Study K-401 December 6, 1996

Memorandum 96-86

Mediation Confidentiality: Draft of Final Recommendation

Attached for the Commission's review is a draft of a final recommendation on mediation confidentiality. The draft incorporates decisions made at the Commission's meeting on November 14-15, 1996. Staff Notes raise a number of issues for decision, including the issues in Memorandum 96-75 that the Commission did not reach in November.

Also attached are two new letters for the Commission to consider: (1) comments of the State Bar Litigation Section (Exhibit pages 1-6), and (2) suggestions from the California Dispute Resolution Council (Exhibit pages 7-10). Staff Notes in the attached draft discuss the points raised in those letters.

At the Commission's upcoming meeting, the staff intends to focus on the issues covered in the Staff Notes. Persons with concerns about other points should plan on raising them at the meeting.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

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THE STATE BAR OF CALIFORNIA

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FAXED 11/5/96 to (916) 327-2186

November 14, 1996

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303

Law Revision Commission
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File: K-401

re: Staff Memorandum on Mediation Confidentiality (November 7, 1996)

Ladies and Gentlemen:

The Litigation Section of the State Bar of California hereby submits the following comments in response to the proposed legislation contained in the November 7, 1996, staff memorandum on mediation confidentiality. For the reasons hereinafter stated, we recommend that a different approach be taken.

The concept of "mediation" is difficult to define without ambiguity. For example, in proposed Evidence Code section 1120(a), the definition of "mediation" is stated as a process in which a mediator facilitates communication to assist in reaching an agreement, but a "mediator" is merely defined as a neutral person who conducts a "mediation." This makes the definition of a "mediation" circular.

The current proposal does attempt to exclude judicial settlement conferences, but the numerous varieties of ways in which mediations and settlement conferences are set up or conducted make even this revision insufficient to exclude all judicial settlement conferences. For example, the San Francisco Superior Court has established an early settlement conference program. San Francisco Superior Court Local Rule 2.13. Settlement conferences under that program are held before a two-member panel of attorneys experienced in the area of the law involved in the litigation. Since those attorneys are not judges, commissioners, referees, temporary judges, special masters, or salaried

employees of the court, they would come within the definition of a "mediator" under proposed Section 1120(a)(2).

In addition, including phrases such as "temporary judge" in the definition of those who are prohibited from being mediators will preclude many people who otherwise act as mediators from conducting mediations. For example, many volunteer lawyers act as judges pro tempore and hear motions, small claims trials, jury trials, and court trials in Municipal and Superior Courts. Surely, the Commission does not intend to prohibit those unpaid volunteer judges pro tempore from working as mediators just because they volunteer their time to the courts. An attorney who volunteers to be a judge pro tempore may still be qualified to be a mediator if the matters in which the attorney sits as a judge pro tempore are not involved in or related to the mediation.

Similarly, the phrase "judicially supervised settlement conference" at page 2, line 16, of the proposal is overbroad because judicially supervised settlement conferences may be heard by persons who are not judges, commissioners, referees, temporary judges, special masters, or salaried employees of the court, so they are not within the third sentence of proposed Section 1120(a)(2).

Instead of attempting to define "mediation" and "mediator" for all purposes, an alternative approach could be to define those words similar to the proposed definitions, but to provide that the standards of confidentiality apply if the parties to the mediation agree to be bound by the proposed confidentiality standards. If the parties want their negotiations to be subject to the proposed rules of confidentiality, they should expressly agree to be bound by them. Mediation should, we suggest, be a consensual process.

Under this approach, it would make no difference whether the particular proceeding is called "mediation," "mediation-arbitration," "dispute resolution," or any other name. If the parties do not agree to confidentiality, the general standards of existing Evidence Code sections 1152, et seq., should govern.

With these general comments in mind, we offer the following comments on sections other than proposed Section 1120 of the Evidence Code.

We agree with the proposed amendment to Evidence Code section 703.5.

In proposed Section 1122(a), we suggest that the phrase ". . . for the purpose of compromising, settling, or resolving a dispute in whole or in part . . ." is redundant. Proposed Section 1120(a)(1) already defines "mediation" to include the concept of reaching agreement. Indeed, the fact that there is mediation does not necessarily mean that there is a dispute. People may engage in mediation to obtain assistance in reaching, for example, agreement on terms of a contract where they are not in dispute about the necessity for or goals of the contract, but need the help of a neutral person in working out details of the agreement. Moreover, the injection into proposed Section 1122(a) of a mens rea [". . . for the purpose of . . ."] will inject new controversies into disputes over the confidentiality or non-confidentiality of the mediation. If persons engage in mediation for more than one purpose, for example, does proposed Section 1122(a) apply or not?

Proposed Section 1122(a)(3) uses the word "confidential." However, that word is not defined in the proposal. What does "confidential" mean in this context? Does it mean that, if any party to the mediation, or any mediator, talks about the mediation, about comments made during the mediation, or about anything related to the mediation, that person is subject to liability? If the word "confidential" has no meaning beyond the prohibitions contained in other sections of the proposal, such as proposed Section 1122(a)(1) and (2) or (d), the word "confidential" may be redundant. However, if it is intended to have a broader meaning, that broader meaning should explicitly be spelled out in the legislation.

The concerns discussed in the preceding paragraph are exacerbated by proposed Section 1122(g). If a participant in mediation requires statutory authority before he or she may voluntarily discuss a mediation for research or educational purposes, all other communications about the mediation are implicitly prohibited. This can lead to results which the Commission likely does not intend. For example, if a party to the mediation is later asked by someone who did not participate in the mediation for a recommendation as to whether or not to hire the mediator in another mediation, and the participant discloses the reasons for his or her recommendation to use or not to use the mediator in another mediation, has the participant violated proposed

Section 1122(a)(3)? This may not be the intended result, but, under the principal *inclusio unius est exclusio alterius*, that may be an interpretation of the proposed legislation.

Conversely, we question the propriety of proposed Section 1122(g). If a participant in mediation may discuss the mediation with others for research or educational purposes, what does "confidentiality" mean? Many extremely sensitive matters are discussed in mediations, and broad license to discuss those matters with persons other than the participants in the mediation will often injure the participants. For example, the recipient is not bound by any rules of confidentiality. There is nothing in the proposal which prohibits the recipient of the information voluntarily disclosed under Section 1122(g) from broadcasting all information about the mediation received from the participant. The confidentiality of the mediation would thereby be destroyed. We suggest that no mediation participant should be able to discuss the mediation for research or education purposes with a non-participant absent the consent of all of the parties to the mediation. Then, the parties can agree or not agree which matters discussed in the mediation can be disclosed, and they can decide whether to impose burdens of confidentiality on the person to whom the information is disclosed.

We agree with the concept contained in proposed Section 1123. However, we suggest that the phrase ". . . a required statement of agreement or non-agreement . . ." should be clarified, for its meaning is not self evident. Would the phrase ". . . a statement that is limited to reporting that agreement was or was not reached . . ." satisfy the intent of the Commission?

In addition, we caution that the phrase ". . . unless all parties in the mediation expressly agree otherwise in writing before the mediation starts . . ." can be a basis for evasion of the prohibition. For example, a judge who orders the parties to involuntary mediation [to us, a nonsequitur anyway] can also order them to make such an agreement, or can force them to enter into such agreement by implicit threats of adverse consequences to the parties in the litigation if they do not make such an agreement. We also suggest that the legislation contain an express prohibition against adoption of any local rule of court or policy inferring such an agreement merely because the parties either were ordered to or agreed to participate in a particular dispute resolution program. Otherwise, local judges or courts can defeat the purpose of this proposed legislation.

We suggest that the phrase "may be admitted or disclosed" at page 6, line 8, of the proposal be changed to read ". . . may be admitted in evidence or disclosed . . . ."

We suggest that proposed Section 1127(b) is ambiguous. The mere fact that something has been said or an admission has been made during the course of the mediation should not determine whether the document should be precluded from admission in evidence or disclosure. If the statement or admission has been made other than in mediation, the fact that it is also made in the course of the mediation should not make the document inadmissible or non-disclosable.

