Study K-401 January 15, 1997

Memorandum 97-3

Mediation Confidentiality: Revised Staff Draft Recommendation

Attached for the Commission's consideration is a revised staff draft recommendation on mediation confidentiality. The following letters are also attached:

Staff Notes raise a number of issues for discussion and decision. Persons with concerns about other points should raise them at or before the Commission's upcoming meeting.

For convenient reference, statute numbers in the attached draft are the same as in previous versions. If the Commission approves the draft as a final recommendation (with revisions), the staff intends to renumber the statutes as follows:

Section 1115. Definitions
Section 1116. Scope of chapter
Section 1117. Court-ordered and court-supervised proceedings
Section 1118. Mediation-arbitration
Section 1119. Recorded oral agreement
Section 1120. Mediation confidentiality
Section 1121. Types of evidence not covered
Section 1122. Mediator reports and communications
Section 1123. Disclosure by agreement
Section 1124. Written settlements reached through mediation

Section 1125. Oral agreements reached through mediation
Section 1126. Attorney's fees

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

STATE OF CALIFORNIA PETE WILSON, GOVERNOR

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR - LEGAL UNIT
45 Fremont Street, Suite 450
San Francisco, CA 94105

ADDRESS REPLY TO:
Office of the Director - Legal Unit
P.O. Box 420603
San Francisco, CA 94142
(415) 972-8900
FAX No.: (415) 972-8928

December 20, 1996

Nathaniel Sterling, Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303

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

Re: Proposed Legislation - Mediation Confidentiality

Dear Mr. Sterling and Ms. Gaal:

We were advised recently by Ron Kelly of the Commission staff that at the Commission's December 12 meeting, the Commission endorsed our request that mediations conducted by staff of the State Mediation and Conciliation Service (SMCS) be included in the forms of mediation that would be protected by the proposed revisions of the Evidence Code. We were also advised, however, that the Commission directed the staff to draft new language for the proposed statute that would allow the parties to a mediation to call a mediator to testify in a later judicial or administrative proceeding, over the objection of the mediator.

This arrangement, if enacted and made applicable to SMCS, would have serious adverse consequences for the operation of SMCS. We strongly oppose a proposal along these lines, for the reasons described below. If the Commission adopts such a proposal as part of its final recommendation, we request that Labor Code 65 be amended in the proposed legislation to exclude mediations conducted by SMCS staff from the scope of the proposed law.

Our reasons for opposing the latest proposal are the following. As noted in earlier letters, SMCS, a Division of the Department of Industrial Relations, includes a staff of 15 mediators, in San Francisco, Los Angeles, Fresno and San Diego. We frequently provide mediation services to assist collective bargaining between public agencies - cities, counties, school districts, transit districts and special purpose districts - and unions of their employees. Mediation services for private sector collective bargaining are usually provided by the Federal Mediation and Conciliation Service.

Thus, our mediators operate within a relatively limited community: they meet with lawyers who represent public employee unions, the elected leadership, and staff representatives of these unions; with lawyers who frequently represent public agencies, and with personnel directors and budget directors for such agencies. Over the years, each mediator works repeatedly with persons that he or she has worked with before, and will probably work with again in another mediation. It is of central importance to each SMCS mediator that all parties view that mediator as an honest and effective neutral parties with no inclination to share one party's perspective more than another party's or to favor one party's interests over those of another.

In this context, the adverse consequences of permitting testimony by a mediator in a legal dispute are apparent. Suppose that a union and an employer are adverse parties in a law suit or arbitration which turns on the interpretation of a provision in their collective bargaining agreement. Suppose Mediator Jones participated in mediation which led to the collective bargaining agreement.

Suppose the union lawyer, believing that Jones' testimony will be of assistance in the presentation of her case, seeks to call the mediator as a witness. Suppose the employer attorney believes, conversely, that the testimony of the mediator will aid his cause, and for that reason raises no objection to presentation of the mediator's testimony.

Suppose that Jones' testimony is more consistent with the testimony of the other union witnesses, and supports the union's version of events more than the employer's version of events. Suppose the union wins the suit or arbitration, and the employer loses. One likely result of this sequence of events is that the employer's negotiators and attorney, who believe that the mediator's testimony is not an accurate description of the events that occurred, will conclude that the mediator (1) has a faulty memory; or (2) misunderstood the negotiations taking place, in which he played a major role; or (3) chose to testify in a way that would favor the union. Each of these conclusions reflects poorly on the mediator, and will result in a reduction of the level of trust which that party will have in the mediator in the future.

The suppositions are not far-fetched. We are aware of several circumstances in recent years in which one party to a dispute discussed with a mediator or SMCS management the possibility of arranging testimony by a mediator in specific

disputes. In all such instances, SMCS refused to allow a mediator to testify.[1]

Please advise us promptly if you have any questions about our past practice or about the position stated here.

Very truly yours,

Martin Fassler
Counsel for Director of Industrial Relations

[1] The National Labor Relations Board and the Ninth Circuit Court of Appeals have held that a mediator who assisted parties in collective bargaining cannot be required to testify in an NLRB proceeding. The question arose in a case in which the employer and union offered different contentions concerning the course of collective bargaining. In NLRB v. Joseph Macaluso Inc. (9th Cir. 1980), 104 LRRM 2097, the Court of Appeals considered the policy reasons for sustaining the NLRB ruling, and concluded (at p. 2099) that "the public interest in maintaining the perceived and actual impartiality of federal mediators does outweigh the benefits derivable from [the mediator's] testimony." A copy of the decision is enclosed.

NLRB v. JOSEPH MACALUSO, INC.

U.S. Court of Appeals,
Ninth Circuit (San Francisco)

NATIONAL LABOR RELATIONS BOARD v. JOSEPH MACALUSO, INC., doing business as LEMON TREE, No. 77-3748, April 16, 1980

LABOR MANAGEMENT RELATIONS ACT

Unfair labor practice proceedings — Revocation of subpoena — Mediator's testimony ▶ 36.55 ▶ 36.64

NLRB properly revoked subpoena issued to mediator of Federal Mediation and Conciliation Service, who was capable of providing information crucial to resolution of factual dispute in proceedings on charge that employer unlawfully refused to bargain with union, solely for purpose of preserving mediator effectiveness, even though revocation of subpoena conflicts with fundamental principle of Anglo-American law that public is entitled to every person's evidence. Public interest in maintaining perceived and actual impartiality of federal mediators outweighs benefits derivable from mediator's testimony; contention that communications made to mediator during course of bargaining sessions were necessarily made in presence of opposing party and were not, therefore, confidential misapprehends purpose of excluding mediator's testimony which is to avoid breach of impartiality, not breach of confidentiality.

Application for enforcement of an NLRB order (96 LRRM 1204, 231 NLRB No. 91). Enforcement granted.

Eric G. Moskowitz (John S. Irving, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Elliott Moore, Deputy Associate General Counsel, and Jay E. Shanklin, with him on brief), for petitioner.

Eugene Nielson (Lane, Powell, Moss & Miller, with him on brief), Seattle, Wash., for respondent.

Nancy Barbrow Broff (Scott A. Kruse, General Counsel), for FMCS, amicus curiae.

Before DUNIWAY and WALLACE, Circuit Judges, and JAMESON,* District Judge.

---

* Honorable William J. Jameson, United States District Judge, District of Montana, sitting by designation.

Full Text of Opinion

WALLACE, Circuit Judge: — The single issue presented in this National Labor Relations Board (NLRB) enforcement proceeding is whether the NLRB erred in disallowing the testimony of a Federal Mediation and Conciliation Service (FMCS) mediator as to a crucial fact occurring in his presence. The decision and order of the Board are reported at 231 NLRB No. 91, 96 LRRM 1204. We enforce the order.

I.

In early 1976 Retail Store Employees Union Local 1001 (Union) waged a successful campaign to organize the employees of Joseph Macaluso, Inc. (Company) at its four retail stores in Tacoma and Seattle, Washington. The Union was elected the collective bargaining representative of the Company's employees, was certified as such by the NLRB, and the Company and Union commenced negotiating a collective bargaining agreement. Several months of bargaining between Company and Union negotiators failed to produce an agreement, and the parties decided to enlist the assistance of a mediator from the FMCS. Mediator Douglas Hammond consequently attended the three meetings between the Company and Union from which arises the issue before us. To frame that issue, it is necessary first to describe the history of this litigation.

During the spring and summer of 1976 the Company engaged in conduct which led the NLRB to charge it with unfair labor practices. Proceedings were held and the NLRB ruled that the Company had violated section 8(a)(1) of the National Labor Relations Act (NLRA) by threatening pro-union employees, and section 8(a)(3) of the NLRA by discharging an employee for union activity. At this unfair labor practice proceeding the NLRB also found that the Company and Union had finalized a collective bargaining agreement at the three meetings with Hammond, and that the Company had violated NLRA sections 8(a)(5) and (1) by failing to execute the written contract incorporating the final agreement negotiated with the Union. The NLRB ordered the Company to execute the contract and pay back-compensation with interest, and seeks enforcement of that order in this court. In response, the Company contends that the parties have never reached agreement, and certainly did not do so at the meetings with Hammond.

The testimony of the Union before the NLRB directly contradicted that of

the Company. The two Union negotiators testified that during the first meeting with Hammond the parties succeeded in reducing to six the number of disputed issues, and that the second meeting began with Company acceptance of a Union proposal resolving five of those six remaining issues. The Union negotiators further testified that the sixth issue was resolved with the close of the second meeting, and that in response to a Union negotiator's statement "Well, I think that wraps it up," the Company president said, "Yes, I guess it does." The third meeting with Hammond, according to the Union, was held only hours before the Company's employees ratified the agreement, was called solely for the purpose of explaining the agreement to the Company accountant who had not attended the first two meetings, and was an amicable discussion involving no negotiation.

