

TEXT OF COMMENTS TO SECTIONS AFFECTED BY  
1997 COMMISSION RECOMMENDATIONS

**CLRC Staff Note.** This document sets out the text of all Official Comments to Commission sponsored legislation in the 1997 legislative session. The source for each Comment is given in the accompanying Table of "Sections Affected by 1997 Commission Legislation."

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

**Comment.** Section 467.5 is amended to reflect the relocation of former Evidence Code Section 1152.5 and the addition of new Evidence Code provisions governing mediation confidentiality. See Evid. Code §§ 1115-1128 (mediation).

**Code Civ. Proc. § 483.010 (amended). Cases in which attachment authorized**

**Comment.** The last clause of subdivision (b) of Section 483.010 is omitted as obsolete. This exception was applicable to personal property formerly covered by the general rule against attachment on a claim secured by personal property.

Subdivision (e) is deleted to remove the sunset provision that was enacted in 1990 and extended in 1995. See 1990 Cal. Stat. ch. 943, § 1; 1995 Cal. Stat. ch. 591, § 1.

**Background Comment (1974-90 revised).** Section 483.010 is based on subdivision (a) of former Section 537.1. Subdivision (a) of former Section 537.1 was designed to limit attachment to cases arising out of commercial transactions. (The title to the 1972 enactment provides that it is one "relating to attachment in commercial actions.") Section 483.010 continues this purpose. Subdivision (a) limits the claims on which an attachment may be issued to those based on a contract, express or implied, where the total amount claimed is \$500 or more, exclusive of costs, interest, and attorney's fees. Subdivision (c) further carries out this purpose by providing that, if the defendant is an individual, an attachment may be issued only if the contract claim "arises out of the conduct by the individual of a trade, business, or profession" and only if the goods, services, or money furnished were not used primarily for the defendant's personal, family, or household purposes. *Cf.* *Advance Transformer Co. v. Superior Court*, 44 Cal. App. 3d 127, 142, 118 Cal. Rptr. 350, 360 (1974) (construing former Sections 537.1 and 537.2 as "limiting the attachment to situations in which the claim arises out of defendant's conduct of his business"). Compare Civil Code Section 1802.1 (retail sales). However, Section 483.010 is intended to encompass each of the situations described in paragraphs (1) through (4) of subdivision (a) of former Section 537.1. In this respect, it should be noted that the term "contract" used in subdivision (a) includes a lease of either real or personal property. See *Stanford Hotel Co. v. M. Schwind Co.*, 180 Cal. 348, 181 P. 780 (1919) (realty); *Walker v. Phillips*, 205 Cal. App. 2d 26, 22 Cal. Rptr. 727 (1962) (personalty). In addition, unlike former Section 537.2, Section 483.010 permits attachment on such claims against corporations and partnerships and other unincorporated associations which are not organized for profit or engaged in an activity for profit. Under Section 483.010, the court is not faced with the potentially difficult and complex problem of determining whether a corporation, partnership, or association is engaged in a trade, business, or profession.

Claims may be aggregated, but the total amount claimed in the action must be not less than \$500. Generally an expeditious remedy will be available for lesser amounts under the small claims procedure. See Section 116.110 *et seq.* The claim must be for a "fixed or readily

ascertainable” amount. This provision continues former law. E.g., *Lewis v. Steifel*, 98 Cal. App. 2d 648, 220 P.2d 769 (1950).

The introductory clause of Section 483.010 recognizes the authority to attach granted by other miscellaneous statutory provisions. See, e.g., Civ. Code §§ 3065a, 3152; Fin. Code § 3144; Food & Agric. Code § 281; Harb. & Nav. Code § 495.1; Health & Safety Code § 11501; Lab. Code § 5600; Rev. & Tax. Code §§ 6713, 7864, 8972, 11472, 12680, 18833, 26251, 30302, 32352. See also Section 492.010 (nonresident attachment).