We suggest that the reference to the Contra Costa Superior Court Local Rule at page 6, line 26, of the proposal be deleted. The local rule should not be cited as authority for the proposition stated in the comment. If the intent is to suggest that local rule is improper, the citation of it as authority in the comment is also inappropriate.

Conversely, as stated above in respect to proposed Section 1123(a), we recommend that the statute, itself, expressly prohibit consents to disclosure being deemed to have occurred under local rules, orders, or policies. This should not be relegated to a comment. Consent to disclosure of otherwise confidential mediation communications should be explicit and voluntary. The purposes of mediation may be defeated if consent to disclosure can be inferred from the mere fact of consenting to mediation or being ordered to mediate.

We support the principles contained in proposed Section 1129(a)(1) and (2). However, we recommend against adoption of proposed Section 1129(a)(3). Either an oral agreement has been reached through the mediation, and the agreement has been recited on the record, or an agreement has not been reached. Reciting "buzz words" of one sort or another does not make an agreement any more or less an agreement. In addition, we are concerned that proposed paragraph (3) would merely lead to litigation about whether an agreement, otherwise binding and enforceable as a matter of law, has been made non-binding and unenforceable because some precise words were not stated in the oral recitation of the agreement on the record.

We are concerned about the wording of proposed Section 1129(b). Suppose, for example, the parties have reached an agreement on

some issues but not others, that partial agreement is recited on the record, and the mediation is going to resume with respect to the other issues. Proposed Section 1129(b) could then be used to preclude confidentiality of the subsequent mediation procedures. In addition, even if an oral agreement has been reached, the parties may include in the oral agreement an agreement to reduce the agreement to writing or to prepare documents by which the parties will perform the oral agreement. If the mediator is going to participate in the process of working out the documents, such as by assisting the parties in resolving ambiguities or otherwise ironing out potential disagreements between them, the parties may well want those discussions to continue to be confidential. They should be free to agree that those conversations are confidential, and proposed Section 1129(b) should not be worded to suggest that they may not. On the other hand, the rewording of proposed Section 1129(b) should anticipate that the parties should be able to offer the oral agreement in evidence if the bad faith of one of the parties precludes the written agreement from being executed.

Please feel free to contact the undersigned if you have any questions about any of the foregoing. We are grateful for this opportunity to comment.

Very truly yours,

LITIGATION SECTION

By: _____
Jerome Sapiro, Jr.

JS:vy
(1:9930.03:112)

cc: Teresa Tan, Esq.
Ruth Robinson, Esq.
Ms. Janet Hayes

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promoting effective, accessible conflict resolution services statewide

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Sent by fax (415-494-1827)

December 3, 1996

Law Revision Commission
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Barbara Gaal
California Law Revision Commission
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Proposed Legislation on Mediation Confidentiality

Dear Ms. Gaal,

The California Dispute Resolution Council, through its Mediation Committee, has considered the November 7th draft of the proposed legislation and wishes to make the following comments:

In general the proposed legislation is thoughtful and carefully crafted, and CDRC supports its enactment. The legislation seeks to regulate in a complex area, in which developing rules to apply across the board is very difficult. With this in mind, CDRC suggests that the principles set forth in the proposed legislation should be clearly acknowledged as general prescriptions, which would permit parties and neutrals to craft or apply different rules to their own situations, through mediation agreements, other legislation, or process groundrules.

Specific comments on each of the sections of the proposed legislation are presented below:

1. Evidence Code § 1120. "Mediation" and "mediator" defined

The Committee discussed these provisions at some length and had several comments. First, the definitions of "mediation" and "mediator" are circular and are very broad in scope; the concern is that confusion may occur among parties and attorneys as various neutral providers include their services within the definition in order to secure the protection of the new confidentiality provisions. For example, facilitators in public disputes would appear to be included within the definition of mediators; but since they typically have very different confidentiality procedures--because of the public nature of the issues involved and the frequent need for representatives to report back to their organizations seeking ratification of any agreements--should they be covered by the blanket provisions of the new legislation? What about ombudspersons in organizational disputes?

Administrative Offices CDRC, P.O. Box 55020, Los Angeles, CA 90055 Phone: (213) 896-6540 Fax: (213) 627-1426

Should neutrals who work with gangs or in schools or in cases where the likelihood of child abuse is high be automatically covered, making their processes automatically confidential? The Committee thought that a number of situations like these might call for more targeted confidentiality protections.

Beyond these general concerns lies a particular problem with the last sentence in §1120(a)(2). That sentence would appear to bar a judge or other listed judicial officer from ever serving as a mediator. This sentence highlights how difficult it is to develop a definition that can apply across the board, since a person with decision-making authority in one setting (such as a judge, special master, etc.) might be legitimately acting without such authority in another setting (such as when a retired judge with no power to compel a result conducts a mediation in the matter, not just a settlement conference). Also, the use of "mixed processes"--such as med/arb or service as a special master for discovery while serving as a mediator for the principal issues in the case--pose special difficulties.

We developed some language for consideration by the Law Revision Commission that might help in handling the more specific problems. The general concerns raised above would still remain, though. We would suggest amending the definitions as follows:

1120. (a) For purposes of this chapter,

(1) "Mediation" means a process conducted by one or more neutral persons who facilitate communication between disputants to assist them in reaching a mutually acceptable agreement and who have no authority to compel a result nor render a decision on any issue in the dispute. A judge, commissioner, referee, temporary judge, special master, salaried employee of a tribunal in which a dispute is pending, or other person acting to resolve a dispute shall be considered to be conducting a mediation only if, when, and to the extent that, he or she lacks authority to compel a result or to render a decision on any issue in the dispute.

(2) "Mediator" means the neutral person who conducts a mediation and includes any person designated by a mediator either to assist in the mediation or to communicate with the parties in preparation for a mediation.

CDRC believes it is important that the neutral's lack of authority to compel a result or to render a decision must be clearly expressed to the parties. We did not include such a condition in the definition of mediation because there may be circumstances in which such clear expressions are not made, and we would not want to place such mediations outside the scope of protection the proposed legislation is designed to afford.

We also think it would be a good idea generally to encourage neutrals to use contractual language to spell out for the parties with precision what the neutral's role is and what confidentiality rules apply. In the case of mixed processes (such as "med/arb") or process changes (such as a shift from mediation to arbitration), this is particularly true. Even with legislative protection, good practice would appear to require that the parties should indicate in writing (by means of a mediation agreement or other similar document) what confidentiality rules should apply to their particular situation.

2. Evidence Code § 1121. Mediation-arbitration

The proposed new section seems to set forth a sensible procedure calling for an express agreement about the use of information from the mediation in a later arbitration. The Committee suggested two additions to this section, to clarify where the information is coming from and that the express agreement should be in writing:

a. On page 2, at line 46, after the word "... agree" add "in writing..."

b. After the sentence ending with "... specific information" insert the words "from the mediation."

The Committee discussed the problems that might be raised when a mediation process shifts to an arbitration, and believed that our suggested definition would make it clear that the mediation process ends when the neutral no longer has no decision-making authority. At that point there should be a new statement of groundrules or procedures so that all participants are clear that confidentiality no longer applies.

3. Evidence Code § 1122. Mediation confidentiality

One minor revision is suggested for grammatical reasons:

On page 3, at line 10, change the word "or" to "nor"

On page 3, at line 22, the Committee expressed a concern that the word "confidential" is nowhere defined and that the paragraph in which it appers is phrased very broadly. Different parties might have different expectations about confidentiality unless it was spelled out. For example, under the current wording, a mediation participant might not be able to explain even the results of a mediation to his or her spouse, business partner, or accountant without violating §1122(a)(3).

We would suggest the following addition to the section:

On page 3, at line 22, after the word "confidential" add ", unless the parties expressly agree otherwise."