The Company testimony did not dispute that the first meeting reduced the number of unsettled issues to six, but its version of the last two meetings contrasts sharply with the Union's account. The Company representatives testified that the second meeting closed without the parties having reached any semblence of an agreement, and that the third meeting was not only inconclusive but stridently divisive. While the Union representatives testified that the third meeting was an amicable explanatory discussion, the Company negotiators both asserted that their refusal to give in to Union demands caused the Union negotiators to burst into anger, threaten lawsuits, and leave the room at the suggestion of Hammond. According to the Company, Hammond was thereafter unable to bring the parties together and the Union negotiators left the third meeting in anger.

In an effort to support its version of the facts, the Company requested that the administrative law judge (ALJ) subpoena Hammond and obtain his testimonial description of the last two bargaining sessions. The subpoena was granted, but was later revoked upon motion of the FMCS. Absent Hammond's tie-breaking testimony, the ALJ decided that the Union witnesses were more credible and ruled that an agreement had been reached. The Company's sole contention in response to this request for enforcement of the resulting order to execute the contract is that the ALJ and NLRB erred in revoking the subpoena of Hammond, the one person whose testimony could have resolved the factual dispute.[1]

[1] The Company did not challenge the NLRB's finding of unfair labor practices from the threatening and discharge of employees.

II.

Revocation of the subpoena was based upon a long-standing policy that mediators, if they are to maintain the appearance of neutrality essential to successful performance of their task, may not testify about the bargaining sessions they attend. Both the NLRB and the FMCS (as amicus curiae) defend that policy before us. We are thus presented with a question of first impression before our court: can the NLRB revoke the subpoena of a mediator capable of providing information crucial to resolution of a factual dispute solely for the purpose of preserving mediator effectiveness?

Statutory authority for NLRB subpoena revocation is found in NLRA section 11(1), 29 U.S.C. §161(1):

> Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the [NLRB] to revoke, and the [NLRB] shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required.

We have interpreted this provision broadly, stating:

> The statute in question does not state that petitions to revoke subpoenas can only be made on the two grounds therein stated, or that the [ALJ] or [NLRB] may revoke only on those grounds. It does provide that a person served with such a subpoena may petition for revocation of the subpoena and the [NLRB] *shall* revoke it if one of the two specified circumstances exist [sic]. Insofar as the statute is concerned, the [NLRB] may also revoke a subpoena on any other ground which is consonant with the overall powers and duties of the [NLRB] under the [NLRA] considered as a whole.

General Engineering, Inc. v. NLRB, 341 F.2d 367, 372-73, 58 LRRM 2432, 2435-2436 (9th Cir. 1965) (emphasis in original). We must determine, therefore, whether preservation of mediator effectiveness by protection of mediator neutrality is a ground for revocation consistent with the power and duties of the NLRB under the NLRA. Stated differently, we must determine whether the reason for revocation is legally sufficient to justify the loss of Hammond's testimony. The NLRB's own regulation authorizing revocation states:

> The administrative law judge or the [NLRB], as the case may be, shall revoke the subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpena does not describe with sufficient particularity the evidence whose production is required, *or if for any other reason sufficient in law the subpena is otherwise invalid.*

29 C.F.R. §102.31(b) (1979) (emphasis added).

The NLRB's revocation of Hammond's subpoena conflicts with the fundamental principle of Anglo-American law that the public is entitled to every person's evidence. Branzburg v. Hayes, 408 U.S. 665, 688 (1972); United States v. Bryan, 339 U.S. 323, 331 (1950); 8 Wigmore, Evidence §2192, at 70 (McNaughton Rev. 1961). According to Dean Wigmore this maxim has existed in civil cases for more than three centuries, and the Sixth Amendment guarantee of compulsory process was created "merely to cure the defect of the common law by giving to parties defendant in criminal cases the common right which was already . . . possessed . . . by parties in civil cases . . . ." Id. at §2191, at 68.

The facts before us present a classic illustration of the need for every person's evidence: the trier of fact is faced with directly conflicting testimony from two adverse sources, and a third objective source is capable of presenting evidence that would, in all probability, resolve the dispute by revealing the truth. Under such circumstances, the NLRB's revocation of Hammond's subpoena can be permitted only if denial of his testimony "has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting), quoted in United States v. Nixon, 418 U.S. 683, 710 n.18 (1974). The public interest protected by revocation must be substantial if it is to cause us to "concede that the evidence in question has all the probative value that can be required, and yet exclude it because its admission would injure some other cause more than it would help the cause of truth, and because the avoidance of that injury is considered of more consequence than the possible harm to the cause of truth." 1 Wigmore, Evidence §11, at 296 (1940). We thus are required to balance two important interests, both critical in their own setting.

We conclude that the public interest in maintaining the perceived and actual impartiality of federal mediators does outweigh the benefits derivable from Hammond's testimony. This public interest was clearly stated by Congress when it created the FMCS:

> It is the policy of the United States that —
> (a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;
> (b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes . . . .

29 U.S.C. §171(a), (b). Since Congress made this declaration, federal mediation has become a substantial contributor to industrial peace in the United States. The FMCS, as amicus curiae, has informed us that it participated in mediation of 23,450 labor disputes in fiscal year 1977, with approximately 325 federal mediators stationed in 80 field offices around the country. Any activity that would significantly decrease the effectiveness of this mediation service could threaten the industrial stability of the nation. The importance of Hammond's testimony in this case is not so great as to justify such a threat. Moreover, the loss of that testimony did not cripple the fact-finding process. The ALJ resolved the dispute by making a credibility determination, a function routinely entrusted to triers of fact throughout our judicial system.

The FMCS has promulgated regulations which explain why the very appearance of impartiality is essential to the effectiveness of labor mediation.

> Public policy and the successful effectuation of the Federal Mediation and Conciliation Service's mission require that commissioners and employees maintain a reputation for impartiality and integrity. Labor and management or other interested parties participating in mediation efforts must have the assurance and confidence that information disclosed to commissioners and other employees of the Service will not subsequently be divulged, voluntarily or because of compulsion, unless authorized by the Director of the Service.
> • • •
> No officer, employee, or other person officially connected in any capacity with the Service, currently or formerly shall, in response to a subpoena, subpoena duces tecum, or other judicial or administrative order, produce any material contained in the files of the Service, disclose any information acquired as part of the performance of his official duties or because of his official status, or testify on behalf of any party to any matter pending in any judicial, arbitral or administrative proceeding, without the prior approval of the Director.

29 C.F.R. §1401.2(a), (b) (1979). This need for the appearance of impartiality, and the potential for loss of that appearance through any degree of mediator testimony, was well expressed by the NLRB in the decision relied upon

by the ALJ when revoking Hammond's subpoena:

> However useful the testimony of a conciliator might be to the [NLRB] in any given case, we can appreciate the strong considerations of public policy underlying the regulation [denying conciliator testimony] and the refusal to make exceptions to it, because of the unique position which the conciliators occupy. To execute successfully their function of assisting in the settlement of labor disputes, the conciliators must maintain a reputation for impartiality, and the parties to conciliation conferences must feel free to talk without any fear that the conciliator may subsequently make disclosures as a witness in some other proceeding, to the possible disadvantage of a party to the conference. If conciliators were permitted or required to testify about their activities, or if the production of notes or reports of their activities could be required, not even the strictest adherence to purely factual matters would prevent the evidence from favoring or seeming to favor one side or the other. The inevitable result would be that the usefulness of the [FMCS] in the settlement of future disputes would be seriously impaired, if not destroyed. The resultant injury to the public interest would clearly outweigh the benefit to be derived from making their testimony available in particular cases.

Tomlinson of High Point, Inc., 74 NLRB 681, 688, 20 LRRM 1203 (1947). We agree.

During oral argument the suggestion was made that we permit the mediator to testify, but limit his testimony to "objective facts" as suggested by International Association of Machinists and Aerospace Workers v. National Mediation Board, 425 F.2d 527, 540, 73 LRRM 2278 (D.C. Cir. 1970). We do not believe, however, that such a limitation would dispel the perception of partiality created by mediator testimony. In addition to the line-drawing problem of attempting to define what is and is not an "objective fact," a recitation of even the most objective type of facts would impair perceived neutrality, "for the party standing condemned by the thrust of such a statement would or at least might conclude that the [FMCS] was being unfair." Id. at 539. "[N]ot even the strictest adherence to purely factual matters would prevent the evidence from favoring or seeming to favor one side or the other." Tomlinson of High Point, Inc., supra, 74 NLRB at 688.

We conclude, therefore, that the complete exclusion of mediator testimony is necessary to the preservation of an effective system of labor mediation, and that labor mediation is essential to continued industrial stability, a public interest sufficiently great to outweigh the interest in obtaining every person's evidence.[2] No party is required to use the FMCS; once having voluntarily agreed to do so, however, that party must be charged with acceptance of the restriction on the subsequent testimonial use of the mediator. We thus answer the question presented by this case in the affirmative: the NLRB can revoke the subpoena of a mediator capable of providing information crucial to resolution of a factual dispute solely for the purpose of preserving mediator effectiveness.[3] Such revocation is consonant with the overall powers and duties of the NLRB, a body created to implement the NLRA goals of "promot[ing] the flow of commerce by removing certain recognized sources of industrial strife and unrest" and "encouraging practices fundamental to the friendly adjustment of industrial disputes . . . ." 29 U.S.C. §151.

THE ORDER OF THE BOARD IS ENFORCED.

[2] We need not reach the question whether a different result would occur if the FMCS Director granted authority for the mediator to testify pursuant to 29 C.F.R. §1401.2(b) (1979).

[3] The Company argued that revocation of Hammond's subpoena was improper because communications made to him during the course of the bargaining sessions were necessarily made in the presence of the opposing party and were not, therefore, confidential. Such a contention misapprehends the purpose of excluding mediator testimony which is to avoid a breach of impartiality, not a breach of confidentiality.

