Study K-401 January 21, 1997

First Supplement to Memorandum 97-3

Mediation Confidentiality: Input on Revised Staff Draft Recommendation

Attached are the following new letters commenting on the Commission's proposal:

The first five letters criticize Section 1127 (Option A) of the revised staff draft recommendation, which allows disclosure of a mediation communication if "[a]ll persons *other than the mediator* who conduct or otherwise participate in the mediation expressly agree" to the disclosure. (Emphasis added.) Because of the concerns raised in these letters and previous communications (see Mem. 97-3, Exhibit pp. 1-20), the staff strongly recommends replacing Section 1127 (Option A) with a statute along the lines of Section 1127 (Option B), as discussed at pages 18-20 of the revised staff draft recommendation. As a general rule, disclosure of a mediation communication should be allowed only if all mediation participants, including the mediator, agree to the disclosure.

Jeffrey Krivis, sponsor of the 1996 bill amending Evidence Code Section 1152.5 to protect intake communications, comments on the definition of "mediation consultation" in Section 1120 of the revised staff draft recommendation. He suggests the following revision:

> 1120. (c) "Mediation consultation" means a communication between a person and a mediator for the purpose of ~~initiating a~~ considering mediation or retaining the mediator.
>
> [See Exhibit p. 9.]

Mr. Krivis explains:

> When I was drafting the new language for § 1152.5, the word "initiate" was contemplated but ultimately removed based on discussions with many people who recognize that there should be protections for conversations in which a party is simply considering mediation but decides against it after conversations with the mediator. For example, someone might call a mediator about a case and the mediator might recommend that they finish taking depositions before we "initiate" the process of mediation. This could take several months or longer. Another example would be when someone contacts a mediator but after learning more about the dispute, the mediator tells the party that in his opinion, it wouldn't be productive to mediate the particular case. These conversations need the kind of broad protection we were able to prescribe in the new language to § 1152.5.
>
> [*Id.*]

The staff appreciates these insightful comments, and urges the Commission to revise Section 1120(c) as Mr. Krivis suggests.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

Conflict Resolution Resources

THE COMMUNITY BOARD PROGRAM

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

14 January 1997

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

Re: Mediation Confidentiality
Study K-401 Draft Final Recommendations

Dear Ms. Gaal and Members of the Commission:

I am writing to you on behalf of The Community Board Program (CBP) in San Francisco. CBP is a non-profit organization, and is a member of the California Association of Community Mediation Programs (CACMP). We have over 230 trained neighborhood mediators in San Francisco who serve as "neighbors helping neighbors resolve conflicts that keep us apart." We receive case referrals from small claims, juvenile and the Superior Court, as well as from public departments, police officers and the disputants themselves.

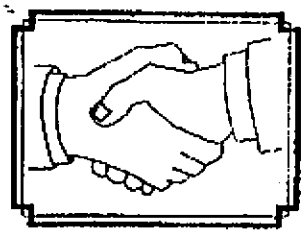
CBP is strongly opposed to the proposed new replacement § 1127(a), which terminates the mediator's ability to maintain the confidentiality of the mediation proceedings. Confidentiality is necessary to facilitate an open, honest and productive mediation. Indeed, the CLRC previously has advocated confidentiality, and we encourage the CLRC to continue drafting and revising laws which affect mediation consistent with that tenet.

We have found that, without the assurance of confidentiality, mediation becomes significantly less effective. We urge you to strike this tentative decision and not to reduce current confidentiality protections.

Thank you for your consideration.

Sincerely,

Terry Amsler
Executive Director
The Community Board Program



Placer Dispute Resolution Service

January 14, 1997

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

Dear Ms. Gaal,

Placer Dispute Resolution Service, a community mediation service in Placer County submits the following comment on legislation impacting sections 1152.5 and 1152.6 of the California Evidence Code. We urge you to keep in tact the explicit confidentiality of mediation by not allowing the disputants to remove the protection of confidentiality after the fact.

Specifically, newly proposed section 1127 would read:

1127. Notwithstanding section 1122, a communication, document or any writing as defined in Section 250, that is made or prepared for the purpose of, or in the course of, or pursuant to a mediation, may be admitted or disclosed if any of the following conditions exist:
(a) all persons OTHER THAN THE MEDIATOR who participate in the mediation expressly consent to disclosure of the communication, document or writing.

The ability to remove the protection of confidentiality after the fact, seems tantamount to removing the protection completely. Our concern is that parties could be pressured into alleged consent by the other party or their attorney saying "If you had nothing to hide" certainly you would consent to removing the protection of confidentiality. Therefore, the logic might progress, since you refuse to make what was said or written in the mediation public, you must be guilty of misrepresentation or manipulation during the mediation. In order to defend their veracity, a party may then feel compelled to agree to disclosure. The situation then becomes a lose/lose proposition for that party.

