

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

Mediation Confidentiality

May 1996

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN September 20, 1996.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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SUMMARY OF TENTATIVE 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 add definitions of "mediation" and "mediator" to the Evidence Code, consolidate mediation confidentiality statutes in that code, and clarify other aspects of mediation confidentiality.

This recommendation was prepared pursuant to Resolution Chapter 130 of the Statutes of 1965, continued in Resolution Chapter 87 of the Statutes of 1995.

MEDIATION CONFIDENTIALITY

1 Mediation is an important means of dispute resolution.¹ There is broad
2 consensus that confidentiality is crucial to effective mediation.² In recognition of
3 the importance of confidentiality, the Legislature added Section 1152.5 to the
4 Evidence Code in 1985 on recommendation of the Law Revision Commission.³
5 With limitations, the statute protects mediation communications from admissibility
6 and disclosure in subsequent proceedings.

7 The Commission deliberately drafted the confidentiality provision in a manner
8 that would allow different mediation techniques to flourish.⁴ Since its enactment,
9 courts and disputants have experimented with mediation in many diverse forms.
10 There have also been significant legislative developments.⁵

11 Although the current statutory scheme provides broad protection, it has
12 ambiguities that cause confusion. In particular, there is a significant issue
13 concerning preparation of settlement agreements parties can enforce.⁶ Clarification
14 would benefit disputants and further the use of mediation to resolve disputes.

EXISTING LAW

15
16 Section 1152.5 states the general rules pertaining to mediation confidentiality.
17 The other main statutory protections are Section 703.5, which governs competency
18 of mediators (and other presiding officials) to testify in subsequent proceedings,
19 and Section 1152.6, which restricts a mediator from filing declarations and
20 findings regarding the mediation.

21 **General Rules: Section 1152.5**

22 Section 1152.5 remains the key provision protecting mediation confidentiality. It
23 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*, __ Cal. App. 4th __, 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).

1 1152.5. (a) When persons agree to conduct and participate in a mediation for the
2 purpose of compromising, settling, or resolving a dispute in whole or in part:

3 (1) Except as otherwise provided in this section, evidence of anything said or of
4 any admission made in the course of the mediation is not admissible in evidence
5 or subject to discovery, and disclosure of this evidence shall not be compelled, in
6 any civil action or proceeding in which, pursuant to law, testimony can be
7 compelled to be given.

8 (2) Except as otherwise provided in this section, unless the document otherwise
9 provides, no document prepared for the purpose of, or in the course of, or
10 pursuant to, the mediation, or copy thereof, is admissible in evidence or subject to
11 discovery, and disclosure of such a document shall not be compelled, in any civil
12 action or proceeding in which, pursuant to law, testimony can be compelled to be
13 given.

14 (3) When persons agree to conduct or participate in mediation for the sole
15 purpose of compromising, settling, or resolving a dispute, in whole or in part, all
16 communications, negotiations, or settlement discussions by and between
17 participants or mediators in the mediation shall remain confidential.

18 (4) All or part of a communication or document which may be otherwise
19 privileged or confidential may be disclosed if all parties who conduct or otherwise
20 participate in a mediation so consent.

21 (5) A written settlement agreement, or part thereof, is admissible to show fraud,
22 duress, or illegality if relevant to an issue in dispute.

23 (6) Evidence otherwise admissible or subject to discovery outside of mediation
24 shall not be or become inadmissible or protected from disclosure solely by reason
25 of its introduction or use in a mediation.

26 (b) This section does not apply where the admissibility of the evidence is
27 governed by Section 1818 or 3177 of the Family Code.

28 (c) Nothing in this section makes admissible evidence that is inadmissible under
29 Section 1152 or any other statutory provision, including, but not limited to, the
30 sections listed in subdivision (d). Nothing in this section limits the confidentiality
31 provided pursuant to Section 65 of the Labor Code.

32 (d) If the testimony of a mediator is sought to be compelled in any action or
33 proceeding as to anything said or any admission made in the course of the
34 mediation that is inadmissible and not subject to disclosure under this section, the
35 court shall award reasonable attorney's fees and costs to the mediator against the
36 person or persons seeking that testimony.

37 (e) Paragraph (2) of subdivision (a) does not limit the effect of an agreement not
38 to take a default in a pending civil action.

39 Notably, Section 1152.5 does not define the term "mediation." This omission
40 was not accidental. When the statute was originally enacted, mediation was just
41 beginning to gain acceptance. The Commission considered it important to allow
42 use of different techniques, without legislative constraints. Thus, instead of
43 imposing a statutory definition of mediation, the Commission crafted Section
44 1152.5 to allow parties to adopt their own definition for purposes of their dispute.⁷
45 This was done by making Section 1152.5 applicable only where the parties

7. See 1985 Recommendation, *supra* note 3, at 245 n.1, 246 n.4.

1 executed a written agreement reciting the statutory text and stating that the statute
2 governed their proceeding.⁸

3 In 1993, Section 1152.5 was amended in a number of ways, including
4 elimination of the requirement of a written agreement.⁹ Apparently, the
5 requirement was considered onerous, particularly in disputes involving
6 unsophisticated persons. Although the amendment eliminated the requirement of a
7 written agreement, it left the term “mediation” undefined.

8 **Competency of Mediators To Testify: Section 703.5**

9 As amended in 1993,¹⁰ Evidence Code Section 703.5 makes a mediator
10 incompetent to testify “in any subsequent civil proceeding” regarding the
11 mediation. The statute does not apply to mediation under the Family Code.
12 Additionally, it excepts statements and conduct that “could (a) give rise to civil or
13 criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the
14 State Bar or Commission on Judicial Performance, or (d) give rise to
15 disqualification proceedings under paragraph (1) or (6) of subdivision (a) of
16 Section 170.1 of the Code of Civil Procedure.” Before the 1993 amendment
17 extending Section 703.5 to mediators, the statute applied only to an arbitrator or a
18 person presiding at a judicial or quasi-judicial proceeding.

19 **Mediator Declarations and Findings: Section 1152.6**

20 Section 1152.6, enacted in 1995,¹¹ provides in significant part: “A mediator may
21 not file, and a court may not consider, any declaration or finding of any kind by
22 the mediator, other than a required statement of agreement or nonagreement,
23 unless all parties in the mediation expressly agree otherwise in writing prior to
24 commencement of the mediation.” Section 1152.6 is intended to prevent a
25 mediator from coercing a party to settle by threatening to inform the assigned
26 judge that the party is being unreasonable or is pressing a meritless argument.¹²
27 Section 1152.5 arguably did not accomplish this, because some courts had local
28 rules stating that a party participating in mediation was deemed to have consented
29 in advance to waive Section 1152.5 with regard to having the mediator submit an
30 evaluation to the court.¹³

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 only 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.

10. 1993 Cal. Stat. ch. 1261, § 5.

11. 1995 Cal. Stat. ch. 576, § 8.