The attachment remedy is not available where the plaintiff’s claim is secured by real property unless, without act of the plaintiff, the security has become valueless or has decreased in value to less than the amount then owing on the claim. See subdivision (b). Moreover, the security cannot simply be waived. As to a claim secured by personal property, see Section 483.015(b)(4). Special rules also apply in unlawful detainer cases. See Section 483.020.

**Code Civ. Proc. § 483.010 (repealed). Cases in which attachment authorized**

**Comment.** Former Section 483.010 (as amended by 1995 Cal. Stat. ch. 591, § 2) is repealed in light of continuation of the alternative rule in Section 483.010, as amended to delete the sunset provision.

**Code Civ. Proc. § 483.015 (amended). Amount to be secured by attachment**

**Comment.** Subdivision (c) of Section 483.015 is deleted to remove the sunset provision that was enacted in 1990 and amended in 1995. See 1990 Cal. Stat. ch. 943, § 2; 1995 Cal. Stat. ch. 591, § 3. For a special limitation on the reduction factor in subdivision (b)(4), see Section 483.020(e) (unlawful detainer). Subdivision (b)(4) is amended for clarity. This is a technical, nonsubstantive change.

**Background Comment (1982-83 revised).** Section 483.015 governs the amount for which an attachment may issue. Subdivision (b) clarifies the nature of claims that will reduce the amount to be secured by attachment. This subdivision makes clear, for example, that the amount to be secured by the attachment is not reduced by a tort claim that has not been reduced to judgment. The defendant may seek to have the amount secured by the attachment reduced as provided in Sections 484.060 and 485.240. Under subdivision (b), if a claim may be offset only if it is “one upon which an attachment could be issued,” the claim must meet the requirements of Section 483.010 as to amount and nature of the claim.

**Code Civ. Proc. § 483.015 (repealed). Amount to be secured by attachment**

**Comment.** Former Section 483.015 (as amended by 1995 Cal. Stat. ch. 591, § 4) is repealed in light of continuation of the alternative rule in Section 483.015, as amended to delete the sunset provision.

**Code Civ. Proc. § 483.020 (technical amendment). Amount secured by attachment in unlawful detainer proceeding**

**Comment.** Section 483.020 is amended to conform this section to Sections 483.010 and 483.015, as amended in 1990. The “notwithstanding” clause formerly in subdivision (d) is unnecessary, since Section 483.010 has been amended to eliminate the categorical restriction on attachment where a claim is secured by personal property. See 1990 Cal. Stat. ch. 943, § 1. Former subdivision (e) is deleted as surplus, since the appropriate reduction in the amount of the attachment is covered by subdivision (d), which incorporates the reduction factors in Section 483.015. See 1990 Cal. Stat. ch. 943, § 2, which added paragraph (4) to Section 483.015(b).

As revised, this section is consistent with the rule that an attachment is available where a claim is partially secured by personal property (Section 483.010(b)), with the amount of the attachment reduced by the value of any security interest (Section 483.015(b)(4)) that is applicable exclusively to the rental obligation. If the security may be applied to any obligation other than rent,

subdivision (e) makes clear that the amount of the attachment is not reduced by the amount of the security.

**Background Comment (1978 revised).** Section 483.020 makes clear that, on the plaintiff's application, the "amount to be secured by the attachment" in an unlawful detainer proceeding may include, in the court's discretion, an amount for the use and occupation of the premises by the defendant during the period from the time the complaint is filed until either the time of judgment or such earlier time as possession has been or is likely to be delivered to the plaintiff. One factor the court should consider in deciding whether to allow the additional amount is the likelihood that the unlawful detainer proceeding will be contested. There may be a considerable delay in bringing the unlawful detainer proceeding to trial if it is contested. In this case, there may be a greater need for attachment to include an additional amount to cover rent accruing after the complaint is filed. It should be noted that, in the case of a defendant who is a natural person, attachment is permitted only where the premises were leased for trade, business, or professional purposes. See Section 483.010.

