California Confidential

What Happens In Mediation May Not Stay In Mediation

By Ana M. Sambold

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Effective January 1, 2019, California Senate Bill 954 requires attorneys to inform their clients

of all confidentiality restrictions related to mediation and to obtain a signed acknowledgment stating that the client understands them. The new law is aimed at helping clients to be aware of California mediation confidentiality rules and allowing them to make a better-informed decision before agreeing to mediation. Consequently, it is important for attorneys representing clients in California mediations to become familiar with mediation confidentiality rules and the scope and impact of confidentiality on admissibility, enforceability and attorney malpractice.

Beware: Mediation Confidentiality Is Not Absolute

For more than two decades, California law has made mediation communications and writings confidential and has precluded the use, disclosure, and admissibility of a mediation communication or writings in a subsequent noncriminal case. Evidence Code sections 703.5 and 1115-1128 provide the evidentiary protections for mediation communication and govern mediation confidentiality. The key statute is section 1119, which bars disclosing (a) "anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation," (b) any writing, "prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation," and (c) "all communications, negotiations, or settlement discussions by and between participants in the course of mediation or a mediation consultation …."

Contrary to popular belief, mediation confidentiality in California is not absolute. Several exceptions allow admissibility and discoverability of mediation communications. The lack of clarity may be due to the fact that these exceptions are not listed in one place but are in different sections of the Evidence Code and other sources:

Criminal proceedings. This is probably the most important exception. The protections to mediation communications provided by section 1119 apply only to "arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given." (Evid. Code, § 1119, subds. (a)-(b)).

Preexisting materials. Section 1120 creates an express exception to mediation confidentiality for preexisting materials. Evidence admissible or subject to discovery before the mediation does not become inadmissible or protected from disclosure solely because it was introduced or used in a mediation or mediation consultation. The Supreme Court has stated: "a party cannot secure protection for a writing—including a photograph, a witness statement, or an analysis of a test sample—that was not 'prepared for the purpose of, in the course of, or pursuant to, a mediation' … simply by using or introducing it in a mediation or even including it as a part of a writing—such as a brief or a declaration or a consultant's report—that was 'prepared for the purpose of, in the course of, or pursuant to, a mediation.'" (*Rojas v. Superior Court* (2004) 33 Cal.4th 407, 417.) The court also pointed out that physical samples do not constitute "writings" under section 1119 and thus do not fall within the protection of the media-

tion confidentiality statutes. (Id. at p. 416). (See also *Kullar v. Foot Locker Retail, Inc.* (2018) 168 Cal.App.4th 116, 132.)

'Neither the language nor the purpose of the mediation statutes supports a conclusion that there is an exception to the confidentiality of mediation communications in connection with alleged attorney malpractice.'

Specified agreements. Section 1119 does not restrict the admissibility of an agreement to mediate, an agreement not to take a default or an agreement for an extension of time in a pending civil action. (Evid. Code, § 1120, subd. (b)(1)-(2).)

Mediator information. The fact that the mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute is not confidential. (Evid. Code, § 1120, subd. (b)(3).)

Financial disclosure declarations exchanged in divorce proceeding. The Family Code requires that in marital nullity, dissolution, and legal separation matters, each party serve on the other party a declaration of disclosure that includes a characterization of all assets and liabilities. Consequently, such declarations of disclosure are admissible as evidence even if they are prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation. (*Lappe v. Superior Court* (2014) 232 Cal.App.4th 774, 777.)

Excluded proceedings. Section 1119 does not apply to a court settlement conference, a family conciliation proceeding, or a court connected mediation of child custody and visitation issues. (Evid. Code § 117, subd. (b).)

Constitutional rights. The protection does not apply if it conflicts with a constitutional right, such as the right of due process ((2011) 51 Cal.4th at 119, 127), or a juvenile's right of confrontation in a juvenile delinquency proceeding (*Rinaker v. Superior Court* (1998) 62 Cal.App.4th 155.)

Absurd results. The history of the mediation confidentiality statutes reflects that the Legislature intended to reduce litigation over the admissibility and disclosure of evidence regarding settlements and communications that occur during the media-

tion. Thus, section 1119 does not apply if it would "lead to absurd results that clearly undermine the statutory purpose." (*Cassel*, 51 Cal.4th at p. 119.)

Express written or oral agreement to waive protection. To waive confidentiality protection, all participants in a mediation must expressly agree in writing (or orally, pursuant to the procedure specified in section 1118). However, unilaterally prepared material may be disclosed as long as it doesn't reveal anything about what was discussed by all the participants, but an express waiver by those participants is needed. (Evid. Code, § 1122.)