12. Kelly, *New Law Takes Effect to Protect Mediation Rights*, N. Cal. Mediation Ass'n Newsl., Spring 1996.

13. See, e.g., Contra Costa Superior Court, Local Rule 207 (1996).

1 **Other Protections**

2 In addition to Evidence Code Sections 703.5, 1152.5, and 1152.6, there are
3 specialized statutes protecting mediation confidentiality to various degrees in
4 differing contexts.¹⁴ Another source of protection is Evidence Code Section 1152,
5 which makes offers to compromise inadmissible to establish liability.¹⁵ Perhaps
6 most importantly, the constitutional right to privacy¹⁶ encompasses
7 communications “tendered under a guaranty of privacy,” and calls for balancing of
8 the interest in mediation confidentiality against competing interests.¹⁷

9 **PROPOSED REFORMS**

10 The Commission proposes to add a new chapter on mediation confidentiality to
11 Division 9 of the Evidence Code. The substance of existing Sections 1152.5 and
12 1152.6 would be included in the new chapter. The proposal would reform existing
13 law in the following respects:

14 **Definitions**

15 Now that a written agreement is no longer necessary for statutory protection, it is
16 important to define what constitutes a “mediation” within the meaning of the
17 statute. Without such a definition, the extent of the protection is unclear.

18 For example, it is unclear whether the statutory protection applies in a court-
19 ordered or otherwise mandatory proceeding, as opposed to an entirely voluntary
20 proceeding. Similarly, it is unclear whether a settlement conference is a
21 “mediation” within the meaning of Section 1152.5.

22 Given the broad array of current dispute resolution techniques, and the
23 importance of confidentiality in promoting candor that may affect the success of
24 those techniques, a participant needs to be able to assess whether the proceeding
25 qualifies as a “mediation” for purposes of the statutes protecting mediation
26 confidentiality.¹⁸

14. 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).

15. Section 1152.5(c) expressly provides that the statute does not made 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.

16. Cal. Const. art. I, § 1.

17. *Garstang v. Superior Court*, __ Cal. App. 4th __, 46 Cal. Rptr. 2d 84 (1995).

18. 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).

1 This recommendation would add a definition of “mediation” to the Evidence
2 Code. It would be broad, stating simply: “‘Mediation’ means a process in which a
3 mediator facilitates communication between disputants to assist them in reaching a
4 mutually acceptable agreement.”¹⁹ The definition would encompass a purely
5 voluntary mediation, as well as a mediation in which participation is court-ordered
6 or otherwise mandatory. Language in Section 1152.5(a) arguably restricting its
7 protection to voluntary mediations would be deleted.

8 The proposed definition of “mediator” is also broad. A “mediator” is “a neutral
9 person who conducts a mediation.” An important restriction applies: The mediator
10 must lack authority to compel a result or render a decision. Thus, although parties
11 may be required to participate in a mediation, the mediator cannot force them to
12 accept any particular resolution.

13 The broad definitions of “mediation” and “mediator” recognize and embrace the
14 variety of existing models of mediation. They allow that variety to continue by
15 ensuring the confidentiality necessary for success.

16 Because family disputes present special considerations, the proposed law does
17 not apply to mediation of custody and visitation issues under Chapter 11
18 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

19 There would also be a special rule for mediation-arbitration (“Med-Arb”)
20 agreements and other dispute resolution agreements in which mediation, if
21 unsuccessful, is followed by another dispute resolution proceeding conducted by
22 the same person who acted as mediator. A mediator exercising coercive authority
23 in the later proceeding would fall outside the statutory definition of “mediator.”
24 Nonetheless, the mediation confidentiality statutes would protect the mediation
25 phase, unless the dispute resolution agreement expressly provides otherwise.

26 **Consent to Admissibility and Disclosure**

27 Section 1152.5(a)(2) now provides that no mediation document is admissible or
28 subject to discovery “unless the document otherwise provides.” This raises a
29 number of issues that are not resolved by the statute. Is it sufficient to unilaterally
30 specify that a document is exempt from Section 1152.5? Is it necessary to have the
31 mediator’s assent, or the assent of nonparties who attended the mediation (e.g., a
32 spouse or insurance representative)?

33 Section 1152.5(a)(4) is similarly ambiguous. It provides that “[a]ll or part of a
34 communication or document which may be otherwise privileged or confidential
35 may be disclosed if all *parties* who conduct or otherwise participate in mediation
36 so consent.” (Emphasis added.) Formerly, the statute called for consent of “all
37 *persons* who conducted or otherwise participated in the mediation.”²⁰ The current
38 wording is not clear as to precisely whose consent is necessary for disclosure.

19. The definition of “mediation” is drawn from Code of Civil Procedure Section 1775.10, which pertains to civil action mediation in certain participating courts.

20. 1985 Cal. Stat. ch. 731, § 1.

1 This recommendation resolves these ambiguities by adding a statute specifically
2 addressing consent to disclosure. It would establish a general rule that consent of
3 all mediation participants is necessary to waive the statutory protection for
4 mediation confidentiality. All persons attending a mediation, parties as well as
5 nonparties, should be able to speak frankly, without fear of having their words
6 turned against them.

7 To ensure that a party who unilaterally commissions an expert's analysis or
8 report is not unfairly deprived of the benefits of that work, the proposed statute
9 would apply a special rule. Only the consent of the mediation participants for
10 whom the material was prepared would be required for disclosure of a unilaterally
11 prepared expert's analysis or report, *provided* the material does not disclose
12 anything said or any admission made in the course of the mediation. A report or
13 analysis that necessarily discloses mediation communications could be admitted or
14 disclosed only upon satisfying the general rule requiring consent of all mediation
15 participants.

16 The recommendation would require that consent of mediation participants to
17 disclosure be express, not just implied. This requirement should help ensure the
18 existence of true, uncoerced consent, as opposed to mere acquiescence in a judge's
19 referral to a court's mediation program.²¹

20 **Settlements Reached Through Mediation**

21 As currently drafted, Section 1152.5 fails to provide clear guidance concerning
22 application of the statute to an oral compromise reached in mediation and a
23 document reducing that compromise to writing. Appellate courts have reached
24 conflicting decisions on whether the confidentiality of Section 1152.5 extends to
25 the process of converting an oral compromise to a definitive written agreement.²²
26 If confidentiality applies, then parties cannot enforce the oral compromise, because
27 evidence of it is inadmissible. If confidentiality does not apply, the oral
28 compromise may be enforceable even if it is never reduced to writing. Resolution
29 of this uncertainty is critical: A disputant must be able to determine when the
30 opponent is effectively bound.

31 In addition, Section 1152.5 fails to highlight a critical requirement concerning
32 written settlement agreements reached through mediation. Under Section
33 1152.5(a)(2), unless it is offered to prove fraud, duress, or illegality, a written
34 settlement agreement is admissible only if it so provides.²³ Parties overlooking this
35 requirement may inadvertently enter into a written settlement agreement that is
36 unenforceable because it is inadmissible.

21. See generally Kelly, *supra* note 12.

22. See *supra* note 6.

23. 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.").

