Study K-401 January 23, 1997

Second Supplement to Memorandum 97-3

Mediation Confidentiality: Additional Input on Revised Staff Draft Recommendation

Attached for the Commission's consideration are letters from: (1) Steve Toben, program officer for the Hewlett Foundation's conflict resolution program, which is "the nation's primary source of grants assistance to nonprofit dispute resolution providers" (Exhibit page 1), and (2) Kim Harmon, director of the San Francisco Dependency Mediation Program (Exhibit pages 2-5). Ron Kelly and John Gromala have also raised some new concerns by phone.

TOBEN'S COMMENTS ON SECTION 1127

Steve Toben reports that he discussed Section 1127 (disclosure by agreement) with Associate Dean Nancy Rogers of Ohio State Law School, "one of the nation's foremost authorities on legal regulation of mediation." (Exhibit p. 1.) She informed him that in some states the privilege for mediation communications runs to all participants in the mediation, but in other states the disputants may waive the privilege over objections of the mediator. (*Id.*) Ohio follows a hybrid approach:

> [T]he disputants may jointly waive the privilege, but the mediator may only be compelled to give evidence as to the statements of the disputants. The mediator may not be forced to disclose his or her own notes or to recount his or her own statements to the parties in caucuses of in plenary sessions.
> [*Id.*]

According to Mr. Toben, this approach "preserves the capacity of the mediator to function freely with assurance that the candor so crucial to the success of mediation is not chilled by the prospect of later disclosure." (*Id.*)

Ohio's hybrid approach may be more acceptable to the California mediation community than the Commission's current proposal, under which a mediation communication may be disclosed if all mediation participants "other than the mediator" expressly agree to the disclosure. (Revised Staff Draft Recommendation, Section 1127 (Option A)). As Ron Kelly has pointed out,

however, in proposing Section 1127 (Option A) the Commission is not "revers[ing] the current prohibition on mediator testimony embodied in Evidence Code section 703.5." (Mem. 97-3, Exhibit p. 15.) The hybrid approach differs from Section 1127 (Option A) in protecting the mediator's notes, but it would not protect the mediator from having to disclose other documents, nor prevent other mediation participants from disclosing what occurred at a mediation. The staff is dubious that the approach would fully allay the concerns expressed in the numerous letters objecting to Section 1127 (Option A). (See Memorandum 97-3, Exhibit pp. 1-20; First Supplement to Memorandum 97-3, Exhibit pp. 1-8.) It may be more productive to focus on Section 1127 (Option B), under which a mediation communication may be disclosed only if the mediator and all other mediation participants expressly agree to the disclosure.

GROMALA'S COMMENTS ON SECTION 1127

Section 1127 (Option B) states in part:

> 1127. (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.

By phone, John Gromala questioned whether this provision could be broadened to include not only a court trial, but also an arbitration, administrative adjudication, or other noncriminal proceeding.

That seems like a good idea, but Code of Civil Procedure Section 657 pertains only to a court trial. Comparable provisions may not exist for all noncriminal proceedings. Perhaps the following revision would work:

> 1127. (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. <u>Any reference to that refusal during any other subsequent noncriminal proceeding is grounds for vacating or modifying the decision in that proceeding, in whole or in part, and granting a new or further hearing on all or part of the issues, if the reference materially affected the substantial rights of the party requesting that relief.</u>

COMMENTS OF SAN FRANCISCO DEPENDENCY MEDIATION PROGRAM

Kim Harmon, Director of San Francisco Superior Court's Dependency Mediation Program, comments on two aspects of the Commission's proposal: (1) the provision making the mediation confidentiality statutes inapplicable to settlement conferences, and (2) the definition of intake communications. (Exhibit pp. 2-5.) Her comments relate to an earlier version of the Commission's proposal; her initial assessment of the revised staff draft recommendation was that it addressed her main concerns. (*Id.* at p. 2.)