The amount authorized under subdivision (c) is in addition to (1) the amount in which the attachment would otherwise issue (unpaid rent due and owing at the time of the filing of the complaint) and (2) the additional amount for costs and attorney's fees that the court may authorize under Section 482.110.

Subdivision (d) makes clear that the amount of a deposit (such as a deposit described in Civil Code Section 1950.7) held by the plaintiff solely to secure the payment of rent is to be subtracted in determining the amount to be secured by the attachment. However, the amount of the deposit is not subtracted in determining the amount to be secured by the attachment where, for example, the deposit is to secure both the payment of rent and the repair and cleaning of the premises on termination of the tenancy. Under former law, it was held that a deposit in connection with a lease of real property was not "security" such as to preclude an attachment under former Section 537(4), superseded by Section 483.010(b). See *Garfinkle v. Montgomery*, 113 Cal. App. 2d 149, 155-57, 248 P.2d 52, 56-57 (1952).

**Code Civ. Proc. § 484.050 (technical amendment). Contents of notice of application and hearing**

**Comment.** Subdivision (c) of Section 484.050 is amended for conformity with the substantive rules governing the amount of an attachment. The notice is required to set out the substance of the rules in Sections 482.110, 483.010, 483.015, and 483.020. See Section 482.030(b) (Judicial Council to prescribe form of notices).

**Code Civ. Proc. § 484.090 (amended). Issuance of order and writ on notice**

**Comment.** Paragraph (4) is added to subdivision (a) of Section 484.090 to make clear that the court is not to issue a right to attach order and writ of attachment if there is no amount to be secured by the attachment. This amendment establishes the principle that a right to attach order cannot be issued if there is no amount for which a writ of attachment can be issued and avoids the theoretical possibility of the court's making a right to attach order with no amount to be secured by the attachment. Prior to the 1990 amendments to Section 483.015, this was not likely to occur even in theory, but with the change in the rules concerning issuance of attachment where the plaintiff's claim is secured by personal property, the statutes read literally would permit issuance of a right to attach order under Section 484.090 even though the value of the security exceeded the amount of the claim. See Section 483.015(b)(4); see also Section 485.240 (application to set aside right to attach order).

**Code Civ. Proc. § 485.220 (technical amendment). Issuance of ex parte order and writ**

**Comment.** Paragraph (6) is added to subdivision (a) of Section 485.220 to make clear that the court is not to issue a right to attach order and writ of attachment if there is no amount to be

secured by the attachment. This amendment is consistent with Section 484.090. See Section 484.090 Comment.

**Code Civ. Proc. § 492.030 (technical amendment). Issuance of foreign attachment order**

**Comment.** Paragraph (6) is added to subdivision (a) of Section 492.030 to make clear that the court is not to issue a right to attach order and writ of attachment if there is no amount to be secured by the attachment. This amendment is consistent with Section 484.090. See Section 484.090 Comment.

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

**Comment.** Section 1775.10 is amended to reflect the relocation of former Evidence Code Section 1152.5 and the addition of new Evidence Code provisions governing mediation confidentiality. See Evid. Code §§ 703.5 (testimony by a judge, arbitrator, or mediator), 1115-1128 (mediation).

**Evid. Code § 1115 (added). Definitions**

**Comment.** Subdivision (a) of Section 1115 is drawn from Code of Civil Procedure Section 1775.1. To accommodate a wide range of mediation styles, the definition is broad, without specific limitations on format. For example, it would include a mediation conducted as a number of sessions, only some of which involve the mediator. 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. 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.” Any person who meets the definition of “mediator” must comply with Section 1121 (mediator reports and communications), which generally prohibits a mediator from reporting to a court or other tribunal concerning the mediated dispute.

Subdivision (c) is drawn from former Section 1152.5, which was amended in 1996 to explicitly protect mediation intake communications. See 1996 Cal. Stat. ch. 174, § 1. Subdivision (c) is not limited to communications to retain a mediator. It also encompasses contacts concerning whether to mediate, such as where a mediator contacts a disputant because another disputant desires to mediate, and contacts concerning initiation or recommencement of mediation, such as where a case-developer meets with a disputant before mediation.