1 This recommendation would remedy these problems by consolidating in a single
2 statute all the confidentiality requirements applicable to written settlements
3 reached through mediation. This will draw attention to the requirements and
4 decrease the likelihood that disputants will inadvertently enter into an
5 unenforceable agreement. The recommendation would also add a statute
6 specifically covering an oral agreement reached through mediation.

7 The proposed statute would explicitly make an executed written settlement
8 agreement admissible if it provides that it is “enforceable” or “binding” or words
9 to that effect. Because parties intending to be bound are likely to use words to that
10 effect, rather than stating that their agreement is “admissible,” the Commission
11 regards this as an important addition.

12 The proposed statute also would make clear that an executed written settlement
13 agreement is subject to disclosure if all of the signatories expressly consent. To
14 facilitate enforcement of such an agreement, consent of other mediation
15 participants, such as the mediator, would not be necessary. In contrast, existing
16 law is unclear as to precisely whose consent is required.²⁴

17 Finally, the recommendation provides a procedure for preparing an oral
18 agreement that can be enforced without violating the statutory protections for
19 mediation confidentiality. For purposes of mediation confidentiality, the mediation
20 ends upon completion of that procedure. Any subsequent proceedings are not
21 confidential.

22 Unless the disputants follow the specified procedure, the rule of *Ryan v.*
23 *Garcia*²⁵ should apply: Confidentiality extends through the process of converting
24 an oral compromise reached in mediation to an executed written settlement
25 agreement. Difficult issues can surface in this process, and confidentiality may
26 promote frankness and creativity in resolving them. The proposed approach should
27 enhance the effectiveness of mediation in promoting durable settlements. It will
28 also spare courts from adjudicating disputes over whether an oral compromise was
29 reached in mediation.

30 **Types of Subsequent Proceedings in Which Confidentiality Applies**

31 As originally enacted, the protection of Section 1152.5 applied in “any civil
32 action” in which testimony could be compelled.²⁶ When Section 1152.5 was
33 amended in 1993, the reference to “civil action” was changed to “civil action or
34 proceeding.”²⁷ The meaning of this change is debatable.²⁸

24. See Section 1152.5(a)(4).

25. 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (1996).

26. 1985 Cal. Stat. ch. 731, § 1.

27. 1993 Cal. Stat. ch. 1261, § 6.

28. Arguably, “civil” modifies “action” but not “proceeding,” and 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.

1 It can be argued that the term “civil” modifies “action” and not proceeding, with
2 the result that the protection of Section 1152.5 extends to criminal cases. It is also
3 unclear whether the protection applies to arbitral and administrative matters.

4 This recommendation would resolve that ambiguity by making explicit that
5 mediation confidentiality extends to any subsequent “arbitration, administrative
6 adjudication, civil action, or other noncriminal proceeding.” The recommendation
7 also proposes a similar amendment to Section 703.5.

8 As in its original recommendation proposing Section 1152.5,²⁹ the Commission
9 does not recommend extending mediation confidentiality to subsequent criminal
10 cases. Such an extension might unduly hamper the pursuit of justice.

11 **Oral Communications Relating to Mediations**

12 Section 1152.5(a)(1) protects “evidence of anything said or of any admission
13 made *in the course of the mediation.*” (Emphasis added.) Section 1152.5(a)(2) is
14 broader. It protects documents “prepared *for the purpose of, or in the course of, or*
15 *pursuant to, the mediation.*” (Emphasis added.)

16 To encourage frankness in discussions relating to mediation, the Commission
17 proposes to eliminate this distinction and to broaden the coverage of subdivision
18 (a)(1) to conform to that of subdivision (a)(2).

19 **Technological Advances**

20 Section 1152.5(a)(2) protects any mediation “document,” but the term
21 “document” is not defined in the Evidence Code. Due to technological advances
22 such as the increasing use of electronic mail and other electronic communications,
23 issues might arise concerning the extent of coverage.

24 The Commission proposes to address this potential problem by incorporating
25 Section 250’s broad definition of “writing” into the mediation confidentiality
26 statutes.³⁰ Because some persons may mistakenly interpret “writing” more
27 narrowly than “document,” the proposal would retain the latter term in the
28 mediation confidentiality statutes as well.

29 **Intake Communications**

30 It is unclear under Section 1152.5 whether protection extends to intake
31 communications, such as discussions about whether to mediate at all or whether a
32 particular mediator is willing to mediate a dispute. Issues concerning
33 confidentiality of intake communications often occur if one party has consulted a
34 mediator about a dispute and the other party refuses to mediate.

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.

29. 1985 Recommendation, *supra* note 3, at 245 n.1, 246 n.4; see also 1985 Cal. Stat. ch. 731, § 1.

30. 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.”

1 Protection of intake communications may promote openness in such exchanges
2 and help mediations get off to a good start.³¹ Accordingly, the Commission
3 proposes to make clear that mediation confidentiality “applies to communications
4 and documents made or prepared in the course of attempts to initiate mediation,
5 regardless of whether an agreement to mediate is reached.”

6 **Attorney’s Fees Provision**

7 Section 1152.5(d) was added in 1993 to provide for an award of attorney’s fees
8 and costs to a mediator if the mediator is subpoenaed to testify “as to *anything said*
9 *or any admission made* in the course of the mediation that is inadmissible and not
10 subject to disclosure under this section.” (Emphasis added.) The reference to
11 “anything said or any admission made” encompasses communications protected
12 under Section 1152.5(a)(1), but would appear not to cover an improper attempt to
13 compel disclosure of documents protected under Section 1152.5(a)(2).³²

14 A mediator may, however, incur substantial litigation expenses regardless of
15 which paragraph of the statute a subpoena may violate. Thus, the recommendation
16 conforms the scope of the attorney’s fees provision to the scope of protected
17 communications.

18 **Agreements To Mediate**

19 As originally enacted, Section 1152.5 included an express exception for
20 agreements to mediate a dispute.³³ The exception facilitated enforcement of such
21 agreements, as by a mediator seeking to collect an unpaid fee.

22 The express exception for agreements to mediate was eliminated in 1993,³⁴ but
23 the change appears to have been inadvertent. The proposed statute would reinstate
24 the earlier provision.

25 **Limited Exception for Research Purposes**

26 Colorado’s mediation confidentiality statute has a limited exception allowing
27 gathering of mediation information for research purposes, provided that mediation
28 participants and their disputes remain unidentifiable. California should add similar
29 language to its statute. This would be consistent with, and in furtherance of, the
30 goal of encouraging experimentation with different mediation techniques.

31 **Reforms of Section 1152.6**

32 Section 1152.6, which generally restricts mediators from filing declarations and
33 findings with courts, would benefit from clarification in a number of respects. In
34 particular, it should be made clear that (1) the restriction applies to all
35 submissions, not just filings, (2) the restriction is not limited to court proceedings,

31. See, e.g., Kirtleyn, *supra* note 2.

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.

