges, arbitrators, and mediators), *1121 (mediation-arbitration),* 1123 (mediator evaluations), 1127 (consent to disclosure of mediation communications), 1128 (written settlements reached through mediation), 1129 (oral agreements reached through mediation). For examples of specialized mediation confidentiality provisions, see Bus. & Prof. Code §§ 467.4-467.5 (community dispute resolution programs), 6200 (attorney-client fee disputes); Code Civ. Proc. §§ 1297.371 (international commercial disputes), 1775.10 (civil action mediation in participating courts); Fam. Code §§ 1818 (family conciliation court), 3177 (child custody); Food & Agric. Code § 54453 (agricultural cooperative bargaining associations); Gov't Code §§ 11420.20-11420.30 (administrative adjudication), 12984-12985 (housing discrimination), 66032-66033 (land use); Ins. Code § 10089.80 (earthquake insurance); Lab. Code § 65 (labor disputes); Welf. & Inst. Code § 350 (dependency mediation). See also Cal. Const. art. I, § 1 (right to privacy); Garstang v. Superior Court, __ Cal. App. 4th __, 46 Cal. Rptr. 2d 84, 88 (1995) (constitutional right of privacy protected communications made during mediation sessions before an ombudsperson).

§ 1123. Mediator evaluations

1123. ~~*A mediator may not submit*~~, *(a) Neither a mediator nor anyone else may submit to a court or other adjudicative body,* and a court or other adjudicative body may not consider, any assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a required statement of agreement or nonagreement, unless all parties in the mediation expressly agree otherwise in writing ~~*prior to commencement of the mediation. However, this*~~ *before the mediation starts.*

(b) Nothing in this section prohibits a mediator from expressing an opinion on a person's position to a mediation participant in the course of a mediation.

(c) This section does not apply to mediation under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

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, *and (4) the statute does not prohibit a mediator from providing a mediation participant with feedback on the dispute in the course of the mediation*.

See Section 1120 ("mediation" and "mediator" defined).

§ 1127. Consent to disclosure of mediation communications

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.

Comment. Section 1127 supersedes former Section 1152.5(a)(4) and part of former Section 1152.5(a)(2), which were unclear regarding precisely whose consent was required for admissibility or disclosure of mediation communications and documents.

Subdivision (a) states the general rule that mediation documents and communications may be admitted or disclosed only upon consent of all participants, including not only parties but also the mediator and other nonparties attending the mediation (e.g., a disputant not involved in litigation, a spouse, an accountant, an insurance representative, or an employee of a corporate affiliate). Consent must be express, not implied. For example, parties cannot be deemed to have consented in advance to disclosure merely because they agreed to participate in a particular dispute resolution program. *Cf.* Contra Costa Superior Court, Local Rule 207 (1996).

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

For other special rules, see Sections 1123 (mediator evaluations), 1128 (written settlements reached through mediation), 1129 (oral agreements reached through mediation).

See Section 1120 ("mediation" and "mediator" defined). See also Sections 703.5 (competency of judges, arbitrators, and mediators) and 1122 (mediation confidentiality).

§ 1128. Written settlements reached through mediation

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:

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

(b) The agreement provides that it is enforceable or binding or words to that effect.

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

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

Comment. Section 1128 ~~*is added to consolidate and clarify*~~ *consolidates and clarifies* provisions governing written settlements reached through mediation.

As to executed written settlement agreements, subdivision (a) continues part of former Section 1152.5(a)(2). See also Ryan v. Garcia, 27 Cal. App. 4th 1006, 1012, 33 Cal. Rptr. 2d 158, 162 (1994) (Section 1152.5 "provides a simple means by which settlement agreements executed during mediation can be made admissible in later proceedings," i.e., the "parties may consent, as part of a writing, to subsequent admissibility of the agreement").

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

As to fully executed written settlement agreements, subdivision (c) supersedes former Section 1152.5(a)(4). To facilitate enforceability of such agreements, disclosure pursuant to subdivision (c) requires only consent of the signatories. Consent of other mediation participants, such as the mediator, is not necessary. Subdivision (c) is thus an exception to the general rule governing consent to disclosure of mediation communications. See Section 1127.

Subdivision (d) continues former Section 1152.5(a)(5) without substantive change.