Settlement conferences and similar proceedings

Ms. Harmon points out that "there is a tremendous need for" mediation programs in the juvenile dependency context. (Exhibit p. 3.) "[D]ue to the financial situation of the vast majority of families involved in the juvenile dependency system, family members do not have the option to hire a private mediator." (*Id.* at p. 2.) "Therefore, without the resources of the court, mediation would not be available at all." (*Id.*)

She also explains that San Francisco Dependency Mediation Program and all other juvenile dependency mediation programs in California are "clearly 'court annexed' programs." (Exhibit p. 3.) "Dependency mediators are hired by the court (or, at least, are supervised by the court), the parties in our program (though not in all dependency mediation programs) are ordered to attend mediation, and the mediators are involved in handling mediations attended by the same attorneys, and sometimes the same parties, with regard to other disputes." (*Id.*)

She considers it essential that the mediation confidentiality statutes apply to the San Francisco program and others like it:

> [T]he need for confidentiality in the mediation process, particularly in the context of an adversarial system where a family member's every act (or failure to act) can be at issue, is self evident. Dependency mediation programs must be afforded the confidentiality protections contemplated by the Evidence Code amendments. Without the protection of confidentiality in the dependency mediation process, there can be no meaningful discussion of the issues that must be aired in order to move the case (and the family) forward.
>
> [*Id.*]

She recognizes "the potential risk of undue influence by the mediator," but asserts that "the need for confidentiality far outweighs" that risk. (*Id.*) She explains that the mediator's "ability to pressure settlement in our program, as well as the other statewide dependency mediation programs, is checked in a number of significant ways." (*Id.*) "The shared safeguards of all of these programs include the following: (1) the mediator does not report to the court in any manner as to the reason for the failure to settle; (2) the mediator does not make recommendations, of any type, to the court; and (3) the mediator does not practice in front of the court in any professional or non-professional capacity in the case he or she is mediating, except as a mediator." (*Id.*)

In light of these considerations, Ms. Harmon was "quite concerned with the broad brush used to define 'settlement conference'" at pages 12-13 of the staff draft recommendation attached to Memorandum 96-86. She is more comfortable with Section 1120.2 of the revised staff draft recommendation. (*Id.* at 2.) Nonetheless, because of her concerns and concerns raised by Ron Kelly (see below), the staff suggests revising Section 1120.2(a) to read:

> 1120.2(a). This chapter does not apply to a settlement conference conducted by a judge with authority to compel a result or render a decision on any issue in the dispute.

The staff will further explain this proposed revision at the Commission's meeting.

Intake communications

Ms. Harmon also expresses concern about protecting pre-mediation case development. (*Id.* at 5.) Section 1120(c) of the revised staff draft recommendation would seem to satisfy that concern, but not if it is revised as suggested by Jeffrey Krivis at page 1 of the First Supplement to Memorandum 97-3. To meet both her concern and the concerns expressed by Mr. Krivis (see First Supp. to Mem. 97-3, pp. 1-2), the staff suggests defining "mediation consultation" as follows:

> 1120(c) "Mediation consultation" means a communication between a person and a mediator for the purpose of initiating or considering mediation or retaining the mediator.

COMMENTS OF RON KELLY

By phone, Ron Kelly has expressed serious concern about the revised staff draft recommendation. He is concerned that the definition of mediator in Section

1120(b) and the limitations of Sections 1120.1(c) and 1120.2 will result in undesirable narrowing of protections for mediation confidentiality and the prohibition on mediator reporting (Section 1123 in the revised staff draft recommendation). In other words, because of the limitations on application of the chapter on mediation, some proceedings that should be subject to the ban on reporting back to the court will not be so protected and will not be confidential, despite disputants' expectations to the contrary. The staff has had similar thoughts but has not yet thought of a satisfactory alternative approach. Mr. Kelly has some specific suggestions, which he intends to present in written form at the Commission's meeting.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

Date: Tue, 21 Jan 1997 16:20:00 -0800 (PST)
From: Steve Toben <S.TOBEN@hewlett.org>
Subject: Proposed Evidence Code sec. 1127
To: Barbara Gaal <bgaal@clrc.ca.gov>
Cc: Ron Kelly <ronkelly@igc.org>
MIME-version: 1.0

Dear Ms. Gaal:

I write with reference to proposed Evidence Code sec. 1127, which as presently drafted would allow parties to a mediation to waive the privilege of confidentiality over the objections of a mediator.