Another minor wording change is suggested:

On page 4, at line 15, change the word "neutral" to "mediator"

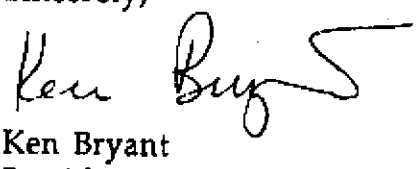
4. Evidence Code § 1123. Mediator evaluations

We did not see how this section would be improved by the proposed addition of "before the mediation starts." Defining the start of a mediation would be difficult since many mediations begin with telephone calls between the parties and the mediator, before a formal session is convened. Therefore, we suggest the following:

On page 5, at line 42, strike all the words after "... in writing" and insert a period after the word "writing".

Thank you for the opportunity to comment on the evolving draft of the proposed legislation. We would be happy to continue participating in the process of developing specific language for these sections. Please let us know how we could be helpful as the Commission's work progresses.

Sincerely,



Ken Bryant
President

cc: Lauren Burton
Robert Barrett
Ron Kelly

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

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

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

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

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

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

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

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

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

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

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

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

#K-401

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Staff Draft

RECOMMENDATION

Mediation Confidentiality

December 1996

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

SUMMARY OF RECOMMENDATION

This recommendation would reform evidentiary provisions governing mediation confidentiality (Evidence Code Sections 703.5, 1152.5, 1152.6) to eliminate ambiguities. In particular, the recommendation would clarify the application of mediation confidentiality to settlements reached through mediation. Clarification is critical to aid disputants in crafting agreements they can enforce. The recommendation also would add definitions of "mediation" and "mediator" to the Evidence Code, consolidate mediation confidentiality statutes in that code, and clarify other aspects of mediation confidentiality.

This recommendation is submitted pursuant to Resolution Chapter 38 of the Statutes of 1996.

MEDIATION CONFIDENTIALITY

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

The Commission deliberately drafted the confidentiality provision in a manner that would allow different mediation techniques to flourish.[4] Since its enactment, courts and disputants have experimented with mediation in many diverse forms. There have also been significant legislative developments.[5]

Although the current statutory scheme provides broad protection, it has ambiguities that cause confusion. In particular, there is a significant issue concerning preparation of settlement agreements parties can enforce.[6] Clarification would benefit disputants and further the use of mediation to resolve disputes.

EXISTING LAW

Section 1152.5 states the general rules pertaining to mediation confidentiality. The other main statutory protections are Section 703.5, which governs competency of mediators (and other presiding officials) to testify in subsequent proceedings, and Section 1152.6, which restricts a mediator from filing declarations and findings regarding the mediation.

General Rules: Section 1152.5

Section 1152.5 remains the key provision protecting mediation confidentiality. It currently provides:

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

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

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

4. *1985 Recommendation*, *supra* note 3, at 245 n.1.

5. In 1993, the Legislature passed a major substantive amendment of Evidence Code Section 1152.5. *See* 1993 Cal. Stat. ch. 1261, § 6. It also extended Evidence Code Section 703.5 (restricting competency to testify in subsequent proceedings) to mediators. See 1993 Cal. Stat. ch. 1261, § 5. Two years later, the Legislature added Evidence Code Section 1152.6, which generally precludes mediators from filing declarations and findings regarding mediations they conduct. See 1995 Cal. Stat. ch. 576, § 8. All further statutory references are to the Evidence Code, unless otherwise indicated.

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

1152.5. (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.

Notably, Section 1152.5 does not define the term "mediation." This omission was not accidental. When the statute was originally enacted, mediation was just beginning to gain acceptance. The Commission considered it important to allow use of different techniques, without legislative constraints. Thus, instead of imposing a statutory definition of mediation, the Commission crafted Section

1152.5 to allow parties to adopt their own definition for purposes of their dispute.[7] This was done by making Section 1152.5 applicable only where the parties executed a written agreement reciting the statutory text and stating that the statute governed their proceeding.[8]

In 1993, Section 1152.5 was amended in a number of ways, including elimination of the requirement of a written agreement.[9] Apparently, the requirement was considered onerous, particularly in disputes involving unsophisticated persons. Although the amendment eliminated the requirement of a written agreement, it left the term "mediation" undefined.

Competency of Mediators To Testify: Section 703.5

As amended in 1993,[10] Evidence Code Section 703.5 makes a mediator incompetent to testify "in any subsequent civil proceeding" regarding the mediation. The statute does not apply to mediation under the Family Code. Additionally, it excepts statements and 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."[11] Before the 1993 amendment extending Section 703.5 to mediators, the statute applied only to an arbitrator or a person presiding at a judicial or quasi-judicial proceeding.

Mediator Declarations and Findings: Section 1152.6

Section 1152.6, enacted in 1995,[12] provides in significant part: "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,

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7. See *1985 Recommendation, supra* note 3, at 245 n.1, 246 n.4.

8. 1985 Cal. Stat. ch. 731, § 1.

9. See 1993 Cal. Stat. ch. 1261 (SB 401), § 6. This 1993 amendment of Section 1152.5 remains the most significant amendment of the statute, although there have been other technical changes. *See* 1992 Cal. Stat. ch. 163, § 73; 1993 Cal. Stat. ch. 219, § 77.7; 1994 Cal. Stat. ch. 1269, § 8. In 1996, Section 1152.5 was amended to expressly protect the mediation intake process. See 1996 Cal. Stat. ch. 174.

10. 1993 Cal. Stat. ch. 1261, § 5.

11. Code of Civil Procedure Section 170.1(a)(1) and (a)(6) provide:

> 170.1. (a) A judge shall be disqualified if any one or more of the following is true:
> (1) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.
> A judge shall be deemed to have personal knowledge within the meaning of this paragraph if the judge, or the spouse of the judge, or a person within the third degree of relationship to either of them, or the spouse of such a person is to the judge's knowledge likely to be a material witness in the proceeding.
> ….
> (6) For any reason (A) the judge believes his or her recusal would further the interests of justice, (B) the judge believes there is a substantial doubt as to his or her capacity to be impartial, or (C) a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial. Bias or prejudice towards a lawyer in the proceeding may be grounds for disqualification.

12. 1995 Cal. Stat. ch. 576, § 8.

unless all parties in the mediation expressly agree otherwise in writing prior to commencement of the mediation." Section 1152.6 is intended to prevent a mediator from coercing a party to settle by threatening to inform the assigned judge that the party is being unreasonable or is pressing a meritless argument.[13] Section 1152.5 may not have accomplished this, because some courts had local rules stating that a party participating in mediation was deemed to have consented in advance to waive Section 1152.5 with regard to having the mediator submit an evaluation to the court.[14]

Other Protections

In addition to Sections 703.5, 1152.5, and 1152.6, there are specialized statutes protecting mediation confidentiality to various degrees in differing contexts.[15] Another source of protection is Section 1152, which makes offers to compromise inadmissible to establish liability.[16] Perhaps most importantly, the constitutional right to privacy[17] encompasses communications "tendered under a guaranty of privacy," and calls for balancing of the interest in mediation confidentiality against competing interests.[18]

PROPOSED REFORMS

The Commission proposes to add a new chapter on mediation confidentiality to the Evidence Code. The substance of existing Sections 1152.5 and 1152.6 would be included in the new chapter. The proposal would reform existing law in the following respects:

Definitions

Now that a written agreement is no longer necessary for statutory protection, it is important to define what constitutes a "mediation" within the meaning of the statute. Without such a definition, the extent of the protection is unclear.

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13. Kelly, *New Law Takes Effect to Protect Mediation Rights,* N. Cal. Mediation Ass'n Newsl., Spring 1996.

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

15. 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).

16. Section 1152.5(c) expressly provides that the statute does not make admissible evidence that is inadmissible under Section 1152 or another statute. "[E]ven though a communication is not made inadmissible by Section 1152.5, the communication is protected if it is protected under Section 1152." Section 1152.5 Comment.

17. Cal. Const. art. I, § 1.

18. Garstang v. Superior Court, 39 Cal. App. 4th 526, 46 Cal. Rptr. 2d 84 (1995).

For example, it is unclear whether the statutory protection applies in a court-ordered or otherwise mandatory proceeding, as opposed to an entirely voluntary proceeding. Similarly, it is unclear whether a court settlement conference is a "mediation" within the meaning of Section 1152.5.