1 but rather applies to all types of adjudications, including arbitrations and
2 administrative adjudications, and (3) the restriction applies to any evaluation or
3 statement of opinion, however denominated. These changes would help ensure that
4 courts interpret the statute in a manner consistent with its goal of preventing
5 coercion by mediators.³⁵

6 CONCLUSION

7 Mediation is a valuable and widely used technique in which candor is crucial to
8 success. Sections 703.5, 1152.5, and 1152.6 promote candor by protecting the
9 confidentiality of mediation proceedings, albeit with limitations. To further the
10 effective use of mediation, the rules concerning confidentiality should be
11 unambiguous.

35. See Kelly, *supra* note 12.

PROPOSED LEGISLATION

1 **Evid. Code § 703.5 (amended). Competency of judges, arbitrators, and mediators**

2 SEC. _____. Section 703.5 of the Evidence Code is amended to read:

3 703.5. No person presiding at any judicial or quasi-judicial proceeding, and no
4 arbitrator or mediator, shall be competent to testify, in any subsequent civil
5 arbitration, administrative adjudication, civil action, or other noncriminal
6 proceeding, as to any statement, conduct, decision, or ruling, occurring at or in
7 conjunction with the prior proceeding, except as to a statement or conduct that
8 could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the
9 subject of investigation by the State Bar or Commission on Judicial Performance,
10 or (d) give rise to disqualification proceedings under paragraph (1) or (6) of
11 subdivision (a) of Section 170.1 of the Code of Civil Procedure. However, this
12 section does not apply to a mediator with regard to any mediation under Chapter
13 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

14 **Comment.** Section 703.5 is amended to make explicit that it precludes testimony in a
15 subsequent arbitration or administrative adjudication, as well as in any civil action or proceeding.
16 See Section 120 ("civil action" includes civil proceedings). See also Sections 1120-1129
17 (mediation).

18 **Evid. Code §§ 1120-1129 (added). Mediation**

19 SEC. _____. Chapter 2 (commencing with Section 1120) is added to Division 9 of
20 the Evidence Code, to read:

21 CHAPTER 2. MEDIATION

22 **§ 1120. "Mediation" and "mediator" defined**

23 1120. (a) For purposes of this chapter,

24 (1) "Mediation" means a process in which a mediator facilitates communication
25 between disputants to assist them in reaching a mutually acceptable agreement.

26 (2) "Mediator" is a neutral person who conducts a mediation. A mediator has no
27 authority to compel a result or render a decision in the dispute.

28 (b) This chapter does not apply to any mediation under Chapter 11 (commencing
29 with Section 3160) of Part 2 of Division 8 of the Family Code.

30 (c) Notwithstanding subdivision (a), if mediation is unsuccessful and by
31 agreement the mediator then conducts a further dispute resolution proceeding, this
32 chapter applies to the mediation unless the agreement expressly provides that
33 confidentiality does not apply.

34 **Comment.** Subdivision (a)(1) and the neutrality requirement of subdivision (a)(2) of Section
35 1120 are drawn from Code of Civil Procedure Section 1775.1. An attorney or other representative
36 of a party is not neutral and so does not qualify as a "mediator" for purposes of this chapter. A
37 "mediator" may be an individual, group of individuals, or entity. See Section 175 ("person"
38 defined). See also Section 10 (singular includes the plural).

39 As recognized in subdivision (b), special confidentiality rules apply to mediation of child
40 custody and visitation issues. See Section 1040; Fam. Code §§ 1818, 3177.

1 Subdivision (c) governs mediation-arbitration (Med-Arb) agreements and similar contractual
2 arrangements in which the person who mediates a dispute serves in another capacity if the
3 mediation is unsuccessful. The protection of this chapter extends to information disclosed in the
4 mediation phase unless the agreement manifests intent to allow subsequent use of such
5 information.

6 **§ 1122. Mediation confidentiality**

7 1122. (a) When persons conduct and participate in a mediation for the purpose of
8 compromising, settling, or resolving a dispute in whole or in part:

9 (1) Except as otherwise expressly provided by statute, evidence of anything said
10 or of any admission made for the purpose of, or in the course of, or pursuant to the
11 mediation is not admissible in evidence or subject to discovery, and disclosure of
12 this evidence shall not be compelled, in any arbitration, administrative
13 adjudication, civil action, or other noncriminal proceeding in which, pursuant to
14 law, testimony can be compelled to be given.

15 (2) Except as otherwise expressly provided by statute, no document, or any
16 writing as defined in Section 250, that is prepared for the purpose of, or in the
17 course of, or pursuant to, the mediation, or copy thereof, is admissible in evidence
18 or subject to discovery, and disclosure of the document or writing shall not be
19 compelled, in any arbitration, administrative adjudication, civil action, or other
20 noncriminal proceeding in which, pursuant to law, testimony can be compelled to
21 be given.

22 (3) All communications, negotiations, or settlement discussions by and between
23 participants or mediators in the mediation shall remain confidential.

24 (4) Evidence otherwise admissible or subject to discovery outside of mediation
25 shall not be or become inadmissible or protected from disclosure solely by reason
26 of its introduction or use in a mediation.

27 (b) This section does not apply where the admissibility of the evidence is
28 governed by Section 1818 or 3177 of the Family Code.

29 (c) Nothing in this section makes admissible evidence that is inadmissible under
30 Section 1152 or any other statutory provision. Nothing in this section limits the
31 confidentiality provided pursuant to Section 65 of the Labor Code.

32 (d) If the testimony of a mediator is sought to be compelled in any action or
33 proceeding as to any communication, document, or any writing as defined in
34 Section 250, that is made or prepared for the purpose of, pursuant to, or in the
35 course of the mediation that is inadmissible and not subject to disclosure under this
36 section, the court shall award reasonable attorney's fees and costs to the mediator
37 against the person or persons seeking that testimony.

38 (e) Subdivision (a) does not limit either of the following:

39 (1) The admissibility of an agreement to mediate a dispute.

40 (2) The effect of an agreement not to take a default in a pending civil action.

41 (f) This section applies to communications, documents, and any writings as
42 defined in Section 250, that are made or prepared in the course of attempts to
43 initiate mediation, regardless of whether an agreement to mediate is reached.

1 (g) Nothing in this section prevents the gathering of information for research or
2 educational purposes, so long as the parties and the specific circumstances of the
3 parties' controversy are not identified or identifiable.

4 **Comment.** The introductory clause of Section 1122(a) continues without change the
5 introductory clause of former Section 1152.5(a), except that the reference to an agreement to
6 mediate is deleted. The protection of Section 1122 extends to mediations in which participation is
7 court-ordered or otherwise mandatory, as well as purely voluntary mediations.

8 Subdivision (a)(1) continues without substantive change former Section 1152.5(a)(1), except
9 that its protection explicitly applies in a subsequent arbitration or administrative adjudication, as
10 well as in any civil action or proceeding. See Section 120 ("civil action" includes civil
11 proceedings). In addition, the protection of Section 1122(a)(1) extends to oral communications
12 made for the purpose of or pursuant to a mediation, not just oral communications made in the
13 course of the mediation. Subdivision (a)(1) also reflects the addition of Sections 1127 (consent to
14 disclosure of mediation communications), 1128 (written settlements reached through mediation),
15 and 1129 (oral agreements reached through mediation). To "expressly provide" an exception to
16 subdivision (a)(1), a statute must explicitly be aimed at overriding mediation confidentiality. See,
17 e.g., Section 1127 ("Notwithstanding Section 1122").

