



Alerts

California Attorneys Must Obtain Client's Signed Understanding of Mediation Confidentiality, Effective January 1, 2019

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[Senate Bill No. 954; Mediation: confidentiality: disclosure](#)

Brief Summary

Effective January 1, 2019, California attorneys will be required to provide written disclosures to their client explaining mediation confidentiality restrictions. They must also obtain written acknowledgment from the client that he/she understands the disclosures *before* participating in a mediation consultation or agreeing to mediation in all matters other than class and representative actions. The disclosure must be in the preferred language of the client, in 12-point font, on a single page of a stand-alone document, and must be signed and dated by the client and the attorney. Failure to obtain a proper signed acknowledgment from a client is not a basis to set aside an agreement prepared for, in the course of, or pursuant to mediation, but may subject an attorney to discipline.

Complete Summary

Confidentiality is a cornerstone of mediation. Existing California law and public policy provide that all communications that take place in anticipation of and at mediation are confidential and are not admissible in evidence. Yet, uninformed clients may not be aware that most communications by and between the parties, their counsel and the mediator are confidential and should not be repeated to third parties outside of mediation or that these restrictions carry over beyond the matter at issue to any future actions, including subsequent actions for professional negligence. California's Senate Bill 954 endeavors to resolve those concerns by adding new Section 1129 to California's Evidence Code, setting forth the specific disclosure requirements and providing sample disclosure language that if used, will provide a "safe harbor" for attorneys such that the disclosure requirements will be deemed met.

Beginning on January 1, 2019, California attorneys must provide to most clients a printed disclosure explaining mediation confidentiality as soon as reasonably possible *before* the client agrees to mediate. Most importantly, attorneys must also "obtain a printed acknowledgment signed by that client stating that he or she has read and understands the confidentiality restrictions." An attorney retained after the client had already agreed to mediation must obtain the client's acknowledgment of mediation confidentiality as soon as reasonably possible

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after retention. The disclosure requirement does not apply in a class or representative action.

Pursuant to Section 1129(c), the *printed* disclosure must:

- Be printed in the preferred language of the client;
- Be in at least 12-point font;
- Be printed on a single page;
- Not be attached to any other document;
- Include the names of the attorney and client;
- Be signed and dated by the attorney; and
- Be signed and dated by the client.

Section 1129(d) provides sample "safe harbor" language that is deemed to comply with the disclosure requirement, if the above requirements are met. The "safe harbor" language provides attorneys with legal assurance that their disclosure is adequate, if they choose to utilize the sample language. The full "safe harbor" language is available in this [downloadable disclosure form](#).

The new SB 954 sought not only to resolve the lack of client awareness of confidentiality, but to inform clients of the potential consequences as demonstrated by the 2011 California Supreme Court case entitled *Cassel v. Superior Court* (2011) 51 Cal.4th 113.

In *Cassel*, the Supreme Court held that private communications between attorneys and their client related to mediation remained confidential, even in a professional negligence action wherein the client contended the attorneys obtained his consent to settlement through bad advice, deception and coercion. Many have been concerned that this holding allows attorneys to escape liability for misconduct during mediation. After *Cassel*, the California Law Revision Commission had recommended adding an exception to mediation confidentiality in a professional negligence action, similar to that used in other states. The Senate Judiciary Committee Report on SB 954 responded to criticism of the recommendation, stating at page 6 of 8:

This bill would take a more measured approach to addressing the issues presented by *Cassel*. Rather than alter the underlying mediation confidentiality scheme, this bill would focus on ensuring that clients are fully informed of the limitations on disclosure when it comes to mediation and related communications, documents, and admissions.

To address the concern that attorneys may escape liability, SB 954 added subsection (a)(3) to Section 1122 of the Evidence Code, allowing a communication, document or writing related to the attorney's compliance with the disclosure requirement to be admissible in an attorney disciplinary proceeding (unless the document disclosed something said or done during mediation). Thus, while an attorney's failure to comply with Section 1129 is not a basis to set aside a mediated settlement, failing to properly comply with the disclosure requirements may subject the attorney to discipline.

Significance of New Statutes

Failure to comply with the disclosure and acknowledgment requirements may subject attorneys to discipline. California attorneys should develop a single page, stand alone, 12 point font disclosure form to provide to all clients before agreeing to participate in mediation. Attorneys and firms should further consider informing clients of this new requirement in their engagement agreements. Calendar systems should also be updated to set a reminder to obtain the client's acknowledgement promptly after the printed disclosure is made.

[Download a sample disclosure form](#) (PDF)

For more information, please contact Joanna L. Storey