Given the broad array of current dispute resolution techniques, and the importance of confidentiality in promoting candor that may affect the success of those techniques, a participant needs to be able to assess whether the proceeding qualifies as a "mediation" for purposes of the statutes protecting mediation confidentiality.[19]

This recommendation would add a definition of "mediation" to the Evidence Code. It would be broad, stating simply: "'Mediation' means a process in which a mediator facilitates communication between disputants to assist them in reaching a mutually acceptable agreement."[20] The definition would encompass a purely voluntary mediation, as well as a mediation in which participation is court-ordered or otherwise mandatory. Language in Section 1152.5(a) arguably restricting its protection to voluntary mediations would be deleted.

The proposed definition of "mediator" is also broad. A "mediator" is "a neutral person who conducts a mediation." An important restriction applies: The mediator must lack authority to compel a result or render a decision. Moreover, a court settlement conference is expressly excluded from the confidentiality provisions, because it may entail apparent, if not actual, coercive authority. Thus, 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.

The broad definitions of "mediation" and "mediator" recognize and embrace the variety of existing models of mediation. They allow that variety to continue by ensuring the confidentiality necessary for success.

Because family disputes present special considerations, the proposed law does not apply to mediation of custody and visitation issues under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

There would also be a special rule for mediation-arbitration ("Med-Arb") agreements and other dispute resolution agreements in which mediation, if unsuccessful, is followed by another dispute resolution proceeding conducted by the same person who acted as mediator. Under that rule, the mediation confidentiality provisions would protect the mediation phase. If mediation does not fully resolve the dispute, the arbitrator may not consider any information from the mediation unless all of the mediation parties expressly agree before or after the mediation that the arbitrator may use specific information.

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

20. The definition of "mediation" is drawn from Code of Civil Procedure Section 1775.10, which pertains to civil action mediation in certain participating courts.

Consent to Admissibility and Disclosure

Section 1152.5(a)(2) now provides that no mediation document is admissible or subject to discovery "unless the document otherwise provides." This raises a number of issues that are not resolved by the statute. Is it sufficient to unilaterally specify that a document is exempt from Section 1152.5? Is it necessary to have the mediator's consent, or the consent of nonparties who attended the mediation (e.g., a spouse or insurance representative)?

Section 1152.5(a)(4) is similarly ambiguous. It provides that "[a]ll 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 mediation so consent." (Emphasis added.) Formerly, the statute called for consent of "all *persons* who conducted or otherwise participated in the mediation."[21] The current wording is not clear as to precisely whose consent is necessary for disclosure.

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

To ensure that a party who unilaterally commissions an expert's analysis or report is not unfairly deprived of the benefits of that work, the proposed statute would apply a special rule. Only the consent of the mediation participants for whom the material was prepared would be required for disclosure of a unilaterally prepared expert's analysis or report, *provided* the material does not disclose anything said or done or any admission made in the course of the mediation. A report or analysis that necessarily discloses mediation communications could be admitted or disclosed only upon satisfying the general rule requiring consent of all mediation participants.

The recommendation would require that consent of mediation participants to disclosure be express, not just implied. This requirement should help ensure the existence of true, uncoerced consent, as opposed to mere acquiescence in a judge's referral to a court's mediation program.[22]

Settlements Reached Through Mediation

As currently drafted, Section 1152.5 fails to provide clear guidance concerning application of the statute to an oral compromise reached in mediation and a document reducing that compromise to writing. Appellate courts have reached conflicting decisions on whether the confidentiality of Section 1152.5 extends to the process of converting an oral compromise to a definitive written agreement.[23] If confidentiality applies, then parties cannot enforce the oral compromise, because

21. 1985 Cal. Stat. ch. 731, § 1.

22. *See generally* Kelly, *supra* note 13.

23. See *supra* note 6.

evidence of it is inadmissible. If confidentiality does not apply, the oral compromise may be enforceable even if it is never reduced to writing. Resolution of this uncertainty is critical: A disputant must be able to determine when the opponent is effectively bound.

In addition, Section 1152.5 fails to highlight a critical requirement concerning written settlement agreements reached through mediation. Under Section 1152.5(a)(2), unless it is offered to prove fraud, duress, or illegality, a written settlement agreement is admissible only if it so provides.[24] Parties overlooking this requirement may inadvertently enter into a written settlement agreement that is unenforceable because it is inadmissible.

This recommendation would remedy these problems by consolidating in a single statute all the confidentiality requirements applicable to written settlements reached through mediation. This will draw attention to the requirements and decrease the likelihood that disputants will inadvertently enter into an unenforceable agreement. The recommendation would also add a statute specifically covering an oral agreement reached through mediation.

The proposed statute would explicitly make an executed written settlement agreement admissible if it provides that it is "enforceable" or "binding" or words to that effect. Because parties intending to be bound are likely to use words to that effect, rather than stating that their agreement is "admissible," the Commission regards this as an important addition.

The proposed statute also would make clear that an executed written settlement agreement is subject to disclosure if all of the signatories expressly consent. To facilitate enforcement of such an agreement, consent of other mediation participants, such as the mediator, would not be necessary. In contrast, existing law is unclear as to precisely whose consent is required.[25]

Finally, the recommendation provides a procedure for preparing an oral agreement that can be enforced without violating the statutory protections for mediation confidentiality. For purposes of mediation confidentiality, the mediation ends upon completion of that procedure. Any subsequent proceedings are not confidential.

Unless the disputants follow the specified procedure, the rule of *Ryan v. Garcia*[26] should apply: Confidentiality extends through the process of converting an oral compromise reached in mediation to an executed written settlement agreement. Difficult issues can surface in this process, and confidentiality may promote frankness and creativity in resolving them. The proposed approach should enhance the effectiveness of mediation in promoting durable settlements. It will

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24. *See* Ryan v. Garcia, 27 Cal. App. 4th at 1012, 33 Cal. Rptr. 2d at 162 (Section 1152.5 "provides a simple means by which settlement agreements executed during mediation can be made admissible in later proceedings" — specifically, the "parties may consent, as part of a writing, to subsequent admissibility of the agreement.").

25. *See* Section 1152.5(a)(4).

26. 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (1996).

also spare courts from adjudicating disputes over whether an oral compromise was reached in mediation.

Types of Subsequent Proceedings in Which Confidentiality Applies

As originally enacted, the protection of Section 1152.5 applied in "any civil action" in which testimony could be compelled.[27] When Section 1152.5 was amended in 1993, the reference to "civil action" was changed to "civil action or proceeding."[28] The meaning of this change is debatable.[29]

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

This recommendation would resolve that ambiguity by making explicit that mediation confidentiality extends to any subsequent "arbitration, administrative adjudication, civil action, or other noncriminal proceeding." The recommendation also proposes a similar amendment to Section 703.5.

As in its original recommendation proposing Section 1152.5,[30] the Commission does not recommend extending mediation confidentiality to subsequent criminal cases. Such an extension might unduly hamper the pursuit of justice.

Oral Communications Relating to Mediations

Section 1152.5(a)(1) protects "evidence of anything said or of any admission made *in the course of the mediation.*" (Emphasis added.) Section 1152.5(a)(2) is broader. It protects documents "prepared *for the purpose of, or in the course of, or pursuant to,* the mediation." (Emphasis added.)

To encourage frankness in discussions relating to mediation, the Commission proposes to eliminate this distinction and to broaden the coverage of subdivision (a)(1) to conform to that of subdivision (a)(2).

Technological Advances

Section 1152.5(a)(2) protects any mediation "document," but the term "document" is not defined in the Evidence Code. Due to technological advances such as the increasing use of electronic mail and other electronic communications, issues might arise concerning the extent of coverage.

The Commission proposes to address this potential problem by incorporating Section 250's broad definition of "writing" into the mediation confidentiality

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27. 1985 Cal. Stat. ch. 731, § 1.

28. 1993 Cal. Stat. ch. 1261, § 6.

29. One view is that "civil" modifies "action" but not "proceeding," so the protection of Section 1152.5 now extends to criminal cases as well as civil matters. That argument draws support from Section 120's definition of "civil action." Using that definition, the reference to "proceeding" in Section 1152.5 is redundant unless it encompasses more than just civil proceedings.