LABORERS v. LOCAL 300

U.S. District Court, Central District of California

LABORERS INTERNATIONAL UNION OF NORTH AMERICA, etc., et al. v. LOCAL 300, LABORERS INTERNATIONAL UNION OF NORTH AMERICA, etc., et al., No. CV 78-4835-RMT(Sx), January 30, 1980

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT

1. Supervision of local union — Trusteeship ▶ 5.13

Supervision imposed by international union on one of its locals due to chaotic array of local's affairs was not tantamount to trusteeship, where supervisor, whose duties included approving extraordinary expenditures and policing local's policies and practices, was unable to conduct normal supervisory activities of trustee. Supervisor was prevented from suspending local's autonomy, and he spent substantial amount of his time searching for records of local which were not made accessible by uncooperative local officials; officers of

Gromala Mediation Service

January 2, 1997

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

Re: Mediation Confidentiality
Staff draft recommendation - section 1127

Dear Ms Gaal:

Does "All persons" in subsection (a) mean that experts who participate in the mediation must consent to disclosure? The words "or otherwise participate" would so indicate to me.

It has been my understanding that a mediator "conducts" the mediation and parties and others "participate" in the mediation. If the mediator's consent is not required should the words "who conduct or" be deleted?

Can the participants require the production of a mediator's notes? Presently many mediators destroy their notes upon conclusion of mediation. This section could be construed to require mediators to retain their notes without specifying how long. Does it mean that the mediator can be subpoenaed to testify as to confidential communications during private caucuses? If this is the intent it will seriously jeopardize the manner in which mediation is conducted.

Mediation works because of the security people find in the concept of being able to communicate candidly without risk. When we change absolute confidentiality in mediation to conditional confidentiality we will deal a serious blow to the process.

Example: You are about to agree to mediation of a highly emotional and factually complex matter. You seriously doubt that it can be resolved through mediation. You are told that if it is not successful and there is subsequent litigation the confidentiality can be waived if everyone agrees. Would you have some apprehension that you might look bad if the other side wanted a waiver and you did not? Since you do not trust the other party, would you be inclined to bare your soul to the mediator?

A purpose of mediation is to reduce court congestion. This provision appears to substitute ambiguity for clarity. It may create a whole new area for litigious individuals to evade the Judicial and Legislative intent of ADR. This concept should not be adopted without additional consideration of the negative impact it will have on mediation.

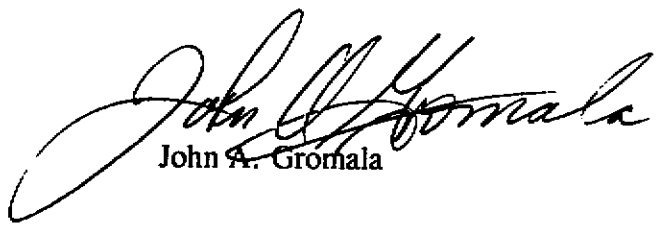
701 Fifth Street, Suite 300 Eureka, California 95501
(707) 441-0499 fax 444-9529

The mediation agreement parties generally sign, when I mediate, expressly mandates confidentiality. The confidentiality provisions are in section 11 of the attached copy. I believe section 1127 (a) should be deleted. At the very least it should allow the parties to agree that 1127 (a) will not govern their mediation, otherwise agreements such a mine may be void as against public policy. Unfortunately a waiver of 1127 (a) could be attacked, after the mediation is concluded, thus creating more litigation. The best solution would be to delete it.

Should "or in the court of" be "or in the course of" in the third line of the first paragraph?

Thank you for considering my concerns. I would be pleased to discuss them with you and the Commission in greater detail if that be appropriate.

Sincerely,



John A. Gromala

JAG:hs
enclosure

AGREEMENT TO MEDIATE

This is an agreement between and among and jointly referred to as Parties and Gromala Mediation Service (mediator) represented by John A. Gromala.

The purpose and goal of this proceeding is to reach an understanding and agreement regarding the obligation, if any, of

The parties agree as follows:

1. Mediator is a neutral facilitator. He will assist the parties to reach an agreement for a plan to resolve the dispute regarding their respective rights and obligations. He will not make decisions about "right" or "wrong" or tell the parties what to do.

2. He will not offer legal advice nor provide legal counsel. Each person has retained their own attorney or other advisors to counsel them about their legal and financial interests, rights and obligations. The parties shall determine whether they desire to have counsel present during mediation. If they elect to have their attorneys participate, all reference to meetings with "parties" shall include their respective attorneys.

3. The purpose of the mediation is to arrive at a mutually acceptable resolution of the dispute in a cooperative and informal manner, instead of a legal and formal manner. To this end the mediator and the parties will work to insure that each party appreciates the facts, strengths and weaknesses of each party. In the exchange and evaluation of information and opinions each party will have the opportunity to disclose with candor all the facts, theories, and opinions on which he relies with regard to the matters in dispute.

4. The mediation process will focus on the interests of the parties and the possible solutions that would be fair, and acceptable to them. Each party will work with the mediator in considering and evaluating solutions that could substantially satisfy each party's interest.

5. It is understood that full disclosure of all relevant and all pertinent information is essential to the mediation process. Accordingly, there will be a voluntary, complete and honest disclosure by each party to the mediator of all information and documents. If either party fails to make such full disclosure, the agreement reached in mediation may be set aside.

6. The parties will submit to the mediator written confidential statements detailing their factual and legal positions by a date to be set by mediator. If the parties desire to do so, they may exchange copies of these statements. The parties may identify affidavits and/or witness statements which are available for review by the mediator.

7. Mediator will review written information submitted by the parties. He will have private confidential meetings (caucus) with each party in addition to the joint meetings. All

discussions at a caucus are confidential unless the party authorizes mediator to disclose such information. The purpose of a caucus is to develop information regarding a party's needs and interests and to explore a range of solutions.

8. While all parties intend to continue with mediation until a settlement agreement is reached, it is understood that any party may withdraw from mediation at any time. It is agreed that if any party decides to withdraw he will discuss this decision in the presence of the other party and mediator.

9. If mediator determines that it is not probable the parties will resolve the matter through mediation he will convey his conclusion to the parties. Either party may terminate or the parties may elect to continue the process.

10. When the parties are in tentative agreement on all proposed terms, mediator will prepare a Memorandum of Understanding. The parties are advised to review this document with their attorneys who will prepare the written settlement. The mediation will not be concluded and there will be no binding agreement until a written contract is signed by the parties

11. It is understood that in order for mediation to work, open and honest communications are essential. Accordingly, all communications, negotiations, and statements (written and oral) made in the course of mediation and reports prepared for the mediation proceedings will be treated as privileged settlement discussions. They are absolutely confidential. The confidentiality provisions of this agreement supplement those which are set forth in Federal and State law and regulations. They are not to be construed as a limitation upon any such laws or regulations.

The "course of mediation" begins with the first communication by any party with the mediator and shall continue until the mediation is concluded. It is concluded when a written agreement is signed by all the parties or when the mediator notifies all parties, in writing, that the process is terminated.

The parties recognize that during the course of mediation they may reach "tentative agreements" pending further discussion. Such tentative agreements are not binding until reduced to a written form signed by all of the parties. Any tentative agreements not included in a signed agreement shall be treated as privileged settlement discussions.

a. The mediator, the parties and their attorneys agree that they are all strictly prohibited from revealing to anyone, including a judge, administrative hearing officer or arbitrator the content of any discussions which take place during the mediation process. This includes statements made, settlement proposals made or rejected, evaluations regarding the parties, their good faith and the reasons a resolution was not achieved, if that be the case. This does not prohibit the parties from discussing information, on a need to know basis, with professional advisors and witnesses.

b. The parties and their attorneys agree that they will not at any time, before, during, or after mediation, call mediator or anyone associated with him as a witness in any judicial, administrative or arbitration proceeding concerning this dispute.

c. The parties and their attorneys agree not to subpoena or demand the production of any records, notes, work product or the like of mediator in any judicial, administrative or arbitration proceeding concerning this dispute.

d. If, at a later time, either party decides to subpoena mediator or his records, mediator will move to quash the subpoena. The party making the demand agrees to reimburse mediator for all expenses incurred, including attorney fees, plus mediator's then current hourly rate for all time taken by the matter.

e. The exception to the above is that this agreement to mediate and any written agreement made and signed by the parties as a result of mediation may be used in any relevant proceeding, unless the parties agree in writing not to do so. Information which would otherwise be subject to discovery, shall not become exempt from discovery by virtue of it being disclosed during mediation.

12. Mediation can only be successful if each party is present at the mediation conference.

13. Mediator fees are $150 per hour, $200 per hour evenings and weekends, billed in increments of 1/4 hours. Each party shall pay to mediator the sum of $0,000 upon signing this agreement. If a solution is reached in less than 00 hours, a proportionate refund will be made. If the parties agree to continue mediation beyond 00 hours, an additional retainer will be paid based on the new estimate of time. (Evening and weekend conferences would reduce the number of hours covered by the retainer)

If a party cannot attend a scheduled conference, the mediator and other party shall be advised at least 24 hours in advance. If the conference is scheduled on a day after a holiday, notification shall be given no later than noon of the last business day preceding the holiday (Sunday shall be considered a holiday with notice to be given by noon Friday). If a party fails to give such notice, that party shall pay to mediator the sum of $200 and to the other party the sum of $200 within ten days of the canceled meeting.

For convenience of the parties this agreement may be signed in counterparts. When the counterparts are signed by both parties the effect will be the same as though all signatures were on one document. The parties shall each have a copy of the agreement carrying the signature of the other party and the mediator.

Each of the parties is signing this agreement in his capacity as an individual.

Gromala Mediation Service

January 8, 1997

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

Re: Staff draft recommendation - section 1127

Dear Ms Gaal:

Following up on my letter of January 2.