See Section 1120 ("mediation" and "mediator" defined). See also Section 1129 (oral agreements reached through mediation).

§ 1129. Oral agreements reached through mediation

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.

Comment. By following the procedure in Section 1129, mediation participants may create an oral agreement that can be enforced without violating Section 1122 (mediation confidentiality). The mediation is over upon completion of that procedure, and the confidentiality protections of this chapter do not apply to any later proceedings, such as attempts to further refine the content of the agreement.

Unless the mediation participants follow the specified procedure, confidentiality extends through the process of converting an oral compromise to a definitive written agreement. Section 1129 thus codifies the rule of Ryan v. Garcia, 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (1994) (mediation confidentiality applies to oral statement of settlement terms), and rejects the contrary approach of Regents of University of California v. Sumner, __ Cal. App. 4th __, 50 Cal. Rptr. 2d 200 (1996) (mediation confidentiality does not protect oral statement of settlement terms).

See Section 1120 ("mediation" and "mediator" defined). See also Section 1128 (written settlements reached through mediation).

Heading of Chapter 2 (commencing with Section 1150) (amended)

SEC. ____. The heading of Chapter 2 (commencing with Section 1150) of Division 9 of the Evidence Code is amended to read:

CHAPTER ~~2~~ 3. OTHER EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

Comment. The chapter heading is renumbered to reflect the addition of new Chapter 2 (Mediation).

Evid. Code § 1152.5 (repealed). Mediation confidentiality

SEC. ____. Section 1152.5 of the Evidence Code is repealed.

~~(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 consultation 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.~~

Comment. Except as noted in the Comment to Section 1122, former Section 1152.5(a)(1)-(3) and (b)-(e) are continued without substantive change in Section 1122 (mediation confidentiality). Former Section 1152.5(a)(4) is superseded by Section 1127 (consent to disclosure of mediation communications). See also Sections 1128 (written settlements reached through mediation), 1129 (oral agreements reached through mediation). Former Section 1152.5(a)(5) is continued without substantive change in Section 1128 (written settlements reached through mediation).

Evid. Code § 1152.6 (repealed). Mediator declarations or findings

SEC. ____. Section 1152.6 of the Evidence Code is repealed.

~~1152.6. 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 nonagreement, unless all parties in the mediation expressly agree otherwise in writing prior to commencement of the mediation. However, this section shall not apply to mediation under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.~~

Comment. Former Section 1152.6 is continued and broadened in Section 1123 (mediator evaluations). See Section 1123 Comment.

Point Of View: The Use of Mediation in Estate Planning: A Preemptive Strike Against Potential Litigation

By John A. Grimaldi, Esq.
Eureka, California

I. INTRODUCTION

Use of an independent mediator during the planning process can help estate planners improve client satisfaction, reduce the probability of family litigation and avoid malpractice claims. The goal of retaining a mediator in estate planning is to prevent a future problem rather than to solve an existing dispute. If there is current conflict among family members, only mediation offers the probability of a solution that includes reconciliation. This article will focus primarily on family dynamics involved in planning and preparation of wills and trusts. The same anxieties are present when planning conservatorships, guardianships, powers of attorney (financial and health), prenuptial and postnuptial agreements.

My experience in mediating will and trust contests, and disputes during administration of wills and trusts, indicates that clients' failure to disclose seemingly unimportant, embarrassing or confidential information during the planning stage requires their estate planners to work with incomplete and/or erroneous family information. Occasionally potential clients who discuss estate planning with an attorney do not return. While the attorney may think the people went to another professional, they may have simply made a passive decision to ignore the complex emotional issues raised during the initial interview.

Most planning cases will not include heirs as active participants. However, it is dangerous to assume that a "happily married" couple is communicating well about the division of their estate. It is even more dangerous to assume a couple about to be married has discussed the terms of a prenuptial agreement at arms length. Persons with close relationships may have a great reluctance to bring up sensitive topics between or among themselves. Multiple marriages inject many additional issues. Avoidance of conflict by ignoring it is considered a virtue by many people. They gloss over sensitive areas to preserve ostensible harmony. Unfortunately, glossing over a problem today invariably spawns a greater conflict tomorrow.