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

30. *1985 Recommendation*, *supra* note 3, at 245 n.1, 246 n.4; *see also* 1985 Cal. Stat. ch. 731, § 1.

statutes.[31] Because some persons may mistakenly interpret "writing" more narrowly than "document," the proposal would retain the latter term in the mediation confidentiality statutes as well.

Attorney's Fees Provision

Section 1152.5(d) was added in 1993 to provide for an award of attorney's fees and costs to a mediator if the mediator is subpoenaed to testify "as to *anything said or any admission made* in the course of the mediation that is inadmissible and not subject to disclosure under this section." (Emphasis added.) The reference to "anything said or any admission made" encompasses communications protected under Section 1152.5(a)(1), but would appear not to cover an improper attempt to compel disclosure of documents protected under Section 1152.5(a)(2).[32]

A mediator may, however, incur substantial litigation expenses regardless of whether a subpoena violates Section 1152.5(a)(1), Section 1152.5(a)(2), or Section 703.5. Thus, the recommendation conforms the scope of the attorney's fees provision to the scope of protection for mediation confidentiality. It also clarifies that either a court or another adjudicative body (e.g., an administrative or arbitral tribunal) may award the fees and costs.

Agreements To Mediate

As originally enacted, Section 1152.5 included an express exception for an agreement to mediate a dispute.[33] The exception facilitated enforcement of such agreements, as by a mediator seeking to collect an unpaid fee.

The express exception for an agreement to mediate was eliminated in 1993,[34] but the change appears to have been inadvertent. The proposed statute would reinstate the earlier provision.

Reforms of Section 1152.6

Section 1152.6, which generally restricts mediators from filing declarations and findings with courts, would benefit from clarification in a number of respects. In particular, it should be made clear that (1) the restriction applies to all submissions, not just filings, (2) the restriction is not limited to court proceedings, but rather applies to all types of adjudications, including arbitrations and administrative adjudications, and (3) the restriction applies to any evaluation or statement of opinion, however denominated. These changes would help ensure that

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31. Section 250 provides: "'Writing' means handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof."

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

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

34. 1993 Cal. Stat. ch. 1261, § 6.

courts interpret the statute in a manner consistent with its goal of preventing coercion by mediators.[35]

CONCLUSION

Mediation is a valuable and widely used technique in which candor is crucial to success. Sections 703.5, 1152.5, and 1152.6 promote candor by protecting the confidentiality of mediation proceedings, albeit with limitations. To further the effective use of mediation, the rules concerning confidentiality should be unambiguous. The Commission's recommendations would be implemented by the following legislation.

35. *See* Kelly, *supra* note 13.

PROPOSED LEGISLATION

Evid. Code § 703.5 (amended). Testimony by judges, arbitrators, and mediators

SECTION 1. 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. 2. 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" means 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.

(b) 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) This chapter does not apply to a court settlement conference.

Comment. Subdivision (a)(1) 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.

Under subdivision (a)(2), a mediator must be neutral and must lack power to coerce a resolution of any issue. The neutrality requirement 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, interpreter, or secretary.

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

Pursuant to subdivision (c), a court settlement conference is not a mediation. A settlement conference is conducted under the aura of the court, whereas a mediation is not. Because a special master either decides issues pursuant to court authority or reports to a court, this chapter does not apply to proceedings before a special master acting as such. See Code Civ. Proc. §§ 638-645.1; Fed. R. Civ. Proc. 53.

☞ **Staff Note.**

(1) ***Code of Civil Procedure Section 664.6.*** At its meeting on November 14-15, 1996, the Commission decided that the Comment to Section 1120 should refer to cases interpreting the "before the court" requirement of Code of Civil Procedure Section 664.6. The thought was that those cases would provide guidance in interpreting Section 1120's reference to "court settlement conference."

On reexamining the cases interpreting Code of Civil Procedure Section 664.6, the staff concluded that referring to them may foster confusion. In interpreting the phrase "before the court," those cases focus on whether a non-judge has adjudicative power and exercises it. *See, e.g.,* In re Marriage of Assemi, 7 Cal. 4th 896, 909-10, 872 P.2d 1190, 30 Cal. Rptr. 2d 265 (1994) (Section 664.6 in applicable 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, __ Cal. App. 4th __, 49 Cal. Rptr. 2d 722, 725 (1996) (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"). The issue in applying Section 1120(c) will be different. Because Section 1120(a)(2) automatically excludes anyone with decisionmaking power from the definition of "mediator," under Section 1120(c) the focus will be on whether a proceeding is "before the court" *even though* the person conducting it lacks decisionmaking power. The cases interpreting Code of Civil Procedure Section 664.6 provide no insight on this point, so the staff advises against citing them.

(2) ***Comments of State Bar Litigation Section and California Dispute Resolution Council ("CDRC").*** The State Bar Litigation Section (Exhibit pages 1-2) and CDRC (Exhibit pages 7-9) have provided thoughtful comments on the proposed definitions of "mediator" and "mediation." Some of their concerns are moot now that the Commission has opted against stating that "[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."

Both organizations maintain that the proposed definitions of "mediator" and "mediation" are circular. The staff disagrees. The definitions have content in that, *inter alia,* a mediator must be neutral, a mediator must lack decisionmaking power, a mediation must not be a court settlement conference, and a mediation must involve an attempt to aide disputants in reaching a mutually acceptable agreement.

The Litigation Section urges that "[i]nstead of attempting to define 'mediation' and 'mediator' for all purposes, an alternative approach could be to define those words similar to the proposed definitions, but to provide that the standards of confidentiality apply if the parties to the mediation agree to be bound by the proposed confidentiality standards." (Exhibit p. 2.) "If the parties do not agree to confidentiality, the general standards of existing Evidence Code sections 1152, *et seq.,* should govern." (*Id.*)

That would be a return to the approach the Commission took in proposing Section 1152.5 in 1985. Given the Legislature's 1993 decision to overturn the approach, it may not be a workable solution. As discussed at the Commission's meeting on November 14-15, 1996, it would buck the trend towards court-ordered mediation, statutorily subject to mediation confidentiality. See Code Civ. Proc. § 1775.10. The Commission may, however, wish to consider whether to retain the

statutory definitions, but supplement them with a provision allowing parties to opt in to the mediation confidentiality protections under specified circumstances.

The focus of CDRC's comments is quite different from the view of the Litigation Section. CDRC suggests defining "mediator" and "mediation" as follows:

> 1120. (a) For purposes of this chapter,
>
> (1) "Mediation" means a process conducted by one or more neutral persons who facilitate communication between disputants to assist them in reaching a mutually acceptable agreement and who have no authority to compel a result nor render a decision on any issue in the dispute. A judge, commissioner, referee, temporary judge, special master, salaried employee of a tribunal in which a dispute is pending, or other person acting to resolve a dispute shall be considered to be conducting a mediation only if, when, and to the extent that, he or she lacks authority to compel a result or to render a decision on any issue in the dispute.
>
> (2) "Mediator" means the neutral person who conducts a mediation and includes any person designated by a mediator either to assist in the mediation or to communicate with the parties in preparation for a mediation.
>
> [Exhibit p. 8.]

In offering this definition, CDRC was working from the staff draft attached to Memorandum 96-75, which provided in part that "[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." The Commission has since adopted a different approach to court settlement conferences, which might affect CDRC's view on how to define "mediator" and "mediation." As best the staff can discern, the latest draft of Section 1120 differs in substance from CDRC's only in its treatment of court settlement conferences and its lack of explicit reference to persons who assist in a mediation. On the latter point, the staff recommends adopting CDRC's proposed language. The definition of "mediator" would then read: "Mediator" means a neutral person who conducts a mediation and includes any person designated by a mediator either to assist in the mediation or to communicate with the parties in preparation for a mediation. A mediator has no authority to compel a result or render a decision on any issue in the dispute."