What is the purpose of creating an exception to the strict privilege presently accorded to mediation proceedings? How has confidentiality impaired mediation? How does 1127(a) improve the mediation process?

Is the purpose of section 1127 (a) to improve mediation, or is it to expand the scope of discovery in litigation? Is mediation to remain an alternative to litigation or is it to become a new tool in preparing for litigation?

A clear distinction between mediation and all other forms of dispute resolution is the mantle of confidentiality surrounding mediation. If we chip away at this fundamental element of the process we will scuttle its effectiveness.

Consider this scenario. One element of A's claim against B is that B negligently engineered and supervised a project. Both have credible experts to back them up on this point. The mediator secures consent from both parties to caucus with the experts out of the parties presence. They further agree that all discussions in caucus will remain confidential even as to the parties. The experts present a joint statement which becomes the basis for resolution.

Do you believe these experts would have been as candid with the mediator if they knew the parties could later rescind the confidential nature of their discussions with the mediator?

This is but one example of the danger posed to the success of the mediation process if we tinker with confidentiality. Unless there is substantial evidence that mediation proceedings are impaired by confidentiality we should leave it alone.

Sincerely,

John A. Gromala

JAG:hs

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

Conciliation Forums of Oakland, Inc.
663 13th Street
Oakland, CA 94612
Phone: (510) 763-2117
Fax: (510) 763-7098

January 4, 1997

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

Dear Commission:

As the Executive Director of the Conciliation Forums of Oakland, a community based mediation program, I strongly urge you not to enact the changes proposed by Evidence Code Section 1127. I believe the provisions therein would irreparabley harm the mediation process, with no appreciable benefit to those involved. The interests of all concerned are better protected by current code provision 1152(a) (4) which allows both parties and their attorneys to continue to make informed decisions with the in-put and oversight of a neutral facilitator.

Sincerely,

Ilene Gusfield
Executive Director

Ron Kelly
MEDIATOR

NEGOTIATIONS AND SETTLEMENTS

CONSTRUCTION
LAND USE &
REAL ESTATE

Mediation · Consulting · Arbitration · Training · Facilitation

Mr. Martin Fassler
Counsel for Director of Industrial Relations
Dept. of Industrial Relations - Legal Unit
PO Box 420603
San Francisco, CA 94142

December 28, 1996

Re: Law Revision Commission Study of Mediation Confidentiality

Dear Mr. Fassler,

Ms. Gaal of the Law Revision Commission staff has forwarded to me a copy your letter of December 20 to the Commission. While I believe your Department's concerns are justified, let me apologize for a couple of misimpressions which I apparently left you with in our recent conversation on this matter. First, I have been working with the Commission at their request as an advisor in helping with the formation of their recommendation, but I am not on the Commission's staff. Second, I don't believe there is any proposal by the Commission that would reverse the current prohibition on mediator testimony embodied in Evidence Code section 703.5. The Commission's recommendation, if enacted, would in fact strengthen and clarify this section. The proposed revision is intended to prevent exactly the damage to the mediation process which your letter warns about. As you may know, I was the sponsor of AB 1757 which extended 703.5 to cover mediators, and I believe its protections to be extremely important. I believe the Commission's proposed clarification of this section deserves your full support.

What I was attempting to explore with you in our recent conversation was what impact there might be on the SMCS from two seemingly small changes to the Commission's Draft Final Recommendation, which were tentatively adopted at end of the Commission's last meeting after the Department's representative had left. Staff was directed to draft proposed language on these changes for Commission consideration at its January 23 meeting. For your review, the relevant portions of the Commission's December 12 meeting minutes are quoted below, to try to clarify exactly what proposed changes were tentatively adopted (source - CLRC web site):

Mediator reports and communications (§ 1123 of staff draft recommendation)
The leadline of the statute restricting communication between a mediator and the adjudicative tribunal should be "mediator reports and communications." Subdivision (a) should be revised as follows:

(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 report, 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 ~~before the mediation~~.

15 YEARS EXPERIENCE

Member, Society of Professionals in Dispute Resolution · Arbitrator, American Arbitration Association
2731 Webster Street Berkeley, CA 94705 • **Tel: (510) 843-6074** • Fax: (510) 843-4439 • Internet: ronkelly@igc.org • Contractor's Lic. 355554

Consent to disclosure (§ 1127 of staff draft recommendation)
The statute governing consent to disclosure of mediation communications should be revised along the following lines:

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 other than the mediator who conduct or otherwise participate in the mediation expressly ~~consent~~ agree in writing 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~~ was prepared by or on behalf of fewer than all the mediation participants, those participants expressly ~~consent~~ agree in writing 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.

Conforming revisions
The redraft should incorporate a conforming revision of Labor Code Section 65, along the lines requested by the Department of Industrial Relations:

65. The department may investigate and mediate labor disputes providing any bona fide party to such dispute requests intervention by the department and the department may proffer its services to both parties when work stoppage is threatened and neither party requests intervention. In the interest of preventing labor disputes the department shall endeavor to promote sound union-employer relationships. The department may arbitrate or arrange for the selection of boards of arbitration on such terms as all of the bona fide parties to such dispute may agree upon. ~~Records of the department relating to labor disputes are confidential; provided, however, that any decision or award arising out of arbitration proceedings shall be a public record.~~ Any decision or award arising out of arbitration proceedings conducted pursuant to this section shall be a public record. The provisions of Evidence Code section 703.5 and of Evidence Code Division 9, Chapter 2, beginning with section 1120, apply to all mediations conducted by the California State Mediation and Conciliation Service and to the persons presiding over those mediations.

The Department's concerns would appear to remain valid, Mr. Fassler, regarding the effects of some of the proposed changes to 1123 and 1127, and I have found that these concerns are shared by many in the mediation community. Following the thrust of the scenario in your letter, parties will seek to compel sworn written declarations from mediators for the same reasons they would seek testimony. This would apparently be allowed if the Commission's latest proposed changes to 1127 and to 1123 are both enacted. Parties would attempt to compel production of all the mediator's files and notes for the same purposes you suggest in your letter. The changes I was attempting to explore in our phone conversation are described below.

The current Evidence Code section 1152.5 (a) (4) now provides that "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**." It seems nearly certain that if the proposed addition of the words "other than the mediator" to 1127 (a) is enacted, mediators will see an increase in subpoenas for their files and notes. It seems nearly certain that parties will increase their attempts to use mediator oral statements, letters and proposals against each other in later court or arbitration proceedings. If the related proposed Commission change to section 1123 is enacted, sworn declarations would more often be sought from mediators in later trials and arbitrations in efforts to prove parties' assertions.

The current Evidence Code 1152.6 now prohibits a mediator from filing and a court from considering any declaration or finding of any kind unless all parties expressly consent before the mediation begins. As you may know, I was the sponsor of the current section 1152.6 on which proposed 1123 is modeled, and again I obviously believe that this section offers important protections for the integrity of the process.

Evidence Code section 1152.6 attempts to insure that all participants including the mediator must know before they start their mediation whether or not the mediator will later be writing any kind of declaration or finding which could be used in a later proceeding. Participants in mediation, certainly including the mediator often conduct themselves very differently depending on whether they know they can or cannot speak off the record. By striking the words "before the mediation" from 1123, the Commission is proposing to change this, so that this election could be reversed from off-the-record to on-the-record after the mediation is already over.

Some mediators and program directors believe that the two proposed Commission changes taken together will make mediators and programs much more hesitant in their efforts to create voluntary agreement. It may be worth reviewing some of the 1986 comments of your Department, when it took an opposed-unless-amended position on AB 1030, the Commission-sponsored bill which originally enacted Evidence Code section 1152.5 (this opposed position was approved by the Governor's office). They are as follows:

> "Since 1949, the Department's State Mediation and Conciliation Service has been afforded confidentiality of information in section 65 of the Labor Code. In 1968 an Attorney General opinion substantiated the confidentiality of information for records of this Division relating to labor disputes, and included in the definition of records that information which the Mediator may recollect This confidentiality has even been interpreted to allow the Mediator, in the course of his/her work, to attend executive sessions with public governing bodies without violating the Brown (Open Meeting) Act.
>
> "While this bill was not intended to address the activities of the State Mediation and Conciliation Service, it is essential to its role that confidentiality not only be maintained, but have no reason to be questioned." [source - Governor's Office records - emphasis added]

Are your current concerns still consistent with the Department's original concerns in 1986? After reviewing the Commission minutes excerpted above, do you believe the proposed changes will cause the confidentiality protections for SMCS mediations to be questioned? If so, I urge you to recommunicate your position to the Commission. I wish to again apologize for any previous miscommunications and to express my hope that this letter clarifies the situation regarding mediator testimony. Please feel free to call, if you would like to discuss this further or for any other reason (510-843-6074).

Sincerely,

Ron Kelly

Ron Kelly, Mediator

cc: Ms. Barbara Gaal, Staff Counsel, California Law Revision Commission
Mr. Dennis Sharp, President, California Dispute Resolution Council

SELK MEDIATION AND ARBITRATION
809 Everett Street
El Cerrito, CA 95530-2922
ph\fax 510-524-3445
January 13, 1997

California Law Revision Commission
4000 Middlefield Road, Room D1
Palo Alto CA 94303-4739

A private and court-appointed mediator, chair of Women Lawyers of Alameda County (WLAC) ADR Committee, and active participant in organizations including Northern California Mediation Association (NCMA) and Society of Professionals in Dispute Resolution (SPIDR), I am writing to voice my distress over the changes in the confidentiality clause proposed in Evidence Code §1127(a). Specifically, I am concerned that omitting the mediator from those who have to consent to disclosure will have a chilling and otherwise deleterious effect upon the parties, the mediator, and most significantly, the process itself. Even the courts are likely to suffer.