For the scope of this chapter, see Section 1117.

**Evid. Code § 1116 (added). Effect of chapter**

**Comment.** Subdivision (a) of Section 1116 establishes guiding principles for applying this chapter.

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

**Evid. Code § 1117 (added). Scope of chapter**

**Comment.** Under subdivision (a) of Section 1117, mediation confidentiality and the other safeguards of this chapter apply to a broad range of mediations. See Section 1115 Comment.

Subdivision (b) sets forth two exceptions. Section 1117(b)(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 or visitation issues. See Section 1040; Fam. Code §§ 1818, 3177.

Section 1117(b)(2) establishes that 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 and is subject to special rules.

**Evid. Code § 1118 (added). Recorded oral agreement**

**Comment.** Section 1118 establishes a procedure for orally memorializing an agreement, in the interest of efficiency. Provisions permitting use of that procedure for certain purposes include Sections 1121 (mediator reports and communications), 1122 (disclosure by agreement), 1123 (written settlement agreements reached through mediation), and 1124 (oral agreements reached through mediation). See also Section 1125 (when mediation ends). For guidance on authority to bind a litigant, see *Williams v. Saunders*, 55 Cal. App. 4th 1158, 64 Cal. Rptr. 2d 571 (1997) (“The litigants’ direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent.”)

**Evid. Code § 1119 (added). Mediation confidentiality**

**Comment.** Subdivision (a) of Section 1119 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 1119(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 (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 (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 Sections 1115(a) (“mediation” defined), 1115(c) (“mediation consultation” defined). See also Section 703.5 (testimony by a judge, arbitrator, or mediator).

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).

**Evid. Code § 1120 (added). Types of evidence not covered**

**Comment.** Subdivision (a) of Section 1120 continues former Section 1152.5(a)(6) without change. It limits the scope of Section 1119 (mediation confidentiality), preventing parties from using a mediation as a pretext to shield materials from disclosure.

Subdivision (b)(1) makes explicit that Section 1119 does not restrict admissibility of an agreement to mediate. Subdivision (b)(2) continues former Section 1152.5(e) without substantive

change, but also includes an express exception for extensions of litigation deadlines. Subdivision (b)(3) makes clear that Section 1119 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 Sections 1115(a) ("mediation" defined), 1115(b) ("mediator" defined), 1115(c) ("mediation consultation" defined).

**Evid. Code § 1121 (added). Mediator reports and communications**

**Comment.** Section 1121 continues the first sentence of former Section 1152.6 without substantive change, except to make clear that (1) the section applies to all submissions, not just filings, (2) the section is not limited to court proceedings but rather applies to all types of adjudications, including arbitrations and administrative adjudications, (3) the section applies to any report or statement of opinion, however denominated, and (4) neither a mediator nor anyone else may submit the prohibited information. The section does not prohibit a mediator from providing a mediation participant with feedback on the dispute in the course of the mediation.

Rather, the focus is on preventing coercion. As Section 1121 recognizes, a mediator should not be able to influence the result of a mediation or adjudication by reporting or threatening to report to the decisionmaker on the merits of the dispute or reasons why mediation failed to resolve it. Similarly, a mediator should not have authority to resolve or decide the mediated dispute, and should not have any function for the adjudicating tribunal with regard to the dispute, except as a non-decisionmaking neutral. See Section 1117 (scope of chapter), which excludes settlement conferences from this chapter.

The exception to Section 1121 (permitting submission and consideration of a mediator's report where "all parties to the mediation expressly agree" in writing) is modified to allow use of the oral procedure in Section 1118 (recorded oral agreement) and to permit making of the agreement at any time, not just before the mediation. A mediator's report to a court may disclose mediation communications only if all parties to the mediation agree to the reporting and all persons who participate in the mediation agree to the disclosure. See Section 1122 (disclosure by agreement).