A mediator does not represent anyone, has no allegiance to any party, gives no advice, makes no decisions and has no conflicts of interest. There are no constraints on the mediator's ability to speak in confidence with each person.

II. EXAMPLE

Let me share an example where attorneys brought in a mediator. A family with an eight figure estate and several adult children had labored through two years of planning. The parents sought input from their family since each child had considerable financial expertise and a substantial estate. The parents and each child retained and conferred with their own experts (attorneys, accountants and financial advisors). The experts corresponded among themselves and their proposals were circulated among the family. Everyone understood the concepts being presented. Each attorney spent much time with his or her client, and family members had many conferences, but the family was not communicating effectively.

By the time a mediator was retained, the family was close to open warfare. Each family member suspected the others of conniving to gain advantage. This suspicion was within and between generations and was affecting spousal relations. The proposed plans had great technical merit as to tax minimization, but the lines of communication between and among attorneys and clients (dictated by conflict rules) did not provide a vehicle for the family members' real interests to become known to each other and their advisors. As a result, each professional was working with pieces of a different puzzle. They were unable to put the pieces together since each had a different concept of how the final picture should look. Spouses and siblings had "non-monetary" needs that were either obfuscated or couched in "dollar" demands. Satisfying the dollar demand failed to satisfy the emotional need.

One such hidden issue involved a family business run by the father with considerable help from his youngest son, Bob. The father wanted to recognize Bob's contribution by giving the enterprise to him. Bob hated the business, wanted no part of it, but never told his father because of the great sentimental value his father attached to it. The business was taking too much of Bob's time, to the detriment of his own business and his relations with his wife and children. The father was continuing the business because he believed Bob loved it and would want to inherit it. He had absolutely no emotional ties to the business. Once father and son could discuss the issue the solution was self-evident.

Within three months the mediator forwarded to the attorneys a memorandum of understanding signed by all family members. By communicating with everyone on an individual basis, in small groups and in the large family group, the mediator was able to develop a complete picture of the family's needs. After conferring with his clients and their accountants, the parents' attorney prepared documents for an estate plan that satisfied the desires, interests and needs of the entire family.

III. CONFIDENTIALITY

Most jurisdictions afford broad protection to mediation proceedings, including prohibiting the mediator from testifying if there is subsequent litigation. Oral and written admissions, offers, notes, etc. made during mediation cannot be used in litigation. California has codified the confidential nature of mediation proceedings in CCP § 1775 *et seq.* and Evidence Code §§ 703.5, 1152.5, 1152.6. Most mediators describe the bounds of confidentiality in a mediation agreement. There is no risk to the parties participating in mediation, whether it be in the planning stages or in a contested proceeding. They maintain control over their destiny by participating in the mediation process.

IV. CONFLICTING NEEDS AND CONFLICTS OF INTEREST

The statistical data clients give to their attorneys are usually comprehensive and accurate, but hidden interests and suppressed emotional needs of clients are seldom fully disclosed in the presence of one another. The accepted mode of representing clients with potential conflicts of interest may interfere with an attorney's ability to get all the information required to determine a client's real interests and needs. For example, one spouse usually will not raise an issue known to be distasteful to the other in the other's presence. People about to be married are often in a state of euphoria, and they may view a prenuptial agreement through "rose-colored glasses." Each one may have an understanding based on a different perspective. In like manner parents may make assumptions concerning their adult children's desires that have little relation to their children's actual needs. Children may make assumptions about each other and their parents based on emotion. This could result in a plan, based in part on flawed assumptions. Such an oversight could result in future litigation and may be the basis for a malpractice claim.

Use of an independent mediator during the planning process can help estate planners improve client satisfaction, reduce the probability of family litigation and avoid malpractice claims. The goal of retaining a mediator in estate planning is to prevent a future problem rather than to solve an existing dispute.

Prior to the era of specialization and stringent conflict rules, much estate planning was done by attorneys who knew their clients and families. Like the "family doctor," the attorney was aware of the family's trials, tribulations, successes and failures. In that climate, it was common for attorneys to counsel spouses without discussing the possibility of a conflict of interest. The primary focus was on preparing a plan satisfactory to both, through an in-depth interview with both spouses.

Today, many families have children who are the issue of more than one marriage or relationship, and this creates the potential for conflicts of interest. How can a fair plan be developed? Equal is not always equitable. Each family's history, interests and needs, as well as assets and taxes, must be considered when designing a plan for their future.