Providing a safe, secure environment for parties to engage in full frank discussion and otherwise safeguarding the process is I believe one of the mediator's primary responsibilities. Key to this is confidentiality. It is, in my experience, only with the guarantee of privacy that parities will enter the kind of discussion and revelation that allows them to reach that moment of understanding from which resolution can flow. The existing statute establishes that in all but the most circumscribed circumstances, all proceedings will remain confidential. The narrowly-drawn exception balances the need for privacy against that for disclosure -- with oversight of the neutral to ensure the continued integrity of the process. By taking the mediator out of the loop, my fears are that:

- The mediator will not be able to continue to monitor and if necessary intervene in the process to make sure that it continues to be fair (Eg. Having leveled the ground during mediation, the mediator may not be able to make sure that the stronger party does not overpower the weaker one after-the-fact),
- The loss of mediator involvement will likely make parties and their lawyers even more reluctant to reveal information critical to resolution, and
- Many mediators will feel forced to dramatically alter both what they offer and how -- to avoid becoming enmeshed by particularly litigious parties.

Finally, the courts too will likely feel an increased burden as more legal proceedings are brought to review what is supposed to be an off-the record alternative to litigation.

Individually and collectively, the above undermine the essence of mediation -- threatening to destroy it altogether. This would be a sad and needless loss.

I urge you to leave Evidence Code§ 1152.5 (a) (4) as it presently stands.

Sincerely,

Nancy Selk

Nancy Selk

HUMBOLDT STATE UNIVERSITY
Institute for Study of Alternative Dispute Resolution

January 8, 1997

TO: Barbara S. Gaal
FROM: Elizabeth Watson, Ph.D.
Director of ISADR
RE: Mediation Confidentiality as discussed in Staff Draft Recommendation: sec. 1127

It is with some concern that I respond to the staff recommendation cited above regarding the issue of confidentiality. I don't understand the reason behind this recommendation as it would have a debilitating effect on the use of the mediation process, especially in regard to its ability to reduce needless litigation. The moving away from anything but complete confidentiality for the mediator and all other participants reduces the willingness to mediate, trust building, and effectiveness and integrity of the process.

I am wondering about the intention of reducing complete confidentiality? Have there been problems that this section is attempting to address? In definitions of mediation confidentiality is cited as integral. This is (along with disputant control of decision-making) what distinguishes mediation from all other types of ADR. If this section is acted on it will have the effect of turning mediation into an expansion of the discovery part of the litigation process

My reading of this section makes confidentiality only conditional. It seems that it would open mediators to being supeoned to testify. Disputants would be very reluctant to put their cards on the table and to honestly and openly discuss all the issues in the conflict. The engine that drives the successful mediation process

Arcata, California 95521-8299 • (707) 826-4750 • Fax (707) 826-5450

is open and direct communication. It is complete confidentiality that makes the mediation process a safe place to talk about things that can not be disclosed in the litigation process. Conditional confidentiality makes open communication too risky for the disputants and will therefore seriously reduce the effectiveness of the mediation process. I can see no gains from the inclusion of this section, only serious loses.

If you would like to discuss this issue further please do not hesitate to contact me.

SAN FRANCISCO DAILY JOURNAL
12/30/96
P-4

The High Road

In Achieving Settlement, Mediators Should Not Sacrifice Ethics

By Richard A. Zitrin

As someone who's worked as a mediator for almost 20 years, I'm a passionate advocate of the process. As someone who's been teaching legal ethics for 20 years, I believe just as passionately in the ethical obligations of lawyers. But I know from experience that when it comes to the ethics of mediators, many neither know nor understand some of the fundamental principles which should guide their conduct.

I recently had an experience as attorney for a party in mediation which brought this home in dramatic fashion. I use it here to illustrate some basic ethical rules which all mediators should — but don't always — follow.

Recently, my co-counsel and I were representing a woman in a sex discrimination case against a large company. Our case was consolidated with a class of women who also alleged discrimination. The mediator spent months trying to bring the class action to settlement. He continued to mediate as the case trailed for trial, and ultimately achieved a tentative agreement, pending class member acceptance and judicial approval.

He then mediated our case, but to no avail; our client and the defendant remained far apart. We told the judge we were ready for trial, but the defendant objected, arguing that our case should be continued until after the final fairness hearing on the settlement. The judge told us to brief the issue of our trial date.

The merits of our motion are beside the point here. What is the point is what we found when we exchanged pleadings on the issue.

Included in the defendant's opposition was a declaration of the mediator on the pleading paper of the opposing law firm. My jaw dropped open as I read the caption styled, as if to remove any doubt as to neutrality, "Declaration of [Mediator] in Support of Defendants' Opposition to Plaintiff's Motion."

In the declaration, the mediator discussed at some length why our client's early trial date could jeopardize the class settlement, because either the trial of our case or the attendant publicity "could unduly influence class members when they are considering whether to file an objection to the settlement."

In one single document, this mediator managed to violate three basic precepts of mediation ethics. But in a world where mediator ethics can take a back seat to settlement at all costs — and in which at least one large alternative dispute resolution organization claims to have no standard ethics code — such behavior, while outrageous, is unfortunately not unique.

Let's examine each of the mediator's three major mistakes. First, he violated his neutrality. Nothing is more important to a mediator than maintaining neutrality at all costs. This is the first principle taught at any mediation training. Without it, the entire process is jeopardized. Indeed, mediators are even called "neutrals."

Mediators simply can't take sides. Even where power imbalances occur — most often in domestic relations mediation, where one party, perhaps unrepresented by counsel, is being overwhelmed by the other to the point where the mediator fears that a result may not be "fair" — experts in mediation ethics almost uniformly agree that they must remain neutral. University of San Francisco law dean Jay Folberg, who has written several books on mediation, says that any other course means "using your thumb to level the scales," a technique that accomplishes little except destroying the mediator's neutrality.

A mediator's responsibilities — to the parties and the process, protected by neutrality and confidentiality — must never be encumbered by personal goals.

Unlike gut-wrenching domestic situations, this case presented a much easier call. Yet the mediator overtly took sides by drafting a declaration to be used by one side against the other. Strike one.

If there is any mediation requirement more clear than the obligation of neutrality, it is the duty of confidentiality. This duty is so important that California has an Evidence Code Section, 1152.5, that ensures confidentiality over all documents, evidence and "communications, negotiations, or settlement discussions." This should make it impossible for a mediator to use such communications as the basis for a declaration.

In our particular case, the mediator declared that he based his opinions on his knowledge of our case. He gained this knowledge only through his position as mediator. Taking what he had learned in confidence and describing it to the court in any form, much less under oath in a sworn declaration, was a clear violation of confidentiality.

Lest there be any doubt, Evidence Code Section 1152.6, passed in 1995, specifically admonishes mediators that they "may not file ... any declaration or findings of any kind by the mediator, other than a required statement of agreement or nonagreement." Strike two.

Somewhat more subtle than the obvious issues of neutrality and confidentiality is the effect that ego plays in mediation. All mediators have ego invested in the process, no matter how they may try to avoid it. This ego is most clearly manifested when it comes to settling a case. This is understandable. Settlement is the very reason mediators are hired in the first place.

In our illustrative example, this mediator forgot that settling the case, in and of itself, was not his only goal. He lost sight of the fact that neutrality and confidentiality can never be sacrificed to forge or maintain a settlement.

But he compounded these errors by assuming that information about our client's case "could unduly influence class members when they are considering whether to file an objection to the settlement." By this statement, he not only got his own ego involved in protecting "his" settlement, but claimed, with what can only be described as hubris, to know what was best for passive class members he had never even met.

When I focused on ego and mediation ethics four years ago in an article for California Lawyer, I found that most mediators said settling a case was not their only goal. Tony Piazza, now of San Francisco and Maui, a strong-willed mediator famed for his "settle-at-all-costs" reputation, told me settling was secondary to assisting the parties to do what's best for themselves. Dean Folberg told me it would be dangerous for mediators to feel that they "win" only when they obtain settlements. And Gary Freedman of Mill Valley, dean of domestic relations mediators, argued eloquently that it is not his job to settle cases, but rather to allow the parties to "reach a certain quality of dealing with each other."

Freedman put it clearly and succinctly: Mediators are not guardians of a settlement but "guardians of the process." In this respect was our mediator most sorely lacking. Strike three.

When I wrote for California Lawyer four years ago, there were no ethical standards for mediators except the general guidelines of the Society of Professionals in Dispute Resolution for "neutrals," applied to both mediators and arbitrators, despite their very different jobs. Now that's begun to change.

The American Arbitration Association, American Bar Association and SPIDR, working in concert, spent over two years developing what are now called the Model Standards of Conduct for Mediators. Among those standards are rules covering "self-determination," or the parties' control of the process; "impartiality"; conflicts of interest; confidentiality; and "the quality of the process."

Even these standards, while a vast improvement from five years ago, tend to be vague and aspirational, particularly when compared to the Rules of Professional Conduct which govern the behavior of lawyers. Of more help may be the increasing number of statutes, like our Evidence Code sections, which have the authority to be more directly prohibitive. But legislation tends to be quite narrow, and — as we experienced — can simply be ignored with little remedy available.

The AAA-ABA-SPIDR rules, though they serve as a floor, not a ceiling, are at least a start. All mediators would be well-advised to go significantly beyond these minimum standards to ensure that — as mediators often say — "the parties own the process."

This is more than a mere empty expression. It means that the mediator's responsibilities — to the parties and the process, protected by neutrality and confidentiality — are never encumbered by personal goals, even when these goals may include protecting the biggest settlement of one's career.

Richard A. Zitrin, a San Francisco lawyer, mediates through the American Arbitration Association, where he concentrates on attorney-client, attorney-attorney and attorney-law firm disputes. He is co-author of the 1995 book "Legal Ethics in the Practice of Law."