The second sentence of former Section 1152.6 is continued without substantive change in Section 1117 (scope of chapter), except that Section 1117 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 Sections 1115(a) ("mediation" defined), 1115(b) ("mediator" defined). See also Sections 703.5 (testimony by a judge, arbitrator, or mediator), 1127 (attorney's fees), 1128 (irregularity in proceedings).

**Evid. Code § 1122 (added). Disclosure by agreement**

**Comment.** Section 1122 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)(1).

Mediation materials that satisfy the requirements of subdivisions (a)(1) or (a)(2) are not necessarily admissible or subject to disclosure. Although the provisions on mediation confidentiality do not bar admissibility or disclosure, there may be other bases for exclusion.

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.

For exceptions to Section 1122, see Sections 1123 (written settlement agreements reached through mediation) and 1124 (oral agreements reached through mediation) & Comments.

See Section 1115(a) (“mediation” defined), 1115(c) (“mediation consultation” defined). See also Sections 703.5 (testimony by a judge, arbitrator, or mediator), 1119 (mediation confidentiality), 1121 (mediator reports and communications).

#### **Evid. Code § 1123 (added). Written settlement agreements reached through mediation**

**Comment.** Section 1123 consolidates and clarifies provisions governing written settlements reached through mediation. For guidance on binding a disputant to a written settlement agreement, see *Williams v. Saunders*, 55 Cal. App. 4th 1158, 64 Cal. Rptr. 2d 571 (1997) (“The litigants’ direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent.”).

As to an executed written settlement agreement, 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 parties. 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 1122.

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

A written settlement agreement that satisfies the requirements of subdivision (a), (b), (c), or (d) is not necessarily admissible or subject to disclosure. Although the provisions on mediation confidentiality do not bar admissibility or disclosure, there may be other bases for exclusion.

See Section 1115(a) (“mediation” defined).

#### **Evid. Code § 1124 (added). Oral agreements reached through mediation**

**Comment.** Section 1124 sets forth specific circumstances under which mediation confidentiality is inapplicable to an oral agreement reached through mediation. Except in those circumstances, Sections 1119 (mediation confidentiality) and 1124 codify 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 reject 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).

Subdivision (a) of Section 1124 facilitates enforcement of an oral agreement that is recorded and memorialized in writing in accordance with Section 1118. For guidance in applying subdivision (a), see Section 1125 (when mediation ends) & Comment.

Subdivision (b) parallels Section 1123(c).

Subdivision (c) parallels Section 1123(d).

An oral agreement that satisfies the requirements of subdivision (a), (b), or (c) is not necessarily admissible or subject to disclosure. Although the provisions on mediation confidentiality do not bar admissibility or disclosure, there may be other bases for exclusion. For guidance on binding a

disputant to a settlement agreement, see *Williams v. Saunders*, 55 Cal. App. 4th 1158, 64 Cal. Rptr. 2d 571 (1997) (“The litigants’ direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent.”).

See Section 1115(a) (“mediation” defined).

**Evid. Code § 1125 (added). When mediation ends**

**Comment.** By specifying when a mediation ends, Section 1125 provides guidance on which communications are protected by Section 1119 (mediation confidentiality).

Under subdivision (a)(1), if mediation participants reach an oral compromise and reduce it to a written settlement fully resolving their dispute, confidentiality extends until the agreement is signed by all the parties. For guidance on binding a disputant to a settlement agreement, see *Williams v. Saunders*, 55 Cal. App. 4th 1158, 64 Cal. Rptr. 2d 571 (1997) (“The litigants’ direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent.”).

Subdivision (a)(2) applies where mediation participants fully resolve their dispute by an oral agreement that is recorded and memorialized in writing in accordance with Section 1118. 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. See Section 1124 (oral agreements reached through mediation). Subdivisions (a)(3) and (a)(4) are drawn from Rule 14 of the American Arbitration Association’s Commercial Mediation Rules (as amended, Jan. 1, 1992). Subdivision (a)(5) applies where an affirmative act terminating a mediation for purposes of this chapter does not occur.