The probability of a conflict of interest is present in many estate plans. Often, spouses are advised to have separate attorneys; individual financial advisors may be recommended. If they decline separate counsel they may be required to sign a "consent to joint representation." Either choice makes married couples uneasy because they do not see themselves as adversaries. The emphasis on differences may cause new or additional stress in the marriage. It can also cause them to abort the estate planning process.

Having a "consent to joint representation" or suggesting separate attorneys may satisfy ethical requirements (and concern over malpractice exposure) without satisfying the real need of clients for a plan that satisfies their joint desires. This need may be lost when each party communicates through a different lawyer and is suppressed if using the same counselor. If the clients elect to use the same attorney, the attorney cannot have separate confidential discussions with each of them. Use of a mediator provides the attorney with a way to be professionally ethical without sacrificing the clarity that is achieved when one person has separate discussions with each interested party.

V. ROLE OF MEDIATOR

A mediator recognizes the attorney's lead role and will not question the advice given by an attorney. The mediator's role is to assist attorneys in fulfilling their responsibilities to craft a plan that will accomplish the testamentary desires of the attorneys' clients. The mediator confers, on a confidential basis, with each person separately and with the parties jointly. Only information that is authorized to be disclosed by each person will be shared with others. The mediation process can provide attorneys, accountants and financial advisors with valuable information about the clients' subjective interests and needs that should be addressed in the estate plan.

A mediator explains the process to each spouse. Joint meetings and individual conferences are scheduled as appropriate. Others are interviewed only with client and attorney approval. The mediator helps the parties face and resolve important subjective issues that otherwise would continue to fester because they were not disclosed to, and thus not addressed by, the attorneys. Mediation assists the attorneys in collecting all segments of the family puzzle.

A mediator does not need to be an expert in estate planning but does need to be familiar with its basic principles and terminology. Expertise in the mediation process and the unique ability to talk with each person, in confidence, makes the mediator a valuable member of the estate planning team. The mediator helps the parties bring conflicting interests to the surface and helps to resolve them; a mediator does not give advice. Mediation builds on latent goodwill. It is the catalyst used to transform disparate messages into a meaningful collage. The estate planners use their expertise to integrate this information with other data in developing the plan.

Many people mistakenly think of a "mediator" as an arbitrator. Attorneys should explain to their clients that a mediator is a facilitator, not a fact finder or decision maker. The mediator helps the parties peel off emotional overlays and accept reality. None of the planning professionals (attorneys, accountants and financial advisors) can fill the need to speak separately and confidentially with each interested party.

VI. COMPLEXITIES OF FAMILY RELATIONS

The number of family members and advisors participating in the example cited earlier created an unusually complex case. However, the family dynamics in less complicated situations are very similar. For example, a child working in the family business may have expectations that have not been discussed with parents or siblings. The child's spouse may expect even

more. Control and succession in a family business are issues waiting to explode if not properly addressed early on. Also, a child who provides years of care for a sick parent may expect a larger share of the estate. Property acquired and children born during multiple marriages inject many additional issues. These are only a few examples that pose a high potential for litigation which can be avoided through early mediation.

The emotional issues present in a family owned or a closely held business create the climate for litigation after death of the entrepreneur or partner. These issues are often ignored or minimized by the spouses and partners during estate planning. Clients with such illiquid assets need assistance from mediation during estate planning and certainly after the death of the testator or trustor if the problems were not addressed during the planning phase.

A mediator recognizes the attorney's lead role and will not question the advice given by an attorney. The mediator's role is to assist attorneys in fulfilling their responsibility to craft a plan that will accomplish the testamentary desires of the attorneys' clients. The mediator confers, on a confidential basis, with each person separately and with the parties jointly.

Mediation during the planning stage may help spouses to discuss sensitive areas and to avoid future conflict. It can increase the probability of full disclosure since each person knows he or she can speak with the mediator in strict confidence.

A mediator can help all parties and their advisors find hidden issues. It is often difficult for one spouse or sibling to explain the interests and needs of others. The nature of family relations can foster many hidden agendas and suppressed emotions. Poor communications and misconceptions may cause people of goodwill to become antagonists. If not addressed, hidden issues can become buried mines waiting to explode. Mediation can expedite the estate planning process. It helps to eliminate the need for foot dragging by a family member who cannot live with a proposal but does not want to be seen as an obstructionist.