#K-401

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Revised Staff Draft

RECOMMENDATION

Mediation Confidentiality

January 1997

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 define the application of mediation confidentiality statutes, consolidate mediation confidentiality statutes in the Evidence 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:

---

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, 42 Cal. App. 4th 1209, 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,

---

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.

---

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 compromising, settling, or resolving a dispute in whole or in part."[20] This definition would encompass a wide range of mediation styles, such as a mediation conducted as a number of sessions, only some of which include the mediator. Mediation confidentiality would extend to a purely voluntary mediation, and, with limitations, a mediation in which participation is ordered by a court or other adjudicative body. 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

---

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.

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.

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 agreement, or the agreement 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 agreement is necessary for disclosure.

This recommendation resolves these ambiguities by adding a statute specifically addressing disclosure by agreement. It would establish a general rule that to waive the statutory protection for mediation confidentiality, all mediation participants other than the mediator must expressly agree to the disclosure, in writing or in accordance with a statutory procedure for memorializing an oral agreement.

The proposed statute would apply a special rule to materials prepared by or on behalf of fewer than all of the mediation participants. To ensure that participants generating such materials are not unfairly deprived of the benefits of their work, only the agreement of the mediation participants for whom the material was prepared would be required for disclosure, *provided* the material does not disclose anything said or done or any admission made in the course of the mediation. Material that necessarily discloses mediation communications could be admitted or disclosed only upon satisfying the general rule requiring agreement of all mediation participants.

The recommendation would require that agreement of mediation participants to disclosure be express, not just implied. This requirement should help ensure the existence of true, uncoerced agreement, 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

---

21. 1985 Cal. Stat. ch. 731, § 1.

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

the process of converting an oral compromise to a definitive written agreement.[23] If confidentiality applies, then parties cannot enforce the oral compromise, because 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 agree to disclosure. To facilitate enforcement of such an agreement, assent of other mediation participants, such as the mediator, would not be necessary. In contrast, existing law is unclear as to precisely whose agreement to disclosure 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

---

23. See *supra* note 6.

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).

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 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 protect "evidence of anything said or of any admission made *for the purpose of, or in the course of, or pursuant to,"* the mediation.

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

---

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.

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 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 legislation 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

---

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.

administrative adjudications, (3) the restriction applies to any report or statement of opinion, however denominated, and (4) neither a mediator nor anyone else may submit the prohibited information. These changes would help ensure that 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 a judge, arbitrator, or mediator

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 1120-1129.1 (mediation).

Evid. Code §§ 1120-1129.1 (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. Definitions

1120. For purposes of this chapter:

(a) "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.

(b) "Mediator" means a neutral person who conducts a mediation and who has no authority to compel a result or render a decision on any issue in the dispute. "Mediator" includes any person designated by a mediator either to assist in the mediation or to communicate with the parties in preparation for a mediation.

(c) "Mediation consultation" means a communication between a person and a mediator for the purpose of initiating a mediation or retaining the mediator.

Comment. Subdivision (a) of Section 1120 is drawn from Code of Civil Procedure Section 1775.1 and the introductory clause of former Section 1152.5(a). To accommodate a wide range of mediation styles, the definition is broad, without specific limitations on format. For example, it would include a mediation conducted as a number of sessions, only some of which involve the mediator. The definition focuses on the nature of a proceeding, not its label. A proceeding may be a "mediation" for purposes of this chapter, even though it is denominated differently.

Under subdivision (b), a mediator must be neutral and must lack power to coerce a resolution of any issue. Because a mediator must lack authority to render a decision, a nonbinding arbitration is not a "mediation." 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. The definition focuses on a person's role, not the person's title. A person may be a "mediator" under this chapter even though the person has a different title, such as "ombudsperson."

Subdivision (c) is drawn from 1996 Cal. Stat. ch. 174, which amended former Section 1152.5 to explicitly protect mediation intake communications. Subdivision (c) is not limited to communications to retain a mediator. It also encompasses contacts with a mediator concerning initiation of a mediation, such as where a mediator contacts a disputant because another disputant desires to mediate.

For other provisions governing the scope of this chapter, see Sections 1120.1 (scope of chapter), 1120.2 (court-ordered and court-supervised proceedings), 1121 (mediation-arbitration).

☞ **Staff Note.** The staff is seeking input on the definition of "mediation consultation," particularly from the sponsor of the 1996 measure protecting mediation intake communications. The staff will supplement this memorandum with whatever information it obtains.

§ 1120.1. Scope of chapter

1120.1. (a) This chapter does not apply to a proceeding under Part 1 (commencing with Section 1800) of Division 5 of the Family Code or a proceeding under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

(b) Nothing in this chapter makes admissible evidence that is inadmissible under Section 1152 or any other statute.

(c) If a statute provides that this chapter applies to a mediation under that statute or another statute, this chapter applies to the mediation only if Sections 1120 through 1120.2, inclusive, are satisfied.

Comment. Subdivision (a) of Section 1120.1 continues without substantive change former Section 1152.5(b). Special confidentiality rules apply to a proceeding in family conciliation court or a mediation of child custody and visitation issues. See Section 1040; Fam. Code §§ 1818, 3177.

Subdivision (b) continues the first sentence of former Section 1152.5(c) without substantive change.

Subdivision (c) makes clear that Sections 1120-1120.2 establish prerequisites for application of this chapter. For examples of statutes covered by subdivision (c), see Code of Civil Procedure Section 1775.10, Government Code Section 66032, Insurance Code Section 10089.80, and Labor Code Section 65.

§ 1120.2. Court-ordered and court-supervised proceedings

1120.2. (a) This chapter does not apply to a settlement conference, or other proceeding to resolve a dispute, that is conducted by a judge or other representative of the tribunal in which the dispute is pending.

(b) Where a court or other adjudicative body orders persons to participate in a proceeding to resolve a dispute, this chapter applies to the proceeding if all of the following conditions are satisfied:

(1) The proceeding is a mediation as defined in Section 1120.

(2) The person conducting the proceeding is a mediator as defined in Section 1120.

(3) The proceeding is not excluded from this chapter by paragraph (a) or by Section 1120.1.

(4) The court or other adjudicative body refers to the proceeding as a "mediation."

(c) Notwithstanding subdivision (b), this chapter does not apply to a proceeding ordered by a court or other adjudicative body if the court or other adjudicative body expressly informs the disputants before the proceeding, in writing or on the record, that the chapter does not apply.

(d) Nothing in this section authorizes a court or other adjudicative body to order disputants to participate in any proceeding.

Comment. Pursuant to subdivision (a) of Section 1120.2, a court settlement conference is not a mediation within the scope of this chapter. 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.

Under subdivision (b), the protections of this chapter, including in particular Sections 1122 (mediation confidentiality) and 1123 (mediator reports and communications), extend to a court-ordered proceeding if it meets the requirements of this chapter and the court refers to the proceeding as a "mediation." This supplements other options a court may use to encourage settlement.

Subdivision (c) gives the court the option of making this chapter inapplicable to a proceeding even though the proceeding meets the requirements of this chapter and the court refers to it as a "mediation." To exercise that option, the court must expressly inform the disputants before the proceeding, in writing or on the record, that the chapter does not apply. Instead of making a pro forma disclosure, the court should attempt to alert the parties to the implications concerning mediation confidentiality and mediator feedback to the court. In determining the content and extent of disclosure, the court should take into account the sophistication of the parties and their counsel, if any.

Subdivision (d) makes clear that although this section recognizes and supplements a court's options for handling a case, it does not expand a court's authority to order participation in a dispute resolution proceeding.

☞ **Staff Note.** Section 1120.2 attempts to express and consolidate the Commission's ideas on applying this chapter to a court settlement conference or court-ordered mediation. The staff has struggled with the drafting of this provision. The Commission made substantial progress at its December meeting, but did not fully resolve what a court needs to do to make the chapter apply to a court-ordered mediation.

If the prerequisites of subdivision (b)(1)-(b)(3) are met, should the chapter automatically apply to a court-ordered proceeding, unless the court says otherwise? Section 1120.2 adopts a different approach, under which the chapter applies only if the court refers to the proceeding as a "mediation." Another option is to make the chapter applicable only if the court refers to the proceeding as a "mediation pursuant to Chapter 2 of Division 9 of the Evidence Code." Alternatively, the statute could require some other disclosure or explanation, such as the following:

> Chapter 2 of Division 9 of the Evidence Code provides for mediation confidentiality and generally prohibits persons from communicating a mediator's thoughts and impressions to the court in which the mediated dispute is pending. The proceeding in which you are to participate will be governed by that chapter, so long as it satisfies the requirements of Sections 1120 through 1120.2 of the Evidence Code. One of those requirements is that the person conducting the proceeding shall not be a judge or other representative of this court. In this court's assessment, the proceeding in which you are to participate satisfies that requirement.

In evaluating these options, the Commission should consider: (1) the need to give courts flexibility in fashioning dispute resolution programs, (2) the importance of extending confidentiality and the prohibition on mediator reporting to court-ordered programs, particularly to a proceeding denominated a "mediation," (3) the interest in protecting legitimate expectations concerning mediation confidentiality and mediator reporting, (4) the benefits and burdens of having courts inform parties of the content of this chapter and its relevance to their proceeding, and (5) the resistance in various sectors to restrictions on using the term "mediation." The staff attempted to balance these considerations in drafting Section 1120.2

In particular, Section 1120.2 makes it relatively easy to invoke the Chapter 2 protections. If the court-ordered proceeding meets the requirements of subdivision (b)(1)-(b)(3), the court need only refer to the proceeding as a "mediation" to make the chapter apply. The staff did not incorporate a more extensive requirement, because Ron Kelly and others would oppose it as too constraining on protections critical for effective mediation. The support expressed for the tentative recommendation and other drafts of this proposal might be jeopardized. Requiring the court to characterize a proceeding as "mediation pursuant to Chapter 2 of Division 9 of the Evidence Code" could also be misleading: What if the court makes such a statement, but the prerequisites of subdivision (b)(1)-(b)(3) are not met? The staff did not make application of the chapter automatic, however, because its understanding from comments at the December meeting is that the Commission wants the court to take an affirmative step to make the chapter apply. By requiring use of the term "mediation," Section 1120.2 gives the court power to make the chapter inapplicable, thus preserving court flexibility. The court can even call such a proceeding a "mediation," so long as it clearly informs the parties that their "mediation" will not be subject to the mediation confidentiality provisions and prohibition on mediator reporting.