Subdivision (b) applies where mediation partially resolves a dispute, such as when the disputants resolve only some of the issues (e.g., contract, but not tort, liability) or when only some of the disputants settle.

Subdivision (c) limits the effect of Section 1125.

See Sections 1115(a) (“mediation” defined), 1115(b) (“mediator” defined).

**Evid. Code § 1126 (added). Effect of end of mediation**

**Comment.** Section 1126 clarifies that mediation materials are confidential not only during a mediation, but also after the mediation ends pursuant to Section 1125 (when mediation ends).

See Section 1115(a) (“mediation” defined).

**Evid. Code § 1127 (added). Attorney’s fees**

**Comment.** Section 1127 continues former Section 1152.5(d) without substantive change, except to clarify that either a court or another adjudicative body (e.g., an arbitrator or an administrative tribunal) may award the fees and costs. Because Section 1115 (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.

See Section 1115(b) (“mediator” defined).

**Evid. Code § 1128 (added). Irregularity in proceedings**

**Comment.** Section 1128 is drawn from Code of Civil Procedure Section 1775.12. The first sentence makes it an irregularity to refer to a mediation in a subsequent civil trial; the second sentence extends that rule to other noncriminal proceedings, such as an administrative adjudication. An appropriate situation for invoking this section is where a party urges the trier of fact to draw an adverse inference from an adversary’s refusal to disclose mediation communications.

See Section 1115 (“mediation” defined).



**Evid. Code § 1150 — Heading of Chapter 2 (commencing with Section 1150) of Division 9 of the Evidence Code (amended)**

**Comment.** The chapter heading is renumbered to reflect the addition of a new Chapter 2 (commencing with Section 1115) (Mediation).

**Evid. Code § 1152.5 (repealed). Mediation confidentiality**

**Comment.** The introductory clause of Section 1152.5(a) is not continued. See Section 1119 (mediation confidentiality).

Except as noted in the Comment to Section 1119, former Section 1152.5(a)(1)-(3) are continued without substantive change in Section 1119 (mediation confidentiality). Former Section 1152.5(a)(4) is superseded by Section 1122 (disclosure by agreement). See also Sections 1123 (written settlement agreements reached through mediation), 1124 (oral agreements reached through mediation). Former Section 1152.5(a)(5) is continued without substantive change in Section 1123 (written settlement agreements reached through mediation). Former Section 1152.5(a)(6) is continued without substantive change in Section 1120 (types of evidence not covered).

Former Section 1152.5(b) is continued without substantive change in Section 1117 (scope of chapter).

The first sentence of former Section 1152.5(c) is continued without substantive change in Section 1116 (effect of chapter). The second sentence of former Section 1152.5(c) is superseded. See Lab. Code § 65.

Except as noted in the Comment to Section 1127, former Section 1152.5(d) is continued without substantive change in Section 1127 (attorney's fees).

Former Section 1152.5(e) is continued without substantive change in Section 1120 (types of evidence not covered).

**Evid. Code § 1152.6 (repealed). Mediator declarations or findings**

**Comment.** Former Section 1152.6 is continued and broadened in Section 1121 (mediator reports and communications). See Section 1121 Comment.

**Gov't Code 11410.60 (added). Application to quasi-public entities**

**Comment.** Section 11410.60 applies this chapter to adjudicative decisions of quasi-public entities for which an evidentiary hearing by the quasi-public entity is statutorily or constitutionally required. A typical decision of this type might involve resolution of a membership assessment protest or a hearing on a claim that has been denied (provided the statute or Constitution requires a hearing for a decision of that type). *Cf.* Section 11405.50 ("decision" is action of specific application that determines legal right or other legal interest of particular person). This chapter does not apply to legislative actions such as an election or negotiation and adoption of a health and welfare benefits plan, pension trust, or collective bargaining agreement by an industry or labor organization.

