

## Second Supplement to Memorandum 97-5

### Mediation Confidentiality: Recent Developments

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Assemblywoman Debra Ortiz, a member of the Assembly Judiciary Committee, has agreed to author the Commission's bill on mediation confidentiality. Two issues warrant attention:

#### SCOPE OF COVERAGE

In the bill as submitted to Legislative Counsel, proposed Evidence Code Sections 1116 and 1117 read as follows:

**§ 1116. Scope of chapter**

1116. (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.

**§ 1117. Court-ordered and court-supervised proceedings**

1117. (a) This chapter does not apply to a settlement conference pursuant to Rule 222 of the California Rules of Court.

(b) This chapter applies to a mediation that is ordered by a court or other adjudicative body, unless the proceeding is excepted by subdivision (a) of Section 1116.

The California Dispute Resolution Council ("CDRC") has pointed out that Section 1117, as currently worded, may generate confusion about whether the chapter on mediation confidentiality applies to a voluntary mediation.

To eliminate the problem and simplify the bill, the staff suggests replacing Sections 1116 and 1117 with a provision along the following lines:

**§ 1116. Scope of chapter**

1116. (a) This chapter applies to a mediation, regardless of whether participation in the mediation is voluntary, pursuant to an agreement, pursuant to order of a court or other adjudicative body, or otherwise.

(b) Notwithstanding any other provision of this chapter, this chapter does not apply to either of the following:

(1) A proceeding under Part 1 (commencing with Section 1800) of Division 5 of the Family Code or Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

(2) A settlement conference pursuant to Rule 222 of the California Rules of Court.

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

If the Commission approves, the staff will have the mediation confidentiality bill so amended.

#### LABOR CODE SECTION 65

As originally submitted to Legislative Counsel, the proposed conforming revision of Labor Code Section 65 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 1115) 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.

Based on this conforming revision, Legislative Counsel designated the bill to go to the Fiscal Committee. Legislative Counsel apparently reasoned that the amendment, particularly the deletion of “[r]ecords of the department relating to labor disputes are confidential,” might make some previously confidential materials public, and therefore change an existing duty of the department.

On learning of this concern, the Department of Industrial Relations (“DIR”) requested a change in the conforming revision. (Exhibit p. 1.) The new language

is intended to make clear that the amendment only affects the confidentiality of mediations conducted by the California State Mediation and Conciliation Service, and does not change the confidentiality of any other materials. To eliminate the Fiscal Committee designation, staff submitted a new bill request to Legislative Counsel, which incorporated DIR's proposed language (with nonsubstantive modifications):

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. Section 703.5 and Chapter 2 (commencing with Section 1115) 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. All other records 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.

Legislative Counsel has prepared the bill with this revision, removing the Fiscal Committee designation. Staff urges the Commission to approve this change.

Respectfully submitted,

Barbara S. Gaal  
Staff Counsel

STATE OF CALIFORNIA

PETE WILSON, GOVERNOR

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December 10, 1996

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Law Revision Commission  
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mediation conf.  
File: bill file

Sent by FAX to (415) 494-1827

Dear Ms. Gaal,

Re: Proposed Legislation- Mediation Confidentiality

After conversations last week with you and with Jack Zorman of the Legislative Counsel office, and later conversations among management of our department, the Department suggests the following language to be included as an amendment to Labor Code section 65. This proposed amendment to the Labor Code section makes no change in existing law, other than providing the additional protection of the proposed Evidence Code provisions to the mediation efforts of the Department. This change, if enacted, will have no fiscal impact on the Department.

Eliminate the last sentence of Labor Code section 65. In its place add:

The provisions of Evidence Code Division 9, Chapter 2, beginning with section 1120, apply to all mediations conducted by the California State Mediation and Conciliation Service. All other records of the Department relating to labor disputes are confidential, provided, however, that any decision or award arising out of arbitration proceedings conducted pursuant to this section shall be a public record.

If you have any questions, please call me at 972-8970.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Martin Fassler".

Martin Fassler

Counsel for Director of Industrial Relations

cc: Jack Zorman, Office of Legislative Counsel