In addition, with this change the potential exists for mediators to see an increase in subpoenas for their files and notes, and that parties will use mediator oral statements, letters and proposals against each other in court.

The protection of confidentiality in mediation allows the parties to deal with each other in an informal environment which often strongly contributes to honesty and the sharing of true interests and concerns which ultimately leads to resolution. Removing the protection of confidentiality, even after the fact, creates a different tone for the proceeding and subjects the mediators to the threat of having their work subpoenaed.

We urge you to remove the recent proposed change adding OTHER THAN THE MEDIATOR to your recommendations on this legislation. Thank your for your consideration.

Sincerely,

Jack Arns
President
Placer Dispute Resolution Service
P.O. Box 4944
Auburn, Ca 95604
(916) 645-9260

LAW OFFICES OF BRIAN P. CONNELLY
161 PALM AVENUE, SUITE 2
AUBURN, CA 95603
916-889-0368
FAX: 916-823-1498

January 16, 1997

Barbara S. Gael
California Law Review Commission
4000 Middlefield Road Room D-1
Palo Alto, CA 94303-4739

Dear Ms. Gaal:

I am currently a volunteer Board member with a community mediation service, Placer Dispute Resolution Services(PDRS), located in Auburn, California. The purpose of this letter is to underscore the importance of retaining the confidential aspect of Mediation and the critical need to preserve this fundamental aspect of confidentiality within the Mediation Process. I strongly concur with the thoughts of Placer Dispute Resolution Service's President Jack Arns, as expressed in his letter to you dated January 15, 1997(copy enclosed).

To protect the Mediation Process, including all of the participants, any proposed legislation, including the Evidence Code, must be drafted to protect and preserve absolute confidentiality in the entire Mediation forum. Thank you for your anticipated attention and efforts in this matter and contact me if you have any questions.

Sincerely,

Brian P. Connelly
Attorney At Law
BPC/sl

cc: Jack Arns, PDRS

Solution
Strategies

Facilitation, Mediation and Training in Conflict Resolution

January 19, 1997

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

Dear Ms. Gaal

As both a commercial and community mediator, I urge you to keep in tact the explicit confidentiality of mediation by not allowing the disputants to remove the protection of confidentiality after the fact.

The protection of confidentiality in mediation allows the parties to deal with each other in an informal environment which often contributes to open discussion and the sharing of true interests and concerns allowing for mutually agreeable resolution. Removing the protection of confidentiality after the fact, creates a different tone for the proceeding and could subject a disputant to coercion from the other party to reveal details shared under the guise of confidentiality.

There are many other forms of dispute resolution which create a non-confidential forum and can be used if mediation fails. In addition, with this change the potential exists for mediators to see an increase in subpoenas for their files and notes, and that parties will use mediator oral statements, letters, and documents against each other in court. Attorneys are protected by client-attorney privilege by the weight and sometimes fiduciary nature of their responsibilities to their clients. As neutrals, mediators have a responsibility to see that the mediation process serves all the parties to a dispute and we therefore strive to maintain the integrity of the process. Confidentiality is integral to the integrity of mediation. Indeed, this type of change could even discourage mediators from practice thereby making scarce the availability of mediation as an alternative form of dispute resolution.

I urge you to remove the recent proposed change from Section 1127 (b) of the Evidence Code adding OTHER THAN THE MEDIATOR to your recommendations on this legislation. Thank your for your consideration.

Sincerely,

Cynthia Spears

5

2742 Penny Lane, Lincoln CA 95648 (916) 645-1734

HUMBOLDT STATE UNIVERSITY
Institute for Study of Alternative Dispute Resolution

Post-it™ Fax Note 7671	Date 1/16/97	# of pages ▶ 3
To Ms. Barbara Gaal	From Chris Viau	
Co./Dept. CLRC	Co. ISADR	
Phone # 415 494 1335	Phone # 707 826 4750	
Fax # 415 494 1827	Fax # 707 826 5450	

January 9, 1997

Ms. Barbara Gaal
Staff Counsel
California Law Revision Commission
4001 Middlefield Rd. Room D-1
Palo Alto, CA 94303-4739

Law Revision Commission
RECEIVED
JAN 16 1997
File: K-401

Re: Mediation Confidentiality
Staff draft recommendation - section 1127

Dear Ms. Gaal:

As an instructor at the Institute for Study of Alternative Dispute Resolution (ISADR) here at Humboldt State University, the matter of mediation confidentiality is extremely important to me. I am curious as to whether or not the wording "All persons" in subsection (a) means that experts who participate in a mediation must consent to disclosure? The wording "or otherwise participate" seems to indicate that this is the intent of this subsection proposal. At this point in time, most professionals in the field are of the understanding that a mediator "conducts" the mediation and all other individuals (including the disputants) "participate" in the mediation process. If the mediator's consent is not required, then what exactly is the intent of the wording "who conduct or otherwise participate"?