This section does not apply to an entity unless the entity was expressly created by statute for the purpose of administering a state function. Thus this chapter governs hearings required to be held by a statutory entity such as the Winegrowers of California Commission (Food & Agric. Code § 74061) or the Escrow Agents' Fidelity Corporation (Fin. Code § 17311). But the statute does not govern hearings of a private entity such as a licensed health care provider (Health & Safety Code § 1200 *et seq.*), a labor organization, or a board of trustees established pursuant to statute under an interindemnity, reciprocal, or interinsurance contract between members of a cooperative corporation (Ins. Code § 1280.7).

This section does not apply to the State Bar, including proceedings of the State Bar Court. See Bus. & Prof. Code § 6001.

The intent of this section is to provide fair hearing rules where a statute or the Constitution requires a hearing. This section is not intended to create any new hearing requirements. Thus, for example, this section does not apply to a decision of the Travel Consumer Restitution Corporation

where the statute requires that the claim be decided on the written record, “with no hearing to be held.” Bus. & Prof. Code § 17550.47.

Although subdivision (b) makes this chapter inapplicable to a quasi-public entity decision if the decision is otherwise reviewable in a proceeding governed by this chapter, the quasi-public entity may voluntarily adopt the procedural protections provided in this chapter. *Cf.* Section 11410.40 (election to apply administrative adjudication provisions).

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

**Comment.** Section 66032 is amended to reflect the relocation of former Evidence Code Section 1152.5 and the addition of new Evidence Code provisions governing mediation confidentiality. See Evid. Code §§ 703.5 (testimony by a judge, arbitrator, or mediator), 1115-1128 (mediation).

Former subdivision (e) is deleted as surplus. See new subdivision (e); Evid. Code § 1121 (mediator reports and communications).

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

**Comment.** Section 66033 is amended to reflect the relocation of former Evidence Code Section 1152.5 and the addition of new Evidence Code provisions governing mediation confidentiality. See Evid. Code §§ 1115-1128 (mediation).

**Gov’t Code § 68616 (operative until Jan. 1, 1999) (amended). Delay reduction deadlines and procedures**

**Comment.** Subdivision (a) of Section 68616 is amended to ensure that the delay reduction deadline for service of process is extended when a plaintiff is unable to achieve service within the prescribed period despite diligent efforts to do so.

**Gov’t Code § 68616 (operative Jan. 1, 1999) (amended). Delay reduction deadlines and procedures**

**Comment.** Subdivision (a) of Section 68616 is amended to ensure that the delay reduction deadline for service of process is extended when a plaintiff is unable to achieve service within the prescribed period despite diligent efforts to do so.

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

**Comment.** Section 10089.80 is amended to reflect the relocation of former Evidence Code Section 1152.5 and the addition of new Evidence Code provisions governing mediation confidentiality. See Evid. Code §§ 703.5 (testimony by a judge, arbitrator, or mediator), 1115-1128 (mediation). Former subdivision (d) is deleted as surplus. See subdivision (c); Evid. Code § 1121 (mediator reports and communications).

**Ins. Code § 10089.82 (amended). Noncompulsory participation in mediation**

**Comment.** Subdivision (c) of Section 10089.82 is amended to reflect the addition of new Evidence Code provisions governing mediation confidentiality. See Evid. Code §§ 1115-1128 (mediation).

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

**Comment.** Section 65 is amended to reflect the addition of new Evidence Code provisions governing mediation confidentiality and make clear that those provisions apply to mediations conducted by the State Mediation and Conciliation Service. See Evid. Code §§ 703.5 (testimony by a judge, arbitrator, or mediator), 1115-1128 (mediation).

**Unemp. Ins. Code § 1953.5 (added). Telephonic hearings of unemployment insurance appeals board**

**Comment.** Good cause, within the meaning of Section 1953.5, may include circumstances where a party resides out of state or at a location distant from the hearing site and it is not practical for the party to appear in person, particularly where the amount in controversy is relatively small. However, the presiding officer may require the parties to appear in person if warranted by the circumstances of the case.

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

**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 provisions governing mediation confidentiality. See Evid. Code §§ 1115-1128 (mediation).

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