Settlement agreements. A written agreement reached in mediation is not made inadmissible, or protected from disclosure, if the agreement is signed by the settling parties and any of the following conditions is satisfied: The agreement provides that it is admissible or subject to disclosure, or words to that effect; the agreement provides it is enforceable or binding or words to that effect; all parties to the agreement expressly agree in writing, or orally in accordance with section 1118, to its disclosure; the agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute. (Evid. Code, § 1123.) If the parties in a mediation failed to include the necessary statutory language, the written agreement is inadmissible and not enforceable. (See *Fair v. Bakhtiari* (2006) 40 Cal.4th 189, 197.) For oral settlement agreements, the requirements are provided in section 1124.

Evidence of conduct. Section 1119 does not protect conduct at mediation, only mediation communications. (*Foxgate Homeowners' Assn. v. Bramalea Cal., Inc.* (2001) 25 Cal.4th at p. 18, fn. 14; *Radford v. Shehorn* (2010) 187 Cal.App.4th 852, 857; *Campagnone v. Enjoyable Pools & Spas Service & Repairs, Inc.* (2008) 163 Cal.App.4th 566, 571-572); *Ellerbee v. County of Los Angeles* (2010) 187 Cal.App.4th 1206, 1216-1217.)

'The impact on the client of the disclosure and acknowledgment, and particularly the mention of attorney malpractice, is still unknown.'

For purposes of confidentiality and to determine when mediation communications are no longer protected, section 1125 specifies the conditions that need to be satisfied to end the mediation. Among other circumstances, a mediation ends when the parties

execute a written settlement agreement that fully resolves the dispute. Anything made inadmissible or protected by the mediation confidentiality statutes before the mediation ends remains inadmissible, protected from disclosure, and confidential after the mediation ends. (Evid. Code, § 1126.)

Interplay Between Mediation Confidentiality and Legal Malpractice

Neither the language nor the purpose of the mediation statutes supports a conclusion that there is an exception to the confidentiality of mediation communications in connection with alleged attorney malpractice. The Supreme Court in *Cassel v. Superior Court* reconfirmed that and held that the confidentiality statutes were not subject to a judicially crafted exception where a client sues for legal malpractice and seeks disclosure of private attorney-client discussions relating to mediation. It was the intent of the Legislature to prioritize and secure the candor necessary for a successful mediation above other policy considerations, including the client's ability to prove legal malpractice actions against their attorney. Such a decision prompted the legislature to consider whether an amendment to the current statutory scheme was needed.

In February 2012, the first formal attempt to change the confidentiality rules was introduced by the Conference of California Bar Associations. Assembly Bill 2025 proposed adding a new exception to the Evidence Code if professional negligence or misconduct was the basis of the client's allegations against the client's attorney. The bill immediately prompted intense opposition. The response was to direct the California Law Revision Commission (CLRC) to analyze the relationship between mediation confidentiality and attorney malpractice and other misconduct and impact of current laws on public protection, professional ethics, attorney discipline, and client rights. The CLRC started to work on the assigned study in July 2013, and Study K-402 was born.

In December 2017, after five years of study, the CLRC released its final recommendation to the Legislature: an amendment creating a new exception to section 1119. The exception would permit the disclosure of otherwise confidential communications in a disciplinary proceeding or a cause of action for damages based upon a claim of malpractice, if the evidence is relevant to prove or disprove an allegation. The recommendation generated fierce opposition, and the CLRC was unable to find a legislator to carry a bill.

Informed Consent - SB 954 - New Approach

In January 2018, State Senator Bob Wieckowski introduced Senate Bill 954, which took a different approach to the issue. Instead of creating an exception to the confidentiality rules, SB 954 adopted a disclosure protocol. The bill amends Evidence Code section 1122 and adds section 1129.

Who Must Comply With the New Requirements?

An attorney representing a client participating in a mediation or a mediation consultation must comply. However, attorneys representing mediation participants in a class or representative action are exempt from this

new disclosure rule. Mediators do not have any obligation under this law but it's a good practice if they point out the requirements to the lawyers in their mediations.

What's Required?

The attorney must provide the client with a printed disclosure explaining the confidentiality restrictions described in section 1119 stating that mediation communications are inadmissible in any noncriminal legal action, including an attorney malpractice action. Attorneys must also obtain a printed acknowledgment signed by that client stating that he or she has read and understands the confidentiality restrictions.

The disclosure shall: (1) be printed in the preferred language of the client in at least 12-point font; (2) be printed on a single page that is not attached to any other document provided to the client; and (3) include the names of the attorney and the client and be signed and dated by the attorney and the client. (Evid. Code § 1129, subd. (d).)

The bill provides "safe harbor" disclosure language that can be copied and pasted for easy use. The language is not mandatory but shall be deemed to comply with the written disclosure and written acknowledgment requirements provided the above-mentioned requirements are met.