CDRC also raises general concerns about application of the definitions to particular types of mediators, such as facilitators in public disputes, ombudspersons in organizational disputes, and neutrals who "work with gangs or in schools or in cases where the likelihood of child abuse is high." (Exhibit pp. 7-8.) Without offering specific suggestions, CDRC concludes that "a number of situations like these might call for more targeted confidentiality protections." (Exhibit p. 8.) This may prove correct. Like CDRC, the staff suggests going forward along the lines of proposed Section 1120, but remaining open to developing targeted approaches for specific situations as the need appears.

Finally, the Litigation Section points out that settlement conferences are set up and conducted in "numerous varieties of ways." (Exhibit p. 1.) For example, early settlement conferences under San Francisco Superior Court Local Rule 2.13 are "held before a two-member panel of attorneys experienced in the area of the law involved in the litigation." (*Id.*) Would this type of proceeding be a "court settlement conference" within the meaning of Section 1120(c)? The staff thinks no, because there is relatively little likelihood of parties or their attorneys having to involuntarily appear before the same two-member panel in connection with another dispute. Does the Commission agree with this analysis? Is there some way to make the term "court settlement conference" readily understandable? Perhaps it would help to state at the end of the Comment: "In assessing whether a proceeding is a court settlement conference, among the relevant factors are whether the person conducting the proceeding is permanently associated with the court adjudicating the dispute, and whether that person's ties to the decisionmaker create an impression of power to influence the decision." Supplementing the statutory definitions with an opt-in clause, as discussed above, might also provide a means to eliminate some of the ambiguity.

(3) ***Emphasis.*** In the current draft, Section 1120 is cast as a set of definitions, rather than as a provision prescribing the application of substantive provisions. The preliminary part (pages 4-5)

is drafted similarly. It may, however, be better to de-emphasize the definitional aspects of Section 1120. That may alleviate some of the concern over the content. It would also direct attention to the real effect of the provisions.

§ 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), 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, that is subject to the protection of this chapter unless all of the mediation parties expressly agree before 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.

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

☞ **Staff Note.** CDRC suggests revising the last sentence of subdivision (b) to read: "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 parties expressly agree in writing before or after the mediation that the person may use specific information from the mediation." The requirement of a writing may prove burdensome in some instances, but may also promote clear understanding of agreed terms. The staff recommends making the changes CDRC requests.

§ 1122. Mediation confidentiality

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

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

(g) The protection of paragraphs (1) to (3), inclusive, of subdivision (a) 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 disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a 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 a mediation in which participation is court-ordered or otherwise mandatory, as well as a purely voluntary mediation.

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 to clarify that (1) fees and costs are available for violation of this chapter or Section 703.5, and (2) either a court or another adjudicative body (e.g., an arbitral or administrative tribunal) may award the fees and costs.

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

Subdivision (f) continues without substantive change the protection for intake communications provided by 1996 Cal. Stat. ch. 174, which amended former Section 1152.5.

In recognition that observing an actual mediation may be invaluable in training or evaluating a mediator or studying the mediation process, subdivision (g) 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) & 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. Similarly, mediation participants may express their views on a mediator's performance, so long as they do not disclose anything said or done at the mediation.

See Section 1120 ("mediation" and "mediator" defined). See also Sections 703.5 (testimony by 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).

☞ **Staff Note.**

(1) ***Subdivision (a), introductory clause.*** The State Bar Litigation Section considers the phrase "…for the purpose of compromising, settling, or resolving a dispute in whole or in part…" redundant, because Section 1120(a)(1) "already defines 'mediation' to include the concept of reaching agreement." (Exhibit p. 3.) According to the Litigation Section, the fact that there is mediation does not necessarily mean that there is a dispute." (*Id.*) The Litigation Section also

points out that "injection into proposed Section 1122(a) of a *mens rea* ["…for the purpose of …"] will inject new controversies into disputes over the confidentiality or nonconfidentiality of the mediation." (*Id.*) For example, if "persons engage in mediation for more than one purpose, … does proposed Section 1122(a) apply or not?" (*Id.*)

The phrase in question is not new, but already exists in Section 1152.5. To the staff's knowledge, however, it has not caused the types of problems the Litigation Section envisions. As the Litigation Section points out, there is some redundancy between it and the definitions in Section 1120. How much will depend on how the Commission decides to handle Section 1120. The staff has reservations about extending mediation confidentiality beyond resolution of disputes, as the Litigation Section proposes. There might be adverse consequences that are hard to foresee. Whether the Commission drops the phrase in question or leaves it intact, the concept of applying confidentiality to mediation of only part of a dispute should be retained. That can either be achieved in Section 1122, as it is now, or moved to Section 1120, which may be more appropriate. For example, the definition of "mediation" could be revised to read: "'Mediation' means a process in which a mediator facilitates communication between disputants to assist them in reaching a mutually acceptable agreement compromising, settling, or resolving a dispute in whole or in part." If this change were made, there would be no need to retain the same language in Section 1122(a).

(2) ***Subdivision (a)(1).*** CDRC suggests the following grammatical change in subdivision (a)(1): "…evidence of any admission made for the purpose of, or in the course of, or pursuant to the mediation is not admissible in evidence ~~or~~ nor subject to discovery …." (Exhibit p. 9.) The staff agrees that this would be an improvement. If anyone disagrees, they should raise this point at the Commission's meeting. Otherwise, the staff will simply incorporate this change into the next draft.

(3) ***Subdivision (a)(3).*** Both CDRC (Exhibit p. 10) and the Litigation Section (Exhibit p. 3) express concern about what the term "confidential" means in subdivision (a)(3). As discussed at pages 15-17 of Memorandum 96-75, this is a critical but loaded issue. At its meeting on November 14-15, 1996, the Commission resolved not to address the point in the instant proposal but to consider it for future study. The staff is convinced that attempting to handle it here would make it difficult if not impossible to introduce the proposal in the Legislature this year. That would delay much-needed reforms, such as clear guidance on the effectiveness of an oral settlement reached through mediation. On the other hand, there are advantages to presenting a complete package, rather than proceeding piecemeal. Is there any sentiment to revisit the Commission's decision regarding subdivision (a)(3)?

(4) ***Subdivision (d).*** At the Commission's meeting on November 14-15, 1996, Commissioner Byrd expressed concern about whether a mediator's assistant would be able to recover attorney's fees pursuant to subdivision (d). To address that problem, the staff suggests doing one or both of the following: (i) revising the first sentence of Section 1120(a)(2) as CDRC suggests (see the Staff Note on Section 1120, *supra*), (ii) adding the following sentence to the Comment to Section 1122: "Because Section 1120(b) defines 'mediator' to include not only the neutral person who takes the lead in conducting a mediation, but also any neutral who assists in the mediation, fees are available regardless of the role played by the person subjected to discovery."

(5) ***Subdivision (f).*** As discussed at the Commission's meeting on November 14-15, 1996, the staff has made efforts to determine whether the Commission's approach to intake communications (subdivision (f)) is acceptable to supporters of SB 1522, Senator Greene's bill on intake communications that was enacted last session. These discussions are ongoing. In particular, SB 1522 sponsor Jeff Krivis of Southern California Mediation Association ("SCMA") considers the phrase "consultation for mediation services" broader than "attempts to initiate mediation." To eliminate debate on this point, the Commission may wish to delete subdivision (f) from Section 1122 and incorporate Senator Greene's language (see Exhibit page 11) instead. Alternatively, the Commission may want to consider using both of the phrases in question.

(6) ***Subdivision (g).*** CDRC suggests substituting the word "mediator" for the word "neutral" in subdivision (g). (Exhibit p. 10.) Unless someone raises this point at the Commission's meeting, the staff will incorporate this change into the next draft.

(7) ***Organizational issues.*** As it has evolved through the Commission's study process, Section 1122 is now a long and complex statute. The staff believes that it would be clearer and more workable if it were broken up into a number of shorter statutes. The staff is working on this idea and will present more concrete suggestions in a supplement or at the Commission's meeting.

§ 1123. Mediator evaluations

1123. (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 before the mediation.

(b) 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 that 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. 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).

