

MEDIATION DISCLOSURE NOTIFICATION AND ACKNOWLEDGMENT

by T. Elizabeth McVicker

SB 954 Provides Confidentiality Transparency to Clients

On September 11, 2018, Governor Jerry Brown signed into law Senate Bill 954 drafted by State Senator Bob Wieckowski (D-Fremont), which amended California Evidence Code section 1122 and added section 1129.¹ Section 1129 requires an affirmative duty of an attorney, except in the case of a class or representative action, who is representing a client participating in mediation or a mediation consultation, or as soon as reasonably possible before the client agrees to participate, to obtain written disclosure from the client confirming his/her understanding of all confidentiality restrictions related to mediation contained in the Evidence Code. Section 1122(a)(3) states that a communication, document or writing relating to an attorney's compliance with section 1129, may be used in an attorney disciplinary proceeding to determine compliance with section 1129, provided it does not disclose anything said or done or any admission made in the course of the mediation.

Section 1129 mandates that the communication include the following: (1) printed in the preferred language of the client in at least 12-point font, on a single page not attached to any other document provided to the client; (2) the names of the attorney and the client; and (3) signed and dated by the attorney and the client. Section 1129 contains model language for disclosure, which, "shall be deemed to comply" with the new disclosure requirements under the law:

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 signed]

[Name of Attorney] [Date signed]

SB 954 comes in the wake of the California Supreme Court's decision in *Cassel v. Superior Court* (2011) 51 Cal.4th 113, and the Second District's Court of Appeal's decision in *Amis v. Greenberg Traurig LLP*, (2015) 235 Cal. App.4th 331, where evidence of confidential attorney-client discussions during mediation negotiations were excluded to

¹ All further statutory references will be to the California Evidence Code unless otherwise indicated.

prevent the clients in each case from proving malpractice claims against their attorneys.

In 2012, the legislature directed the California Law Revision Commission (CLRC) to examine the relationship between attorney malpractice and mediation confidentiality. In 2017, CLRC recommended disclosure of otherwise confidential communications in an attorney disciplinary proceeding of the State Bar or a private malpractice action for damages, if the evidence is relevant to prove or disprove an allegation. In 2018, the California Senate Judiciary Committee analyzed various proposals and amendments to Senator Wieckowski's bill, with the support of various law groups, before adopting the final version.

SB 954 does not alter the overriding public policy to maintain open and honest frank candid discussions in mediation to reach an out of court resolution. Instead, it strikes a balance of the competing interests of participants in the mediation process and the attorneys who represent them.

The new law provides transparency and a clearer understanding of the mediation process and its ramifications to clients. The required disclosure to clients directs them to various sections of the Evidence Code to understand what testimony, communications, writings and evidence specifically remain confidential, inadmissible and not subject to discovery or disclosure. Those sections also reveal when disclosure of otherwise confidential communications or writings is permissible (§1122(a)(1)-(3)), and what evidence can be disclosed if such evidence is otherwise admissible in court, such as declarations of disclosure required by section 1120 and Family Code sections 2104 and 2105.

Clients must acknowledge that if problems arise during mediation, attorney-client communications cannot be used against their attorney in a malpractice claim. Therefore, a client makes an informed decision whether or not to proceed with a mediation. SB 954 also protects the inviolability of the mediation process by adding language that the failure of an attorney to comply with its requirements is not a basis to set aside an agreement prepared in the course of, or pursuant to, mediation.

With the passage of SB 954, attorneys should continue to bring their skills to the table during mediation. Attorneys have a duty to support the Constitutions of the United States and the State of California. (Bus. & Prof. Code § 6068.)

Compliance with the printed disclosure requirements at the onset of client retention is advised if there is any future possibility of mediation.

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