18 Subdivision (a)(2) continues without substantive change former Section 1152.5(a)(2), except
19 that its protection explicitly applies in a subsequent arbitration or administrative adjudication, as
20 well as in any civil action or proceeding. See Section 120 ("civil action" includes civil
21 proceedings). In addition, subdivision (a)(2) expressly encompasses any type of "writing" as
22 defined in Section 250, regardless of whether the representations are on paper or on some other
23 medium. Subdivision (a)(2) also reflects the addition of Sections 1127 (consent to disclosure of
24 mediation communications), 1128 (written settlements reached through mediation), and 1129
25 (oral agreements reached through mediation). To "expressly provide" an exception to subdivision
26 (a)(2), a statute must explicitly be aimed at overriding mediation confidentiality. See, e.g., Section
27 1127 ("Notwithstanding Section 1122").

28 Subdivision (a)(3) continues former Section 1152.5(a)(3) without substantive change.
29 Subdivision (a)(4) continues former Section 1152.5(a)(6) without change.

30 Subdivision (b) continues former Section 1152.5(b) without change.

31 Subdivision (c) continues former Section 1152.5(c) without substantive change.

32 Subdivision (d) continues former Section 1152.5(d) without substantive change, except that its
33 scope is conformed to the scope of subdivisions (a)(1)-(a)(3).

34 Subdivision (e) continues former Section 1152.5(e) without substantive change, except it makes
35 explicit that Section 1122 does not restrict admissibility of agreements to mediate.

36 Subdivision (f) is new.

37 Subdivision (g) is new. It is drawn from Colo. Rev. Stats. § 13-22-307(5) (Supp. 1995).

38 See Section 1120 ("mediation" and "mediator" defined). See also Sections 703.5 (competency
39 of judges, arbitrators, and mediators), 1123 (mediator evaluations), 1127 (consent to disclosure of
40 mediation communications), 1128 (written settlements reached through mediation), 1129 (oral
41 agreements reached through mediation). For examples of specialized mediation confidentiality
42 provisions, see Bus. & Prof. Code §§ 467.4-467.5 (community dispute resolution programs),
43 6200 (attorney-client fee disputes); Code Civ. Proc. §§ 1297.371 (international commercial
44 disputes), 1775.10 (civil action mediation in participating courts); Fam. Code §§ 1818 (family
45 conciliation court), 3177 (child custody); Food & Agric. Code § 54453 (agricultural cooperative
46 bargaining associations); Gov't Code §§ 11420.20-11420.30 (administrative adjudication),
47 12984-12985 (housing discrimination), 66032-66033 (land use); Ins. Code § 10089.80
48 (earthquake insurance); Lab. Code § 65 (labor disputes); Welf. & Inst. Code § 350 (dependency
49 mediation). See also Cal. Const. art. I, § 1 (right to privacy); *Garstang v. Superior Court*, __ Cal.
50 App. 4th __, 46 Cal. Rptr. 2d 84, 88 (1995) (constitutional right of privacy protected
51 communications made during mediation sessions before an ombudsperson).

1 **§ 1123. Mediator evaluations**

2 1123. A mediator may not submit, and a court or other adjudicative body may
3 not consider, any assessment, evaluation, recommendation, or finding of any kind
4 by the mediator concerning a mediation conducted by the mediator, other than a
5 required statement of agreement or nonagreement, unless all parties in the
6 mediation expressly agree otherwise in writing prior to commencement of the
7 mediation. However, this section does not apply to mediation under Chapter 11
8 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

9 **Comment.** Section 1123 continues former Section 1152.6 without substantive change, except it
10 makes clear that (1) the statute applies to all submissions, not just filings, (2) the statute is not
11 limited to court proceedings but rather applies to all types of adjudications, including arbitrations
12 and administrative adjudications, and (3) the statute applies to any evaluation or statement of
13 opinion, however denominated.

14 See Section 1120 (“mediation” and “mediator” defined).

15 **§ 1127. Consent to disclosure of mediation communications**

16 1127. Notwithstanding Section 1122, a communication, document, or any
17 writing as defined in Section 250, that is made or prepared for the purpose of, or in
18 the course of, or pursuant to, a mediation, may be admitted or disclosed if any of
19 the following conditions exist:

20 (a) All persons who conduct or otherwise participate in the mediation expressly
21 consent to disclosure of the communication, document, or writing.

22 (b) The communication, document, or writing is an expert’s analysis or report, it
23 was prepared for the benefit of fewer than all the mediation participants, those
24 participants expressly consent to its disclosure, and the communication, document,
25 or writing does not disclose anything said or any admission made in the course of
26 the mediation.

27 **Comment.** Section 1127 supersedes former Section 1152.5(a)(4) and part of former Section
28 1152.5(a)(2), which were unclear regarding precisely whose consent was required for
29 admissibility or disclosure of mediation communications and documents.

30 Subdivision (a) states the general rule that mediation documents and communications may be
31 admitted or disclosed only upon consent of all participants, including not only parties but also the
32 mediator and other nonparties attending the mediation (e.g., a disputant not involved in litigation,
33 a spouse, an accountant, an insurance representative, or an employee of a corporate affiliate).
34 Consent must be express, not implied. For example, parties cannot be deemed to have consented
35 in advance to disclosure merely because they agreed to participate in a particular dispute
36 resolution program. *Cf. Contra Costa Superior Court, Local Rule 207 (1996).*

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

42 For other special rules, see Sections 1123 (mediator evaluations), 1128 (written settlements
43 reached through mediation), 1129 (oral agreements reached through mediation).

44 See Section 1120 (“mediation” and “mediator” defined). See also Sections 703.5 (competency
45 of judges, arbitrators, and mediators) and 1122 (mediation confidentiality).

1 **§ 1128. Written settlements reached through mediation**

2 1128. Notwithstanding Sections 1122 and 1127, an executed written settlement
3 agreement prepared in the course of, or pursuant to, a mediation, may be admitted
4 or disclosed if any of the following conditions exist:

5 (a) The agreement provides that it is admissible or subject to disclosure, or
6 words to that effect.

7 (b) The agreement provides that it is enforceable or binding or words to that
8 effect.

9 (c) All signatories to the agreement expressly consent to its disclosure.

10 (d) The agreement is used to show fraud, duress, or illegality that is relevant to
11 an issue in dispute.

12 **Comment.** Section 1128 is added to consolidate and clarify provisions governing written
13 settlements reached through mediation.