☞ **Staff Note.**

(1) ***Required statement of agreement or non-agreement.*** The Litigation Section considers the phrase " …a required statement of agreement or non-agreement" unclear. (Exhibit p. 6.) It would substitute "…a statement that is limited to reporting that agreement was or was not reached." (*Id.*) The staff suggests the following language instead: "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~~ a report that is mandated by court rule or other law and states only whether an agreement was reached, unless all parties in the mediation expressly agree otherwise in writing."

(2) ***Timing of consent.*** CDRC would delete the phrase "before the mediation," which is at the end of subdivision (a). (Exhibit p. 10.) In its experience, defining the start of a mediation "would be difficult since many mediations begin with telephone calls between the parties and the mediator, before a formal session is convened." (*Id.*) The staff recommends making the suggested change.

(3) ***Misuse of the consent exception.*** The State Bar Litigation Section perceptively comments:

> [W]e caution that the phrase "…unless all parties in the mediation expressly agree otherwise in writing before the mediation starts…" can be a basis for evasion of the prohibition. For example, a judge who orders the parties to involuntary mediation [to us, a nonsequitur anyway] can also order them to make such an agreement, or can force them to enter into such agreement by implicit threats of adverse consequences to the parties in the litigation if they do not make such an agreement. We also suggest that the legislation contain an express prohibition against adoption of any local rule of court or policy inferring such an agreement merely because the parties either were ordered to or agreed to participate in a particular dispute resolution program. Otherwise, local judges or courts can defeat the purpose of this proposed legislation.
>
> [Exhibit p. 4.]

The staff sees no ready solution to the problem of courts using "implicit threats of adverse consequences" to skirt the requirements of Section 1123. Perhaps courts must simply be trusted not to abuse their power in this respect. The Litigation Section does not propose a specific alternative.

On whether to expressly prohibit a local rule or policy inferring an agreement waiving Section 1123, the staff thinks that something along these lines would be a good idea, although the current language should already cover the point. Adding the following sentence to the end of subdivision (a) might help: "A party's agreement to waive the protection of this section shall not be inferred from agreement to participate in a dispute resolution program or agreement to any other term or condition." It might also be helpful to insert the following language after the first sentence of the Comment: "Any agreement to waive the protection of Section 1123 must be express, not implied."

§ 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 done 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, but it only applies so long as those materials may be produced in a manner revealing nothing about the mediation discussion. Reports and analyses 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 (testimony by judges, arbitrators, and mediators) and 1122 (mediation confidentiality).

☞ **Staff Note.**

(1) ***Grammatical change.*** The Litigation Section suggests changing the phrase "admitted or disclosed" to "admitted in evidence or disclosed." (Exhibit p. 5.) The staff proposes to implement this change, not only in Section 1127, but also in Sections 1128 and 1129 and the conforming revision of Insurance Code Section 10089.82. If anyone disagrees with this revision, they should raise the point at the Commission's meeting.

(2) ***Cite.*** In the Comment, the Litigation Section would delete the cite to Contra Costa Superior Court Local Rule 207 (1996). (Exhibit p. 5.) The staff will make this change in the next draft, unless someone disagrees with it and raises the point with the Commission.

(3) ***Numbering.*** There is now a numbering gap between Section 1123 and Section 1127. In preparing the Commission's final recommendation, the staff intends to renumber the statutes in a logical sequence. The precise numbering will depend on the reorganization, if any, of Section 1122.

(4) ***Consent inferred from local rules or policies.*** As with Section 1123, the Litigation Section recommends that

> the statute, itself, expressly prohibit consents to disclosure being deemed to have occurred under local rules, orders, or policies. This should not be relegated to a comment. Consent to disclosure of otherwise confidential mediation communications should be explicit and voluntary. The purposes of mediation may be defeated if consent to disclosure can be inferred from the mere fact of consenting to mediation or being ordered to mediate.
>
> [Exhibit p. 4.]

To address this concern, the staff suggests adding the following sentence to the end of subdivision (a): "Consent to disclosure shall not be inferred from agreement to participate in a dispute resolution program or consent to any other term or condition." The same language could be added to the end of subdivision (b).

(5) ***Assistants.*** If the Commission expressly includes assistants within its definition of "mediator" (see the Staff Note on Section 1120, *supra*), should consent from each of those people be necessary under Section 1127? This point could be addressed by stating in the text or Comment: "A mediator's consent is binding on any person who acts as an assistant to or agent of the mediator in the mediation."

(6) ***Comments of the State Bar Committee on Administration of Justice ("CAJ").*** 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.) 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. Mr. Sapiro expressed similar concern in his letter on behalf of the State Bar Litigation Section. (Exhibit p. 5.)

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, of the sources commenting on the tentative recommendation, only the State Bar groups suggested reducing the existing protection of documents prepared for a mediation. Community Board Program made very clear that it would oppose such a move: "We are especially concerned that all documentation relating to the preparation of a mediation, …be deemed inadmissible as evidence unless both parties agree that it should be disclosed." (Mem. 96-70, Exhibit p. 5.) 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. (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 the concerns raised by CAJ and the Litigation Section. 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 done or any admission made in the course of the mediation.

§ 1128. Written settlements reached through mediation

1128. Notwithstanding any other provision of this chapter, 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 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).

☞ **Staff Note.**

(1) ***Fraud, duress, or illegality***. Chip Sharpe of Humboldt Mediation cautions 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.) 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 difficult area, the Commission should leave Section 1128(d) as it is.

(2) ***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 (First Supp. to Mem. 96-70, Exhibit pp. 8-9) and mediator Robert Holtzman (Mem. 96-70, Exhibit pp. 10-11) suggest removing those requirements and focusing instead on the intent of the parties. As Mr. Holtzman puts it, 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, Exhibit pp. 10-11.) The Litigation Section makes the same point with respect to Section 1129, but not Section 1128. (Exhibit p. 5.)

Mr. Kelly disagrees with these comments. 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(b) and 1129(a)(3) as is. The current draft affords sufficient leeway by not requiring use of the words "enforceable" or "binding," just any "words to that effect."

§ 1129. Oral agreements reached through mediation

1129. (a) Notwithstanding any other provision of this chapter, 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 or by a tape recorder or other reliable means of sound recording.

(2) The mediator recites the terms of the oral agreement on the record.

(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) On 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).

☞ **Staff Note.**

(1) ***Magic language.*** CAJ, the Litigation Section, and mediator Robert Holtzman have raised concerns about subdivision (a)(3). See the Staff Note on Section 1128, *supra*.

(2) ***Subdivision (b).*** The Litigation Section comments:

> We are concerned about the wording of proposed Section 1129(b). Suppose, for example, the parties have reached an agreement on some issues but not others, that partial agreement is recited on the record, and the mediation is going to resume with respect to the other issues. Proposed Section 1129(b) could then be used to preclude confidentiality of the subsequent mediation procedures. In addition, even if an oral agreement has been reached, the parties may include in the oral agreement an agreement to reduce the agreement to writing or to prepare documents by which the parties will perform the oral agreement. If the mediator is going to participate in the process of working out the documents, such as by assisting the parties in resolving ambiguities or otherwise ironing out potential disagreements between them, the parties may well want those discussions to continue to be confidential. They should be free to agree that those conversations are confidential, and proposed Section 1129(b) should not be worded to suggest that they may not. On the other hand, the rewording of proposed Section 1129(b) should anticipate that the parties should be able to offer the oral agreement in evidence if the bad faith of one of the parties precludes the written agreement from being executed.
>
> [Exhibit pp 5-6.]

In drafting Sections 1128 and 1129, the Commission took into account precisely the considerations that the Litigation Section raises. It concluded that mediation participants should have two options for creating an effective agreement (one that is enforceable and admissible): (1) putting their agreement in writing, in which case confidentiality continues until any oral agreement is reduced to writing, and the written agreement is fully executed and includes the necessary indicia of binding effect, and (2) reciting their agreement orally as set forth in Section 1129, in which case confidentiality does not apply to subsequent efforts to reduce the agreement to writing. That approach has proved acceptable, or at least nonobjectionable, to the other groups and individuals commenting on the tentative recommendation. The staff recommends against abandoning it at this point.

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

SEC. 3. 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. 4. Section 1152.5 of the Evidence Code is repealed.