VII. NEED FOR MEDIATION

Whenever a potential conflict of interest requires consideration of separate counsel clients should be advised about the benefits of a skilled mediator. The mediator's work may dispel or confirm and resolve the conflict. In either case, a mediator will help planners identify underlying emotional issues so they can better address the family's spectrum of concerns. Even if a conflict of interest is not apparent, a mediator may be advisable in large estates. The mediator might uncover a latent conflict or bring out information that will prevent a conflict from developing. The attorneys, invariably, will receive information through mediation that will be beneficial in developing a viable plan. At the very least, the attorneys will have a better record that their advice and plan documents correctly address the desire of their clients.

Mediation also works well in resolving problems during probate and trust administration. Relations between executors or trustees and beneficiaries can turn sour because of different priorities. Often differences are in perception rather than substance. A mediator can help the parties clear up areas of ambiguity and aid them in developing a plan of interaction that will promote all their interests. As a result executors and trustees may no longer dread the beneficiaries' phone calls and beneficiaries may be happier while making fewer calls to the fiduciaries.

Courts are not charged with working out reasonable solutions to heirship contests or disputes over administration of wills and trusts. Judges listen to scripted testimony and make decisions. The results may be cumbersome, with little relief to any party. If the goal is a solution rather than a finding of fault, mediation is the best means to achieve the goal.

VIII. CONCLUSION

The services of a mediator should be considered if any of the following scenarios is present:

- mentally or physically challenged child
- economic disparity among heirs
- divorce and multiple marriages
- inherited or other separate property
- a child who is caring for a parent
- testator is either very indecisive or dogmatic
- entrepreneurial or closely held business

Mediation in conflict resolution is a profession in its adolescence. Mediation in estate planning is in its infancy. During the past decade, trial lawyers have recognized the important role mediation can have in providing a better service for their clients. The Estate Planning Bar should consider recommending professional mediators as part of the scope and quality of service they offer their clients. Estate planners have an opportunity to help estate planning mediation develop in a manner most useful to clients and professionals. Dialogue between estate planners and mediators as well as continuing education seminars focusing on mediation in estate planning should be a high priority.

Attorneys whose clients have the benefit of mediation will have more satisfied clients and a reduced risk of malpractice claims. Failure to use a mediator may increase the probability of criticism, misunderstanding and future litigation. The use of a mediator will help to assure a result that is equitable, realistic and acceptable to the key parties, be it estate planning or settlement. ◗

Barbara S. Gaal, 04:48 PM 10/9/96, Mediation Confidentiality

To: Barbara S. Gaal
From: John Gromala <jgromala@tidepool.com>
Subject: Mediation Confidentiality
Cc:
Bcc:
X-Attachments:

Dear Ms Gaal:

Thank you for Memorandum 96-70. Unfortunately it was delivered this morning, thus this tardy memo. The report is well reasoned.

At the risk of being redundant I will make another suggestion regarding mediation/arbitration. For the reasons previously stated I believe an agreement that will require the parties to use the mediator as their arbitrator substantially diminishes the probability of a successful mediation.

Could we satisfy the desire for a definite conclusion with the following concept. Delete the proposed section 1121.(a)(2) and add to 1121.(a)(1) a provision giving either party, at the conclusion of mediation, the right to require a third person to arbitrate.

The process would allow the parties to agree to med/arb but with the security of knowing that either party could veto the mediator as arbitrator without giving a reason. At the outset, the parties would agree on the mediator and on the alternate arbitrator in the event one was needed.

The parties would have the security of knowing that confidential and possibly damaging information could be given to the mediator along with the knowledge that there would be a resolution through arbitration if mediation failed. If they were concerned that the mediator as arbitrator might subconsciously use confidential information against them, they could require the alternate arbitrator to serve.

The only negative factors are the additional time and cost required to present the case to the new arbitrator. This is outweighed by the enhanced probability that the mediation will be successful, thus obviating the need for arbitration.

Thank you for your, the staff's and the Commission's consideration.

Sincerely,

John A. Gromala