I direct the program on conflict resolution at the Hewlett Foundation, which is the nation's primary source of grants assistance to nonprofit dispute resolution providers. Before coming to the Foundation in 1991, I practiced law for nine years in the private and public sectors. I received my first mediation training in 1985 and have mediated professionally and as a volunteer in a variety of contexts.

In assessing proposed section 1127, I consulted with Associate Dean Nancy Rogers of the Ohio State Law School. Prof. Rogers is considered to be one of the nation's foremost authorities on the legal regulation of mediation. She has authored the leading treatise analyzing the statutes, rules, ethical provisions, and case law regarding mediation, and she has served as an advisor to the Ohio Supreme Court on law and mediation.

Prof. Rogers reports that states have treated the problem of mediation confidentiality in many different ways. In some states the privilege runs to all participants in the mediation; in other states, the disputants may waive the privilege over the objections of the mediator. Ohio offers a distinctive, hybrid approach that addresses the interests of both disputants and mediators. Summarizing, the disputants may jointly waive the privilege, but the mediator may only be compelled to give evidence as to the statements of the disputants. The mediator may not be forced to disclose his or her own notes or to recount his or her own statements to the parties in caucuses or in plenary sessions. This approach preserves the capacity of the mediator to function freely with assurance that the candor so crucial to the success of mediation is not chilled by the prospect of later disclosure.

In summary, Prof. Rogers does not believe that a mediator should be able to block the mutual waiver of parties to disclose aspects of the mediation other than the notes and statements of the mediator. She holds out one exception: in the labor-management arena, a strong public policy would favor barring the production of evidence by the mediator, evidence whose purpose would be to support one side or another. Because labor-management mediations generally involve a few "repeat players", this scenario would over time likely taint the standing of neutral third parties.

For additional information, you may contact Prof. Rogers at Ohio State University, College of Law, 55 West Twelgth Ave., Columbus, Oh, 43210-1391, (614) 292-2631.

Thank you for your consideration.

Sincerely,

Steve Toben
Program Officer

Dependency Mediation Program
San Francisco Superior Court

375 Woodside Avenue • San Francisco, CA 94127 • (415) 753-7697 • Fax: (415) 753-7888

FAX TRANSMITTAL

Law Revision Commission
RECEIVED

JAN 22 1997

File:_____

To: Barbara S. Gaal
From: Kim Harmon
Date: January 22, 1997
# of Pages (including cover): 4
Fax #: 494-1827

Re: Mediation Confidentiality

Dear Barbara,

I have enclosed a letter I composed prior to receiving the latest proposed revisions. After looking over the Commission's latest draft, particularly Section 1120.2, it appears that my main concerns have been addressed. However, I have not had the time to look carefully at all the information you sent me.

Perhaps my letter, in any event, will give you a better sense of our program's particular issues. I also wanted to let you know that Maxine Baker Johnson, who is a mediator in the dependency mediation program in Los Angeles is planning to attend the Commission's meeting this Friday and will be informing the Commission of the particular issues facing dependency mediation programs.

I very much appreciate your keeping me informed of the Commission's work and look forward o working with you in the future.

Dependency Mediation Program
San Francisco Superior Court

375 Woodside Avenue San Francisco, CA 94127 (415) 753-7697 Fax: (415) 753-7888

January 22, 1997

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

Dear Barbara,

After reviewing the Law Revision Commission's recommendations with regard to the confidentiality of mediation, I would like to explain the unique context in which juvenile dependency mediation is practiced and offer some specific suggestions for changing the proposed legislation.

Unlike other litigants, the parents and guardians involved in juvenile dependency matters are involved in the dependency system against their will and are in opposition to the power and resources of the State. They do not have the ability to "settle" a case and exit the system in the same manner as civil litigants. Settlement, in the dependency context, generally relates to the settlement of the issues involved at a specific statutory review date, rather than a settlement that will end the family's involvement in the dependency system all together. In fact, juvenile dependency cases can, and often do, continue until the minor reaches the age of majority. It should also be noted that due to the financial situation of the vast majority of families involved in the juvenile dependency system, family members do not have the option to hire a private mediator. Therefore, without the resources of the court, mediation would not be available at all.

