

## Senate Bill 954 - Mediation Confidentiality - effective November 1, 2018

Effective November 1, 2018 a new section 1129 is added to the Evidence Code. The bill also contains amendments to existing section 1122. The purpose of the bill is to make sure that clients going into mediation understand the confidential nature of the process. The underlying issue relates to the ability of a client to file a malpractice action for activity that took place during the course of mediation. The California Supreme Court in Cassel v Superior Court (51 Cal. 4th 113) held that private communication between an attorney and a client related to mediation remain confidential, even in a later lawsuit between the attorney and his client. As Justice Chin stated in his concurring opinion, "this holding will effectively shield an attorney's actions during mediation, including advising the client, from a malpractice action even if those actions are incompetent or even deceptive." Justice Chin suggested the legislature should consider this.

What has resulted is not an overturning of the *Cassel* ruling but a new section requiring more explicit disclosure to a client prior to entering the mediation process.

New section 1129 (a) states "except in the case of a class or representative action, an attorney representing a client participating in a mediation or a mediation consultation shall, as soon as reasonably possible before the client agrees to participate in the mediation or mediation consultation, provide that client with a printed disclosure containing the confidentiality restrictions described in section 1119 and obtain a printed acknowledgment signed by that client stating that he or she has read and understands the confidentiality restrictions."

Section 1129(c) sets forth the requirements of such a written disclosure. It must be printed in the preferred language of the client in at least 12 point font, be on a single page not attached to any other document, include the names of the attorneys and client, and be signed and dated by the attorney and the client.

Section 1129(d) states that the requirements of subdivision (c) are met by language set forth in the next part of the section. That language is attached below.

The take-away is that in all mediations the mediator should ensure that the necessary disclosure notification has been presented and signed by the client and attorney. The statute does state that failure to obtain the signed disclosure is not grounds for disciplinary action.

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*Thanks to Kenneth S. Wolf of Freeman, Freeman & Smiley, LLP for this information.*

MEDIATION DISCLOSURE NOTIFICATION AND ACKNOWLEDGMENT

To promote communication in mediation, California law generally makes mediation a confidential process. California's mediation confidentiality laws are laid out in Sections 703.5 and 1115 to 1129, inclusive, of the Evidence Code. Those laws establish the confidentiality of mediation and limit the disclosure, admissibility, and a court's consideration of communications, writings, and conduct in connection with a mediation; In general, those laws mean the following:

- All communications, negotiations, or settlement offers in the course of a mediation must remain confidential.
- Statements made and writings prepared in connection with a mediation are not admissible or subject to discovery or compelled disclosure in noncriminal proceedings.
- A mediator's report, opinion, recommendation, or finding about what occurred in a mediation may not be submitted to or considered by a court or another adjudicative body.
- A mediator cannot testify in any subsequent civil proceeding about any communication or conduct occurring at, or in connection with, a mediation.

This means that all communications between you and your attorney made in preparation for a mediation, or during a mediation, are confidential and cannot be disclosed or used (except in extremely limited circumstances), even if you later decide to sue your attorney for malpractice because of something that happens during the mediation.

I, *[Name of Client]*, understand that, unless all participants agree otherwise, no oral or written communication made during a mediation, or in preparation for a mediation, including communications between me and my attorney, can be used as evidence in any subsequent noncriminal legal action including an action against my attorney for malpractice or an ethical violation.

NOTE: This disclosure and signed acknowledgment does not limit your attorney's potential liability to you for professional malpractice, or prevent you from (1) reporting any professional misconduct by your attorney to the State Bar of California or (2) cooperating with any disciplinary investigation or criminal prosecution of your attorney.

*(Name of Client)* \_\_\_\_\_

Date: \_\_\_\_\_

*(Name of Attorney)* \_\_\_\_\_

Date: \_\_\_\_\_