Section 1120.2 thus represents a compromise of competing interests. The staff encourages input on Section 1120.2 and analysis of whether it is an effective solution.

§ 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 in writing, or orally in accordance with Section

1121.1, before or after the mediation that the person may use specific information from the mediation.

Comment. Section 1121 neither sanctions nor prohibits mediation-arbitration agreements. It just makes this chapter, including in particular Section 1122 (mediation confidentiality), available notwithstanding existence of such an agreement.

See Section 1120 (definitions). For other provisions governing the scope of this chapter, see Sections 1120.1 (scope of chapter) and 1120.2 (court-ordered and court-supervised proceedings).

§ 1121.1. Recorded oral agreement

1121.1. An oral agreement is "in accordance with Section 1121.1" if it satisfies all of the following conditions:

(a) It is recorded by a court reporter, tape recorder, or other reliable means of sound recording.

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

(c) The parties to the oral agreement expressly state on the record that the agreement is enforceable or binding or words to that effect.

Comment. In the interest of efficiency, Section 1121.1 establishes a procedure for orally memorializing an agreement. Statutes permitting use of that procedure for certain purposes include Sections 1121 (mediation-arbitration), 1123 (mediator reports and communications), 1127 (disclosure by agreement), 1128 (written settlements reached through mediation), and 1129 (oral agreements reached through mediation).

See Section 1120 (definitions).

☞ **Staff Note.** Subdivision (b) requires the mediator to recite the terms of the oral agreement on the record. Should it be broadened to allow either the mediator or the parties to recite the terms?

Similarly, subdivision (c) requires the parties to expressly state on the record that the agreement is enforceable or binding or words to that effect. Should it be broadened to permit either the mediator or the parties to make the required statement?

In each context, the limitation on who must make the necessary statements may be overlooked, resulting in an ineffective agreement. On the other hand, having the neutral person state the terms may help ensure that the terms are stated in an unbiased manner. Having the parties state that those terms are binding may help ensure that the parties truly understand that their agreement is final. For these reasons, and because the substance of Section 1121.1 has been in many drafts of this proposal without any objection along these lines, the staff recommends leaving the provision as is. If anyone has different thoughts on this point, please express them at or before the Commission's meeting. The staff does not plan to raise the issue unless someone comments on it.

§ 1122. Mediation confidentiality

1122. (a) Except as otherwise expressly provided by statute, evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is not admissible in evidence nor 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.

(b) Except as otherwise expressly provided by statute, no document, or writing as defined in Section 250, or copy of a document or writing, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, 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.

(c) All communications, negotiations, or settlement discussions by and between participants or mediators in the course of a mediation or a mediation consultation shall remain confidential.

Comment. Subdivision (a) of Section 1122 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) 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) also reflects the addition of Sections 1122.1 (types of evidence not covered), 1127 (disclosure by agreement), 1128 (written settlements reached through mediation), and 1129 (oral agreements reached through mediation). To "expressly provide" an exception to subdivision (a), a statute must explicitly be aimed at overriding mediation confidentiality. See, e.g., Section 1122.1 ("Notwithstanding any other provision of this chapter ….").

Subdivision (b) 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 (b) 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 (b) also reflects the addition of Sections 1122.1 (types of evidence not covered), 1127 (disclosure by agreement), 1128 (written settlements reached through mediation), and 1129 (oral agreements reached through mediation). To "expressly provide" an exception to subdivision (b), a statute must explicitly be aimed at overriding mediation confidentiality. See, e.g., Section 1122.1 ("Notwithstanding any other provision of this chapter ….").

Subdivision (c) continues former Section 1152.5(a)(3) without substantive change. A mediation is confidential notwithstanding the presence of an observer, such as a person evaluating or training the mediator or studying the mediation process.

See Section 1120 (definitions). See also Sections 703.5 (testimony by a judge, arbitrator, or mediator), 1120.1 (scope of chapter), 1120.2 (court-ordered and court-supervised proceedings), 1121 (mediation-arbitration), 1122.1 (types of evidence not covered), 1123 (mediator reports and communications), 1127 (disclosure by agreement), 1128 (written settlements reached through mediation), 1129 (oral agreements reached through mediation), 1129.1 (attorney's fees).

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, 39 Cal. App. 4th 526, 46 Cal. Rptr. 2d 84, 88 (1995) (constitutional right of privacy protected communications made during mediation sessions before an ombudsperson).

§ 1122.1. Types of evidence not covered

1122.1. (a) Notwithstanding any other provision of this chapter, evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure

solely by reason of its introduction or use in a mediation or a mediation consultation.

(b) This chapter does not limit any 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.

(3) 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. Subdivision (a) of Section 1122.1 continues former Section 1152.5(a)(6) without change. It limits the scope of Section 1122 (mediation confidentiality), preventing parties from using a mediation as a pretext to shield materials from disclosure.

Subdivision (b)(1) makes explicit that Section 1122 does not restrict admissibility of an agreement to mediate. Subdivision (b)(2) continues former Section 1152.5(e) without substantive change. Subdivision (b)(3) 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 (definitions).

§ 1123. Mediator reports and communications

1123. 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 report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than 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, or orally in accordance with Section 1121.1.

Comment. Section 1123 continues the first sentence of former Section 1152.6 without substantive change, except to make 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, (3) the statute applies to any report or statement of opinion, however denominated, and (4) neither a mediator nor anyone else may submit the prohibited information. The exception where "all parties in the mediation expressly agree otherwise in writing" is modified to allow use of the oral procedure in Section 1121.1 (recorded oral agreement) and to permit making of the agreement at any time, not just before the mediation. The statute does not prohibit a mediator from providing a mediation participant with feedback on the dispute in the course of the mediation. The second sentence of former Section 1152.6 is continued without substantive change in Section 1120.1 (scope of chapter), except that Section 1120.1 excludes proceedings under Part 1 (commencing with Section 1800) of Division 5 of the Family Code, as well as proceedings under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

See Section 1120 (definitions). See also Sections 703.5 (testimony by a judge, arbitrator, or mediator), 1129.1 (attorney's fees).

☞ **Staff Note.**

(1) At its meeting on December 12, 1996, the Commission decided to delete the phrase "before the mediation" from Section 1123: "…unless all parties expressly agree otherwise in writing ~~before the mediation~~." In his letter to Martin Fassler dated December 28, 1996 (Exhibit pp. 15-17), Ron Kelly expresses concern about the combined effect of this change and the changes that the Commission made to Section 1127. The staff believes, however, that his concern could be resolved through revision of Section 1127, without making any further changes to Section 1123.

As the staff recollects, before the Commission revised Section 1127 in December, Mr. Kelly had no objection to deleting the phrase "before the mediation" from Section 1123. The California Dispute Resolution Council ("CDRC") specifically requested that change.

(2) For a sobering and enlightening discussion of the dangers of mediator declarations, see Richard A. Zitrin, *The High Road,* San Francisco Daily Journal (12/30/96), p.4, which is attached as Exhibit p. 21.

§ 1127. Disclosure by agreement (Option A)

1127. Notwithstanding any other provision of this chapter, 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 or a mediation consultation, may be admitted in evidence or disclosed if any of the following conditions are satisfied:

(a) All persons other than the mediator who conduct or otherwise participate in the mediation expressly agree in writing, or orally in accordance with Section 1121.1, to disclosure of the communication, document, or writing.

(b) The communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree in writing, or orally in accordance with Section 1121.1, 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 agreement 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 agreement of all participants other than the mediator. Agreement must be express, not implied. For example, parties cannot be deemed to have agreed in advance to disclosure merely because they agreed to participate in a particular dispute resolution program.

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

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

See Section 1120 (definitions). See also Sections 703.5 (testimony by a judge, arbitrator, or mediator) and 1122 (mediation confidentiality).

☞ **Staff Note.** In the tentative recommendation and subsequent drafts, Section 1127(a) read: "All persons who conduct or otherwise participate in the mediation expressly consent to disclosure of the communication, document, or writing." At its meeting on December 12, 1996, the Commission revised this to: "All persons other than the mediator who conduct or otherwise participate in the mediation expressly …."

That change has elicited a storm of protest. The Department of Industrial Relations ("DIR") previously sought to have mediations conducted by the State Mediation and Conciliation Service ("SMCS") expressly included in this chapter. It now writes that if the Commission's proposal "would allow the parties to a mediation to call a mediator to testify in a later judicial or administrative proceeding, over the objection of the mediator," then "we request that Labor Code 65 be amended in the proposed legislation to exclude mediations conducted by SMCS staff from the scope of the proposed law." (Exhibit p. 1 (emphasis in original).)

In reply to DIR, Ron Kelly comments that the change to Section 1127 would not affect Section 703.5's prohibition on mediator testimony. Rather, he states that the revision would lead to an increase in requests for mediator declarations and documents. (Exhibit p. 16.) Mr. Kelly comments that "many in the mediation community" are concerned about this. (*Id.*)

That statement appears accurate. For example, mediator John Gromala has written not one, but two letters voicing concern about Section 1127. (Exhibit pp. 8-13.) Similarly, Ilene Gusfield (Executive Director of the Conciliation Forums of Oakland) "strongly urge[s]" the Commission "not to enact the changes proposed by Evidence Code Section 1127." (Exhibit p. 14.) She believes that the provision would irreparably harm the mediation process, "with no appreciable benefit to those involved." (*Id.*) Similarly, Elizabeth Watson (Director for the Institute for Study of Alternative Dispute Resolution at Humboldt State University) comments that Section 1127 as revised at the Commission's December meeting would "have a debilitating effect on the use of the mediation process, especially in regard to its ability to reduce needless litigation." (Exhibit p. 19.) Nancy Selk of Selk Mediation and Arbitration warns that "omitting the mediator from those who have to consent to disclosure will have a chilling and otherwise deleterious effect upon the parties, the mediator, and most significantly, the process itself." (Exhibit p. 18.)