The issue raised by the Commission with regard to the pressure that can be exerted by "neutrals" on parties to a mediation is well taken, but I am quite concerned with the broad brush used to define "settlement conference". On pages 12 and 13 the Commission suggests the following with regard to determining whether or not a meeting is a settlement conference (and therefore not to be afforded the protection of confidentiality):

> (A) under section 1120© the focus will be on whether a proceeding is "before the court" *even though* the person conducting it lacks decision making power.
>
> (B) "In assessing whether a proceeding is a court settlement conference, among the relevant factors are whether the person conducting the proceeding is *permanently associated with the court adjudicating the dispute*, and whether that person's ties to the decision maker create an impression of power to influence the decision."

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Our program fits the currently suggested profile of "settlement conference", as do all of the juvenile dependency mediation programs throughout the State. We are clearly "court annexed" programs. Dependency mediators are hired by the court (or, at least, are supervised by the court), the parties in our program (though not in all dependency mediation programs) are ordered to attend mediation, and the mediators are involved in handling mediations attended by the same attorneys, and sometimes the same parties, with regard to other disputes.

However, as discussed above, there is a tremendous need for court annexed mediations in the juvenile dependency context. Likewise, the need for confidentiality in the mediation process, particularly in the context of an adversarial system where a family member's every act (or failure to act) can be at issue, is self evident. Dependency mediation programs must be afforded the confidentiality protections contemplated by the Evidence Code amendments. Without the protection of confidentiality in the dependency mediation process, there can be no meaningful discussion of the issues that must be aired in order to move the case (and the family) forward.

In fact, the need for confidentiality far outweighs the potential risk of undue influence by the mediator. The mediator's ability to pressure settlement in our program, as well as the other statewide dependency mediation programs, is checked in a number of significant ways. The shared safeguards of all of these programs include the following: (1) the mediator does not report to the court in any manner as to the reason for the failure to settle; (2) the mediator does not make recommendations, of any type, to the court; and (3) the mediator does not practice in front of the court in any professional or non-professional capacity in the case he or she is mediating, except as a mediator. Each county's dependency mediation program operates according to the situation presented by its specific needs and, therefore, may have additional safeguards. However, the shared safeguards enumerated above should be incorporated into the proposed legislation.

Therefore, the following suggestions are made to address both our concerns that court-annexed mediation programs have the protection of confidentiality, as well as to meet the larger concerns of potential mediator abuse or pressure on parties involved in court annexed mediations:

Sec. 1120.1 (a)(1) (1120(c)of SDR)

The following should be added to the Comments of this Section.
The term mediation includes those meetings conducted by neutrals, whether or not those neutrals are permanently associated with the court adjudicating the dispute, so long as the neutrals have no authority to resolve disputes, have no other function before the adjudicating court with regard to the case being mediated other than that of a non decision making neutral, and make no reports or recommendations to the court with regard to either the specific merits of the cases brought to mediation or any report as to the reasons for the lack of resolution.

I also think it important to specifically include the task of case development as part of the mediation process for purposes of protecting confidentiality and propose the following additions:

Sec. 1120©
"Mediation consultation" means a consultation by a person with a mediator or mediation service for the purpose of retaining the mediator or mediation service, *as well as any discussions which are in furtherance of the mediator's or mediation service's understanding of the issues and/or dynamics involved in the dispute being brought to mediation.*

Sec. 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, a mediation consultation *or pre-mediation case development conducted by the mediator* is not admissible in evidence . . . . "

I'm sorry that I was unaware of your work until only recently and could not sooner address these issues. It is critical to the juvenile dependency mediation programs that these concerns are addressed in the final draft of the Law Revision Commission's recommended legislation and we hope that you will be able to incorporate these changes into the work you've already done. Thank you for all of your work on this important legislation. Please call me with any questions.

Yours truly,

KIM HARMON

Director,
San Francisco Dependency
Mediation Program