14 As to executed written settlement agreements, subdivision (a) continues part of former Section
15 1152.5(a)(2). See also *Ryan v. Garcia*, 27 Cal. App. 4th 1006, 1012, 33 Cal. Rptr. 2d 158, 162
16 (1994) (Section 1152.5 “provides a simple means by which settlement agreements executed
17 during mediation can be made admissible in later proceedings,” i.e., the “parties may consent, as
18 part of a writing, to subsequent admissibility of the agreement”).

19 Subdivision (b) is new. It is added due to the likelihood that parties intending to be bound will
20 use words to that effect, rather than saying their agreement is intended to be admissible or subject
21 to disclosure.

22 As to fully executed written settlement agreements, subdivision (c) supersedes former Section
23 1152.5(a)(4). To facilitate enforceability of such agreements, disclosure pursuant to subdivision
24 (c) requires only consent of the signatories. Consent of other mediation participants, such as the
25 mediator, is not necessary. Subdivision (c) is thus an exception to the general rule governing
26 consent to disclosure of mediation communications. See Section 1127.

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

28 See Section 1120 (“mediation” and “mediator” defined). See also Section 1129 (oral
29 agreements reached through mediation).

30 **§ 1129. Oral agreements reached through mediation**

31 1129. (a) Notwithstanding Sections 1122 and 1127, an oral agreement prepared
32 in the course of, or pursuant to, a mediation, may be admitted or disclosed, but
33 only if all of the following conditions are satisfied:

34 (1) The oral agreement is recorded by a court reporter, tape recorder, or other
35 reliable means of sound recording.

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

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

39 (b) Upon recording an oral agreement pursuant to this section, the mediation
40 ends for purposes of this chapter.

41 **Comment.** By following the procedure in Section 1129, mediation participants may create an
42 oral agreement that can be enforced without violating Section 1122 (mediation confidentiality).
43 The mediation is over upon completion of that procedure, and the confidentiality protections of
44 this chapter do not apply to any later proceedings, such as attempts to further refine the content of
45 the agreement.

46 Unless the mediation participants follow the specified procedure, confidentiality extends
47 through the process of converting an oral compromise to a definitive written agreement. Section

1 1129 thus codifies the rule of *Ryan v. Garcia*, 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (1994)
2 (mediation confidentiality applies to oral statement of settlement terms), and rejects the contrary
3 approach of *Regents of University of California v. Sumner*, __ Cal. App. 4th __, 50 Cal. Rptr. 2d
4 200 (1996) (mediation confidentiality does not protect oral statement of settlement terms).

5 See Section 1120 (“mediation” and “mediator” defined). See also Section 1128 (written
6 settlements reached through mediation).

7 **Heading of Chapter 2 (commencing with Section 1150) (amended)**

8 SEC. _____. The heading of Chapter 2 (commencing with Section 1150) of
9 Division 9 of the Evidence Code is amended to read:

10 **CHAPTER 2 3. OTHER EVIDENCE AFFECTED OR**
11 **EXCLUDED BY EXTRINSIC POLICIES**

12 **Comment.** The chapter heading is renumbered to reflect the addition of new Chapter 2
13 (Mediation).

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

15 SEC. _____. Section 1152.5 of the Evidence Code is repealed.

16 ~~1152.5. (a) When persons agree to conduct and participate in a mediation for the~~
17 ~~purpose of compromising, settling, or resolving a dispute in whole or in part:~~

18 ~~(1) Except as otherwise provided in this section, evidence of anything said or of~~
19 ~~any admission made in the course of the mediation is not admissible in evidence or~~
20 ~~subject to discovery, and disclosure of this evidence shall not be compelled, in any~~
21 ~~civil action or proceeding in which, pursuant to law, testimony can be compelled~~
22 ~~to be given.~~

23 ~~(2) Except as otherwise provided in this section, unless the document otherwise~~
24 ~~provides, no document prepared for the purpose of, or in the course of, or pursuant~~
25 ~~to, the mediation, or copy thereof, is admissible in evidence or subject to~~
26 ~~discovery, and disclosure of such a document shall not be compelled, in any civil~~
27 ~~action or proceeding in which, pursuant to law, testimony can be compelled to be~~
28 ~~given.~~

29 ~~(3) When persons agree to conduct or participate in mediation for the sole~~
30 ~~purpose of compromising, settling, or resolving a dispute, in whole or in part, all~~
31 ~~communications, negotiations, or settlement discussions by and between~~
32 ~~participants or mediators in the mediation shall remain confidential.~~

33 ~~(4) All or part of a communication or document which may be otherwise~~
34 ~~privileged or confidential may be disclosed if all parties who conduct or otherwise~~
35 ~~participate in a mediation so consent.~~

36 ~~(5) A written settlement agreement, or part thereof, is admissible to show fraud,~~
37 ~~duress, or illegality if relevant to an issue in dispute.~~

38 ~~(6) Evidence otherwise admissible or subject to discovery outside of mediation~~
39 ~~shall not be or become inadmissible or protected from disclosure solely by reason~~
40 ~~of its introduction or use in a mediation.~~

1 ~~(b) This section does not apply where the admissibility of the evidence is~~
2 ~~governed by Section 1818 or 3177 of the Family Code.~~

3 ~~(c) Nothing in this section makes admissible evidence that is inadmissible under~~
4 ~~Section 1152 or any other statutory provision, including, but not limited to, the~~
5 ~~sections listed in subdivision (d). Nothing in this section limits the confidentiality~~
6 ~~provided pursuant to Section 65 of the Labor Code.~~

7 ~~(d) If the testimony of a mediator is sought to be compelled in any action or~~
8 ~~proceeding as to anything said or any admission made in the course of the~~
9 ~~mediation that is inadmissible and not subject to disclosure under this section, the~~
10 ~~court shall award reasonable attorney's fees and costs to the mediator against the~~
11 ~~person or persons seeking that testimony.~~

12 ~~(e) Paragraph (2) of subdivision (a) does not limit the effect of an agreement not~~
13 ~~to take a default in a pending civil action.~~

14 **Comment.** Except as noted in the Comment to Section 1122, former Section 1152.5(a)(1)-(3)
15 and (b)-(e) are continued without substantive change in Section 1122 (mediation confidentiality).
16 Former Section 1152.5(a)(4) is superseded by Section 1127 (consent to disclosure of mediation
17 communications). See also Sections 1128 (written settlements reached through mediation), 1129
18 (oral agreements reached through mediation). Former Section 1152.5(a)(5) is continued without
19 substantive change in Section 1128 (written settlements reached through mediation).

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

21 SEC. _____. Section 1152.6 of the Evidence Code is repealed.

22 ~~1152.6. A mediator may not file, and a court may not consider, any declaration~~
23 ~~or finding of any kind by the mediator, other than a required statement of~~
24 ~~agreement or nonagreement, unless all parties in the mediation expressly agree~~
25 ~~otherwise in writing prior to commencement of the mediation. However, this~~
26 ~~section shall not apply to mediation under Chapter 11 (commencing with Section~~
27 ~~3160) of Part 2 of Division 8 of the Family Code.~~

28 **Comment.** Former Section 1152.6 is continued and broadened in Section 1123 (mediator
29 evaluations). See Section 1123 Comment.