It is unclear to me what the express purpose is of creating exceptions to the strict privilege currently accorded to mediation proceedings. Are there any cases or rulings currently extant showing that confidentiality impairs the conduct of the mediation process? Alternately phrased, how would adoption of 1127 (a) improve the mediation process?

I am of the opinion that section 1127 (a) should be deleted. When I conduct mediations, I have disputants sign an agreement to mediate, which expressly guarantees confidentiality. This is standard practice within the

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

field of mediation, and this practice would be essentially voided by adoption of this section. I am also curious if the wording "or in the court of" should read "or in the course of" in the third line of the first paragraph?

If section 1127 (a) were to be adopted, both private parties and the courts would be immediately plagued by many troubling questions. Would participants be able to demand the working notes taken by the mediator? Would mediators be required to keep their working materials, and if so, for how long? If this section were adopted, would it mean that mediators could be subpoenaed to testify regarding confidential communications originating in private caucuses? Would disputants hesitate to participate in a mediation if they felt that the potential for litigating their case would be damaged by waiving confidentiality? Would outside experts be forthcoming with their candid assessments of family, business and environmental disputes in a mediation setting with a mediator who could not give an assurance of absolute confidentiality? If the current confidential nature of mediation is modified, these are only a few of the troubling questions that will arise, and eventually have to be settled through litigation.

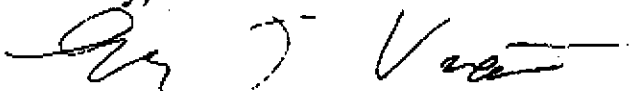
One of the functions of mediation and other forms of ADR is to alleviate court congestion. However, 1127 (a) seems to substitute confusion for clarity, thereby diminishing the Legislative, Judicial, and professional intent of the mediation process. Potentially, the ambiguity inherent in 1127 (a) could create a field day for litigation pertaining to ADR cases, dealing a double blow to both mediators and the Judiciary. Even if parties to a dispute agreed that their mediation would not be subject to section 1127 (a), such a waiver could be contested through litigation.

A definitive characteristic of mediation is that of absolute confidentiality, and the secure environment that this creates encourages disputants to speak candidly, resolving their issues without resorting to litigation. If this absolute privilege is amended through the adoption of 1127 (a) to conditional confidentiality, this may very well be a critical blow to the efficacy of the mediation process

Frequently, mediators are employed in a process of fact-finding between disputants, and this may be seen as a type of non-adversarial discovery. This procedure, which is in many cases, of great benefit to both parties, would be virtually eliminated if 1127 (a) were to be adopted. It is unclear whether or not the purpose of this section is to either improve mediation, or transform it into a new tool to be used in preparation for litigation, expanding the scope of discovery.

Thank you for your time and consideration of my apprehensions regarding this matter. Once again , I recommend wholeheartedly that section 1127 (a) should be deleted. Normally, in the course of its duties, the CLRC displays exceptionally good judgement, and I am sure that in this situation, the CLRC will carefully consider the sentiments expressed by the dispute resolution community and proceed accordingly. Ms Gaal, I would be more than happy to discuss these issues with you and the Commission if that would be of any help in reaching an informed decision.

Sincerely,



Christopher J. Viau
Certificate Course II Instructor

JEFFREY KRIVIS

ATTORNEY AT LAW

MEDIATION ◻ ARBITRATION

16501 Ventura Blvd.
Suite 610
Encino, California 91436

Telephone (818) 784-4544
Facsimile (818) 784-1836
Email: jkrivis@igc.apc.org

January 19, 1997

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

RE: Law Revision Commission Study On Mediation Confidentiality

Dear Barbara:

In response to your inquiry about the term "mediation consultant" as that has been defined in §1120 of the proposed legislation, I would urge the commission to remove the term "initiate" and replace it with the term "considering." That allows for a broader protection with respect to conversations between people who are thinking about bringing a case to mediation but are not sure if it would make sense to do so.

When I was drafting the new language for §1152.5, the word "initiate" was contemplated but ultimately removed based on discussions with many people who recognize that there should be protections for conversations in which a party is simply considering mediation but decides against it after conversations with the mediator. For example, someone might call a mediator about a case and the mediator might recommend that they finish taking depositions before we "initiate" the process of mediation. This could take several months or longer. Another example would be when someone contacts a mediator but after learning more about the dispute, the mediator tells the party that in his opinion, it wouldn't be productive to mediate the particular case. These conversations need the kind of broad protection we were able to prescribe in the new language to §1152.5.

Unfortunately I will not be able to attend the January 24, 1997 meeting, but appreciate being kept informed of further developments. I will continue to report to the board of the Southern California Mediation Association about the proposed legislation.

Sincerely,

Jeffrey Krivis