In revising Section 1127 to make the mediator's agreement to disclosure unnecessary, the Commission's main objective was to address a practical problem arising from Section 1120's broad definition of "mediator," which includes "any person designated by the mediator either to assist in the mediation or to communicate with the parties in preparation for a mediation." Specifically, the Commission was concerned about the difficulty of obtaining agreement from persons such as a mediator's former secretary or an interpreter vacationing in a foreign country. By making the mediator's agreement to disclosure unnecessary, the Commission sought to eliminate that problem.

In light of the strong objections to that approach, the staff suggests resolving the problem in another way instead. See Section 1127 (Option B) below.

§ 1127. Disclosure by agreement (Option B)

1127. (a) Notwithstanding any other provision of this chapter, 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 or a mediation consultation, may be admitted in evidence or disclosed if any of the following conditions are satisfied:

(1) All persons ~~other than the mediator~~ who conduct or otherwise participate in the mediation expressly agree in writing, or orally in accordance with Section 1121.1, to disclosure of the communication, document, or writing.

(2) The communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree in writing, or orally in accordance with Section 1121.1, 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.

(b) For purposes of paragraph (a), if the neutral person who conducts a mediation expressly agrees to disclosure, that agreement binds any person designated by the mediator either to assist in the mediation or to communicate with the parties in preparation for the mediation.

(c) If a person refuses to agree to disclosure pursuant to this section, any reference to that refusal during any subsequent trial is an irregularity in the

proceedings of the trial for purposes of Section 657 of the Code of Civil Procedure.

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 agreement was required for admissibility or disclosure of mediation communications and documents.

Subdivision (a)(1) states the general rule that mediation documents and communications may be admitted or disclosed only upon agreement 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). Agreement must be express, not implied. For example, parties cannot be deemed to have agreed in advance to disclosure merely because they agreed to participate in a particular dispute resolution program.

Subdivision (a)(2) facilitates admissibility and disclosure of unilaterally prepared materials, but it only applies so long as those materials may be produced in a manner revealing nothing about the mediation discussion. Materials that necessarily disclose mediation communications may be admitted or disclosed only upon satisfying the general rule of subdivision (a).

Subdivision (b) makes clear that if the person who takes the lead in conducting a mediation agrees to disclosure, it is unnecessary to seek out and obtain assent from each assistant to that person, such as a case developer, interpreter, or secretary.

To prevent coerced agreement to disclosure, subdivision (c) makes commenting on a person's refusal to agree an irregularity in the proceedings. Such a comment may be grounds for vacating a decision or granting a new trial, but only if it materially affected substantial rights of the aggrieved party. See Code Civ. Proc. § 657.

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

See Section 1120 (definitions). See also Sections 703.5 (testimony by a judge, arbitrator, or mediator) and 1122 (mediation confidentiality).

☞ **Staff Note.** The staff recommends replacing Section 1127 (Option A) with Section 1127 (Option B). Although some of the letters commenting on Section 1127 (Option A) urge the Commission to delete the provision altogether (see Exhibit pp. 9, 20), the staff believes that Section 1127 (Option B) meets the concerns expressed and addresses the problem that the Commission was trying to fix when it decided to revise Section 1127 at its December meeting. Section 1127(c) is based on a suggestion that mediator John Gromala made by phone.

§ 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 in evidence or disclosed if any of the following conditions are satisfied:

(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 agree in writing, or orally in accordance with Section 1121.1, 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 agreement of the signatories. Agreement of the mediator and other mediation participants is not necessary. Subdivision (c) is thus an exception to the general rule governing disclosure of mediation communications by agreement. See Section 1127.

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

See Section 1120 (definitions). See also Section 1129 (oral agreements reached through mediation).

☞ **Staff Note.**

(1) ***Fraud, duress, or illegality***. Chip Sharpe of Humboldt Mediation cautions that 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.)

As Mr. Kelly has explained to the Commission, 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." By referring to Section 1121.1, Section 1129 incorporates a similar requirement for an oral compromise 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 1128, but not Section 1129. (Mem. 96-86, 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 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 made in the course of, or pursuant to, a mediation, may be admitted in evidence or disclosed, but only if it is recorded in accordance with Section 1121.1.

(b) On recording, in accordance with Section 1121.1, an oral agreement compromising, settling, or resolving a dispute in whole or in part, the mediation ends for purposes of this chapter.

Comment. By following the procedure in Section 1121.1, mediation participants may create an oral settlement 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, 42 Cal. App. 4th 1209, 50 Cal. Rptr. 2d 200 (1996) (mediation confidentiality does not protect oral statement of settlement terms).

See Section 1120 (definitions). 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 the requirement (incorporated into Section 1129 through its reference to Section 1121.1) that the parties to the oral agreement "expressly state on the record that the agreement is enforceable or binding or words to that effect." 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.
>
> [Mem. 96-86, 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.

§ 1129.1. Attorney's fees

1129.1. If a person subpoenas or otherwise seeks to compel a mediator to testify or produce a document, and the court or other adjudicative body determines that the testimony or document is inadmissible or protected from disclosure under Section 703.5 or this chapter, the court or adjudicative body making the determination shall award reasonable attorney's fees and costs to the mediator against the person seeking the testimony or document.

Comment. Section 1129.1 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 (testimony by a judge, arbitrator, or mediator), and (2) either a court or another adjudicative body (e.g., an arbitral or administrative tribunal) may award the fees and costs. Because Section 1120 (definitions) 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.

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. The introductory clause of Section 1152.5(a) is continued in part in Section 1120 (definitions). The reference to an agreement to mediate is not continued. See Section 1120.2 (court-ordered and court-supervised proceedings), which extends mediation confidentiality to a court-ordered proceeding in specified circumstances.

Except as noted in the Comment to Section 1122, former Section 1152.5(a)(1)-(3) are continued without substantive change in Section 1122 (mediation confidentiality). Former Section 1152.5(a)(4) is superseded by Section 1127 (disclosure by agreement). 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). Former Section 1152.5(a)(6) is continued without substantive change in Section 1122.1 (types of evidence not covered).

Former Section 1152.5(b) is continued without substantive change in Section 1120.1 (scope of chapter).

The first sentence of former Section 1152.5(c) is continued without substantive change in Section 1120.1 (scope of chapter). The second sentence of former Section 1152.5(c) is superseded. See Labor Code § 65.

Except as noted in the Comment to Section 1129.1, former Section 1152.5(d) is continued without substantive change in Section 1129.1 (attorney's fees).

Former Section 1152.5(e) is continued without substantive change in Section 1122.1 (types of evidence not covered).

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 reports and communications). 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 a judge, arbitrator, or mediator), 1120-1129.1 (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 a judge, arbitrator, or mediator), 1120-1129.1 (mediation). For a limitation on Section 1775.10, see Evidence Code Section 1120.1.

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 of the Evidence Code shall~~ Section 703.5 and Chapter 2 (commencing with Section 1120) of Division 9 of the Evidence Code 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 a judge, arbitrator, or mediator), 1120-1129.1 (mediation). For a limitation on new subdivision (e), see Evidence Code Section 1120.1.

Former subdivision (e) is deleted as surplussage. See new subdivision (e) and Evidence Code Section 1123 (mediator reports and communications).

☞ **Staff Note.** 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. If anyone disagrees, please raise this point at or before the Commission's upcoming meeting.

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 1120-1129.1 (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 a judge, arbitrator, or mediator), 1120-1129.1 (mediation). For a limitation on subdivision (c), see Evidence Code Section 1120.1. Former subdivision (d) is deleted as surplussage. See subdivision (c) and Evidence Code Section 1123 (mediator reports and communications).

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 in evidence or disclosed unless the insured and all other parties to the agreement expressly agree 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 1120-1129.1 (mediation).

Labor Code § 65 (amended). Powers and duties of department; access to records

SEC. 12. Section 65 of the Labor Code is amended to read:

65. The department may investigate and mediate labor disputes providing any bona fide party to such dispute requests intervention by the department and the department may proffer its services to both parties when work stoppage is threatened and neither party requests intervention. In the interest of preventing labor disputes the department shall endeavor to promote sound union-employer relationships. The department may arbitrate or arrange for the selection of boards of arbitration on such terms as all of the bona fide parties to such dispute may agree upon. ~~Records of the department relating to labor disputes are confidential; provided, however, that any decision or award arising out of arbitration proceedings shall be a public record.~~ Any decision or award arising out of an arbitration conducted pursuant to this section is a public record. Section 703.5 and Chapter 2 (commencing with Section 1120) of Division 9 of the Evidence Code apply to a mediation conducted by the California State Mediation and Conciliation Service, and any person conducting the mediation.

Comment. Section 65 is amended to reflect the addition of new Evidence Code statutes governing mediation confidentiality and make clear that those statutes apply to mediations conducted by the State Mediation and Conciliation Service. See Evidence Code Sections 703.5 (testimony by a judge, arbitrator, or mediator), 1120-1129.1 (mediation). For a limitation on Section 65, see Evidence Code Section 1120.1.

☞ **Staff Note.** DIR strongly objects to Section 1127 (Option A). Its position on this conforming revision depends on how the Commission decides to draft Section 1127. See the Staff Note to Section 1127, *supra.*

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

SEC. 13. 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 1120-1129.1 (mediation).