30 **CONFORMING REVISIONS**

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

32 SEC. _____. Section 467.5 of the Business and Professions Code is amended to
33 read:

34 467.5. Notwithstanding the express application of ~~Section 1152.5~~ Chapter 2
35 (commencing with Section 1120) of Division 9 of the Evidence Code to
36 mediations, all proceedings conducted by a program funded pursuant to this
37 chapter, including, but not limited to, arbitrations and conciliations, are subject to
38 Section 1152.5 Chapter 2 (commencing with Section 1120) of Division 9 of the
39 Evidence Code.

40 **Comment.** Section 467.5 is amended to reflect the relocation of former Evidence Code Section
41 1152.5 and the addition of new Evidence Code statutes governing mediation confidentiality.

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

3 SEC. _____. Section 1775.10 of the Code of Civil Procedure is amended to read:
4 1775.10. All statements made by the parties during the mediation shall be
5 subject to ~~Sections 1152 and 1152.5~~ Section 1152 and Chapter 2 (commencing
6 with Section 1120) of Division 9 of the Evidence Code.

7 **Comment.** Section 1775.10 is amended to reflect the relocation of former Evidence Code
8 Section 1152.5 and the addition of new Evidence Code statutes governing mediation
9 confidentiality.

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

11 SEC. _____. Section 66032 of the Government Code is amended to read:

12 66032. (a) Notwithstanding any provision of law to the contrary, all time limits
13 with respect to an action shall be tolled while the mediator conducts the mediation,
14 pursuant to this chapter.

15 (b) Mediations conducted by a mediator pursuant to this chapter that involve less
16 than a quorum of a legislative body or a state body shall not be considered
17 meetings of a legislative body pursuant to the Ralph M. Brown Act (Chapter 9
18 (commencing with Section 54950) of Part 1 of Division 2 of Title 5), nor shall
19 they be considered meetings of a state body pursuant to the Bagley-Keene Open
20 Meeting Act (Article 9 (commencing with Section 11120) of Chapter 1 of Part 1
21 of Division 3 of Title 2).

22 (c) Any action taken regarding mediation conducted pursuant to this chapter
23 shall be taken in accordance with the provisions of current law.

24 (d) Ninety days after the commencement of the mediation, and every 90 days
25 thereafter, the action shall be reactivated unless the parties to the action do either
26 of the following:

27 (1) Arrive at a settlement and implement it in accordance with the provisions of
28 current law.

29 (2) Agree by written stipulation to extend the mediation for an another 90-day
30 period.

31 ~~(e) A mediator shall not file, and a court shall not consider, any declaration or~~
32 ~~finding of any kind by the mediator, A mediator may not submit, and a court or~~
33 ~~other adjudicative body may not consider, any assessment, evaluation,~~
34 ~~recommendation, or finding of any kind by the mediator concerning a mediation~~
35 ~~conducted by the mediator, other than a required statement of agreement or~~
36 ~~nonagreement, unless all parties in the mediation expressly agree otherwise, in~~
37 ~~writing.~~

38 ~~(f) Sections 703.5 and 1152.5 Section 703.5 and Chapter 2 (commencing with~~
39 ~~Section 1120) of Division 9 of the Evidence Code shall apply to any mediation~~
40 ~~conducted pursuant to this chapter.~~

41 **Comment.** Subdivision (e) of Section 66032 is amended to clarify three points: (1) the statute
42 applies to all submissions, not just filings, (2) the statute is not limited to court proceedings but
43 rather applies to all types of adjudications, including arbitrations and administrative adjudications,
44 and (3) the statute applies to any evaluation or statement of opinion, however denominated.

1 Subdivision (f) is amended to reflect the relocation of former Evidence Code Section 1152.5
2 and the addition of new Evidence Code statutes governing mediation confidentiality.

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

4 SEC. _____. Section 66033 of the Government Code is amended to read:

5 66033. (a) At the end of the mediation, the mediator shall file a report with the
6 Office of Permit Assistance, consistent with ~~Section 1152.5~~ Chapter 2
7 (commencing with Section 1120) of Division 9 of the Evidence Code, containing
8 each of the following:

9 (1) The title of the action.

10 (2) The names of the parties to the action.

11 (3) An estimate of the costs avoided, if any, because the parties used mediation
12 instead of litigation to resolve their dispute.

13 (b) The sole purpose of the report required by this section is the collection of
14 information needed by the office to prepare its report to the Legislature pursuant to
15 Section 66036.

16 **Comment.** Section 66033 is amended to reflect the relocation of former Evidence Code
17 Section 1152.5 and the addition of new Evidence Code statutes governing mediation
18 confidentiality.

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

21 SEC. _____. Section 10089.80 of the Insurance Code is amended to read:

22 10089.80. (a) The representatives of the insurer shall know the facts of the case
23 and be familiar with the allegations of the complainant. The insurer or the insurer's
24 representative shall produce at the settlement conference a copy of the policy and
25 all documents from the claims file relevant to the degree of loss, value of the
26 claim, and the fact or extent of damage.

27 The insured shall produce, to the extent available, all documents relevant to the
28 degree of loss, value of the claim, and the fact or extent of damage.

29 The mediator may also order production of other documents that the mediator
30 determines to be relevant to the issues under mediation. If a party declines to
31 comply with that order, the mediator may appeal to the commissioner for a
32 determination of whether the documents requested should be produced. The
33 commissioner shall make a determination within 21 days. However, the party
34 ordered to produce the documents shall not be required to produce while the issue
35 is before the commissioner in this 21-day period. If the ruling is in favor of
36 production, any insurer that is subject to an order to participate in mediation issued
37 under subdivision (a) of Section 10089.75 shall comply with the order to produce.
38 Insureds, and those insurers that are not subject to an order to participate in
39 mediation, shall produce the documents or decline to participate further in the
40 mediation after a ruling by the commissioner requiring the production of those
41 other documents. Declination of mediation by the insurer under this section may
42 be considered by the commissioner in exercising authority under subdivision (a) of
43 Section 10089.75.

1 The mediator shall have the authority to protect from disclosure information that
2 the mediator determines to be privileged, including, but not limited to, information
3 protected by the attorney-client or work-product privileges, or to be otherwise
4 confidential.

5 (b) The mediator shall determine prior to the mediation conference whether the
6 insured will be represented by counsel at the mediation. The mediator shall inform
7 the insurer whether the insured will be represented by counsel at the mediation
8 conference. If the insured is represented by counsel at the mediation conference,
9 the insurer's counsel may be present. If the insured is not represented by counsel at
10 the mediation conference, then no counsel may be present.

11 (c) ~~Sections 703.5 and 1152.5~~ Section 703.5 and Chapter 2 (commencing with
12 Section 1120) of Division 9 of the Evidence Code apply to a mediation conducted
13 under this chapter.