~~1152.5. (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), (a)(6), 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. 5. 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.

CONFORMING REVISIONS

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

SEC. 6. Section 467.5 of the Business and Professions Code is amended to read:

467.5. Notwithstanding the express application of ~~Section 1152.5~~ Chapter 2 (commencing with Section 1120) of Division 9 of the Evidence Code to mediations, all proceedings conducted by a program funded pursuant to this chapter, including, but not limited to, arbitrations and conciliations, are subject to ~~Section 1152.5~~ Chapter 2 (commencing with Section 1120) of Division 9 of the Evidence Code.

Comment. Section 467.5 is amended to reflect the relocation of former Evidence Code Section 1152.5 and the addition of new Evidence Code statutes governing mediation confidentiality. See Evidence Code Sections 703.5 (testimony by judges, arbitrators, and mediators), 1120-1129 (mediation).

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

SEC. 7. Section 1775.10 of the Code of Civil Procedure is amended to read:

1775.10. All statements made by the parties during the mediation shall be subject to ~~Sections 1152 and 1152.5~~ Section 703.5, Section 1152 and Chapter 2 (commencing with Section 1120) of Division 9 of the Evidence Code.

Comment. Section 1775.10 is amended to reflect the relocation of former Evidence Code Section 1152.5 and the addition of new Evidence Code statutes governing mediation confidentiality. See Evidence Code Sections 703.5 (testimony by judges, arbitrators, and mediators), 1120-1129 (mediation).

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

SEC. 8. Section 66032 of the Government Code is amended to read:

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

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

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

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

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

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

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

~~(f) Sections 703.5 and 1152.5~~ Section 703.5 and Chapter 2 (commencing with Section 1120) of Division 9 of the Evidence Code shall apply to any mediation conducted pursuant to this chapter.

Comment. Section 66032 is amended to reflect the relocation of former Evidence Code Section 1152.5 and the addition of new Evidence Code statutes governing mediation confidentiality. See Evidence Code Sections 703.5 (testimony by judges, arbitrators, and mediators), 1120-1129 (mediation). Former subdivision (e) is deleted as surplussage. See new subdivision (e) and Evidence Code Section 1123 (mediator evaluations).

☞ **Staff Note.**

(1) ***Tolling.*** Mediator John Gromala suggests that a tolling provision like subdivision (a) would be beneficial for all mediations." (Mem. 96-70, Exhibit p. 9.) Although such a reform may have merit, it is beyond the scope of this evidentiary study.

(2) ***Redundancy.*** The amendment of subdivision (f) makes all of the Evidence Code statutes on mediation confidentiality, including proposed Section 1123 (mediator evaluations), applicable to a land use mediation. In light of that amendment, subdivision (e) is redundant. Accordingly, the staff has deleted it and revised the Comment accordingly.

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

SEC. 9. Section 66033 of the Government Code is amended to read:

66033. (a) At the end of the mediation, the mediator shall file a report with the Office of Permit Assistance, consistent with ~~Section 1152.5~~ Chapter 2 (commencing with Section 1120) of Division 9 of the Evidence Code, containing each of the following:

(1) The title of the action.

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

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

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

Comment. Section 66033 is amended to reflect the relocation of former Evidence Code Section 1152.5 and the addition of new Evidence Code statutes governing mediation confidentiality. See Evidence Code Sections 703.5 (testimony by judges, arbitrators, and mediators), 1120-1129 (mediation).

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

SEC. 10. Section 10089.80 of the Insurance Code is amended to read:

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

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

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

other documents. Declination of mediation by the insurer under this section may be considered by the commissioner in exercising authority under subdivision (a) of Section 10089.75.

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

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

(c) ~~Sections 703.5 and 1152.5~~ Section 703.5 and Chapter 2 (commencing with Section 1120) of Division 9 of the Evidence Code apply to a mediation conducted under this chapter.

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

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

Comment. Section 10089.80 is amended to reflect the relocation of former Evidence Code Section 1152.5 and the addition of new Evidence Code statutes governing mediation confidentiality. See Evidence Code Sections 703.5 (testimony by judges, arbitrators, and mediators), 1120-1129 (mediation). Former subdivision (d) is deleted as surplussage. See new subdivision (d) and Evidence Code Section 1123 (mediator evaluations).

☞ **Staff Note.** The amendment of subdivision (c) makes all of the Evidence Code statutes on mediation confidentiality, including proposed Section 1123 (mediator evaluations), applicable to a land use mediation. In light of that amendment, subdivision (d) is redundant. Accordingly, the staff has deleted it and revised the Comment accordingly.

Ins. Code § 10089.82 (amended). Noncompulsory participation; settlement agreement

SEC. 11. Section 10089.82 of the Insurance Code is amended to read:

10089.82. (a) An insured may not be required to use the department's mediation process. An insurer may not be required to use the department's mediation process, except as provided in Section 10089.75.

(b) Neither the insurer nor the insured is required to accept an agreement proposed during the mediation.

(c) If the parties agree to a settlement agreement, the insured will have three business days to rescind the agreement. Notwithstanding Sections 1128 and 1129 of the Evidence Code, if the insured rescinds the agreement it may not be admitted or disclosed unless the insured and all other parties to the agreement expressly consent to its disclosure. If the agreement is not rescinded by the insured, it is binding on the insured and the insurer, and acts as a release of all specific claims for damages known at the time of the mediation presented and agreed upon in the mediation conference. If counsel for the insured is present at the mediation conference and a settlement is agreed upon that is signed by the insured's counsel, the agreement is immediately binding on the insured and may not be rescinded.

(d) This section does not affect rights under existing law for claims for damage that were undetected at the time of the settlement conference.

(e) All settlements reached as a result of department-referred mediation shall address only those issues raised for the purpose of resolution. Settlements and any accompanying releases are not effective to settle or resolve any claim not addressed by the mediator for the purpose of resolution, nor any claim that the insured may have related to the insurer's conduct in handling the claim.

Referral to mediation or the pendency of a mediation under this article is not a basis to prevent or stay the filing of civil litigation arising in whole or in part out of the same facts. Any applicable statute of limitations is tolled for the number of days beginning from the referral to mediation until the date on which the mediation is either completed or declined, or the date on which the insured fails to appear for a scheduled mediation for the second time, or, in the event that a settlement is completed, the expiration of any applicable three business day cooling off period.

Comment. Subdivision (c) of Section 10089.82 is amended to reflect the addition of new Evidence Code statutes governing mediation confidentiality. See Evidence Code Sections 703.5 (testimony by judges, arbitrators, and mediators), 1120-1129 (mediation).

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

SEC. 12. Section 350 of the Welfare and Institutions Code is amended to read:

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

(2) Each juvenile court in Contra Costa, Los Angeles, Orange, Sacramento, San Diego, Santa Clara, and Tulare Counties is encouraged to develop a dependency mediation program to provide a problem-solving forum for all interested persons to develop a plan in the best interests of the child, emphasizing family preservation

and strengthening. The Legislature finds that mediation of these matters assists the court in resolving conflict, and helps the court to intervene in a constructive manner in those cases where court intervention is necessary. Notwithstanding any other provision of law, no person, except the mediator, who is required to report suspected child abuse pursuant to the Child Abuse and Neglect Reporting Act (Article 2.5 (commencing with Section 11164) of Chapter 2 of Title 1 of Part 4 of the Penal Code), shall be exempted from those requirements under ~~Section 1152.5~~ Chapter 2 (commencing with Section 1120) of Division 9 of the Evidence Code because he or she agreed to participate in a dependency mediation program established in one of these juvenile courts.

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

(b) The testimony of a minor may be taken in chambers and outside the presence of the minor's parent or parents, if the minor's parent or parents are represented by counsel, the counsel is present and any of the following circumstances exist:

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

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

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

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

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

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

Comment. Subdivision (a)(2) of Section 350 is amended to reflect the relocation of former Evidence Code Section 1152.5 and the addition of new Evidence Code statutes governing mediation confidentiality. See Evidence Code Sections 703.5 (testimony by judges, arbitrators, and mediators), 1120-1129 (mediation).