14 (d) ~~A mediator may not file, and a court may not consider, a declaration or~~
15 ~~finding of any kind by the mediator~~ A mediator may not submit, and a court or
16 other adjudicative body may not consider, any assessment, evaluation,
17 recommendation, or finding of any kind by the mediator concerning a mediation
18 conducted by the mediator, other than a required statement of agreement or
19 nonagreement, unless all parties to the mediation expressly agree otherwise in
20 writing.

21 (e) The statements made by the parties, negotiations between the parties, and
22 documents produced at the mediation are confidential. However, this
23 confidentiality shall not restrict the access of the department to documents or other
24 information the department seeks in order to evaluate the mediation program or to
25 comply with reporting requirements. This subdivision does not affect the
26 discoverability or admissibility of documents that are otherwise discoverable or
27 admissible.

28 **Comment.** Subdivision (c) of Section 10089.80 is amended to reflect the relocation of former
29 Evidence Code Section 1152.5 and the addition of new Evidence Code statutes governing
30 mediation confidentiality.

31 Subdivision (d) is amended to clarify three points: (1) the statute applies to all submissions, not
32 just filings, (2) the statute is not limited to court proceedings but rather applies to all types of
33 adjudications, including arbitrations and administrative adjudications, and (3) the statute applies
34 to any evaluation or statement of opinion, however denominated.

35 **Ins. Code § 10089.82 (amended). Noncompulsory participation; settlement agreement**

36 SEC. _____. Section 10089.82 of the Insurance Code is amended to read:

37 10089.82. (a) An insured may not be required to use the department's mediation
38 process. An insurer may not be required to use the department's mediation process,
39 except as provided in Section 10089.75.

40 (b) Neither the insurer nor the insured is required to accept an agreement
41 proposed during the mediation.

42 (c) If the parties agree to a settlement agreement, the insured will have three
43 business days to rescind the agreement. Notwithstanding Sections 1128 and 1129
44 of the Evidence Code, if the insured rescinds the agreement it may not be admitted

1 or disclosed unless the insured and all other parties to the agreement expressly
2 consent to its disclosure. If the agreement is not rescinded by the insured, it is
3 binding on the insured and the insurer, and acts as a release of all specific claims
4 for damages known at the time of the mediation presented and agreed upon in the
5 mediation conference. If counsel for the insured is present at the mediation
6 conference and a settlement is agreed upon that is signed by the insured's counsel,
7 the agreement is immediately binding on the insured and may not be rescinded.

8 (d) This section does not affect rights under existing law for claims for damage
9 that were undetected at the time of the settlement conference.

10 (e) All settlements reached as a result of department-referred mediation shall
11 address only those issues raised for the purpose of resolution. Settlements and any
12 accompanying releases are not effective to settle or resolve any claim not
13 addressed by the mediator for the purpose of resolution, nor any claim that the
14 insured may have related to the insurer's conduct in handling the claim.

15 Referral to mediation or the pendency of a mediation under this article is not a
16 basis to prevent or stay the filing of civil litigation arising in whole or in part out
17 of the same facts. Any applicable statute of limitations is tolled for the number of
18 days beginning from the referral to mediation until the date on which the
19 mediation is either completed or declined, or the date on which the insured fails to
20 appear for a scheduled mediation for the second time, or, in the event that a
21 settlement is completed, the expiration of any applicable three business day
22 cooling off period.

23 **Comment.** Subdivision (c) of Section 10089.82 is amended to reflect the addition of new
24 Evidence Code statutes governing mediation confidentiality.

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

26 SEC. _____. Section 350 of the Welfare and Institutions Code is amended to read:

27 350. (a)(1) The judge of the juvenile court shall control all proceedings during
28 the hearings with a view to the expeditious and effective ascertainment of the
29 jurisdictional facts and the ascertainment of all information relative to the present
30 condition and future welfare of the person upon whose behalf the petition is
31 brought. Except where there is a contested issue of fact or law, the proceedings
32 shall be conducted in an informal nonadversary atmosphere with a view to
33 obtaining the maximum cooperation of the minor upon whose behalf the petition is
34 brought and all persons interested in his or her welfare with any provisions that the
35 court may make for the disposition and care of the minor.

36 (2) Each juvenile court in Contra Costa, Los Angeles, Orange, Sacramento, San
37 Diego, Santa Clara, and Tulare Counties is encouraged to develop a dependency
38 mediation program to provide a problem-solving forum for all interested persons
39 to develop a plan in the best interests of the child, emphasizing family preservation
40 and strengthening. The Legislature finds that mediation of these matters assists the
41 court in resolving conflict, and helps the court to intervene in a constructive
42 manner in those cases where court intervention is necessary. Notwithstanding any
43 other provision of law, no person, except the mediator, who is required to report

1 suspected child abuse pursuant to the Child Abuse and Neglect Reporting Act
2 (Article 2.5 (commencing with Section 11164) of Chapter 2 of Title 1 of Part 4 of
3 the Penal Code), shall be exempted from those requirements under ~~Section 1152.5~~
4 Chapter 2 (commencing with Section 1120) of Division 9 of the Evidence Code
5 because he or she agreed to participate in a dependency mediation program
6 established in one of these juvenile courts.

7 If a dependency mediation program has been established in one of these juvenile
8 courts, and if mediation is requested by any person who the judge or referee deems
9 to have a direct and legitimate interest in the particular case, or on the court's own
10 motion, the matter may be set for confidential mediation to develop a plan in the
11 best interests of the child, utilizing resources within the family first and within the
12 community if required.

13 (b) The testimony of a minor may be taken in chambers and outside the presence
14 of the minor's parent or parents, if the minor's parent or parents are represented by
15 counsel, the counsel is present and any of the following circumstances exist:

16 (1) The court determines that testimony in chambers is necessary to ensure
17 truthful testimony.

18 (2) The minor is likely to be intimidated by a formal courtroom setting.

19 (3) The minor is afraid to testify in front of his or her parent or parents.

20 After testimony in chambers, the parent or parents of the minor may elect to
21 have the court reporter read back the testimony or have the testimony summarized
22 by counsel for the parent or parents.

23 The testimony of a minor also may be taken in chambers and outside the
24 presence of the guardian or guardians of a minor under the circumstances specified
25 in this subdivision.

26 (c) At any hearing in which the probation department bears the burden of proof,
27 after the presentation of evidence on behalf of the probation department and the
28 minor has been closed, the court, on motion of the minor, parent, or guardian, or
29 on its own motion, shall order whatever action the law requires of it if the court,
30 upon weighing all of the evidence then before it, finds that the burden of proof has
31 not been met. That action includes, but is not limited to, the dismissal of the
32 petition and release of the minor at a jurisdictional hearing, the return of the minor
33 at an out-of-home review held prior to the permanency planning hearing, or the
34 termination of jurisdiction at an in-home review. If the motion is not granted, the
35 parent or guardian may offer evidence without first having reserved that right.

36 **Comment.** Subdivision (a)(2) of Section 350 is amended to reflect the relocation of former
37 Evidence Code Section 1152.5 and the addition of new Evidence Code statutes governing
38 mediation confidentiality.