When to Comply?

The attorney should comply as soon as reasonably possible before the client agrees to participate in the mediation or mediation consultation. If the attorney is retained after an individual agrees to participate in the mediation or mediation consultation, he or she shall, as soon as reasonably possible after being retained, comply with the printed disclosure and acknowledgment requirements.

Consequences of Noncompliance

Failure to comply with these new requirements will subject an attorney to state bar disciplinary proceedings, but noncompliance does not affect the validity of any settlement prepared in the course of or pursuant to a mediation. However, any document relating to an attorney's compliance with the disclosure requirements could be used in an attorney disciplinary proceeding (so long as the document does not disclose anything said or done during the mediation).

How Will Clients React?

The impact on the client of the disclosure and acknowledgment, and particularly the mention of attorney malpractice, is still unknown. Attorneys would be well advised to be prepared to answer questions concerning attorney malpractice claims generally and the extent of mediation confidentiality and its impact on admissibility and discoverability.

For the full text of SB 954 visit: leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB954.

Ana M. Sambold is a San Diego-based mediator and arbitrator serving on the AAA, San Diego Superior Court and ADR Services, Inc. panels of neutrals. She resolves disputes involving business, insurance, real estate, employment, consumer and personal injury matters. She co-chairs the CLA Litigation Section's ADR Committee. Sambold@sambold-law.com.

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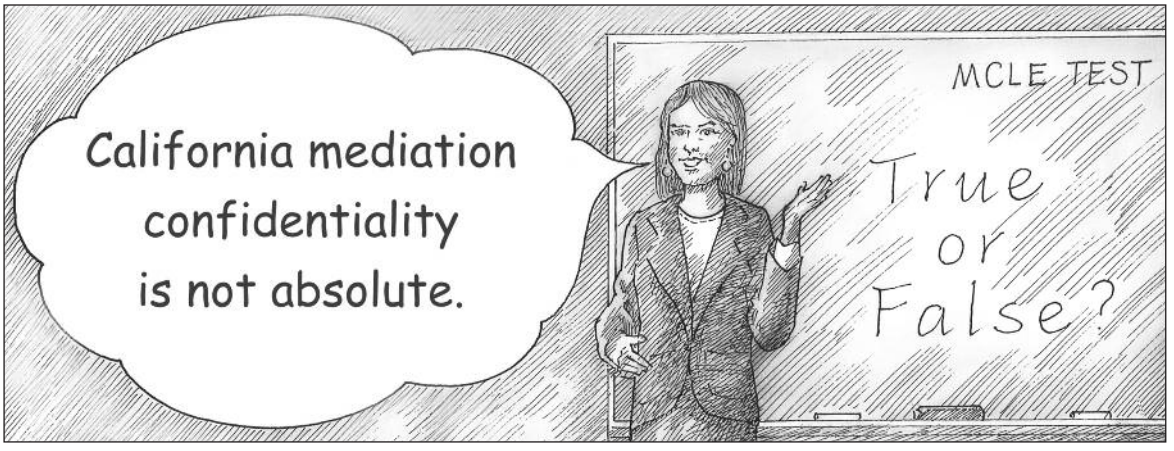

1. ***True or false?*** Effective June 1, 2019, California Senate Bill 954 imposes new disclosure requirements before mediation.

2. ***True or false?*** Senate Bill 954 is aimed at helping attorneys to be aware of California mediation confidentiality rules.

3. ***True or false?*** Evidence Code section 1119, provides confidentiality protection only for oral mediation communications.

4. ***True or false?*** Communications during a mediation consultation are confidential and inadmissible under Evidence Code section 1119.

5. ***True or false?*** California mediation confidentiality is not absolute. Several exceptions allow admissibility and discoverability of mediation communications.

6. ***True or false?*** The protections to mediation communications proded by section 1119 do not apply to criminal proceedings.

7. ***True or false?*** A party in a mediation can secure confidentiality protection for a writing – including a photograph, a witness statement, or an analysis of a test sample – that was not prepared for the purpose of, in the course of, or pursuant to, a mediation- simply by using or introducing it in a mediation brief that was prepared for the purpose of, in the course of, or pursuant to, a mediation.

8. ***True or false?*** A physical sample does not constitute a "writing" under section 1119 and thus does not fall within the protection of the mediation confidentiality statutes.

9. ***True or false?*** Section 1119 does not restrict the admissibility of an agreement not to take a default or an agreement for an extension of time in a pending civil action.

10. ***True or false?*** Financial disclosure declarations exchanged during a mediation of a marital dissolution are confidential and inadmissible as evidence in subsequent civil actions because they were prepared for the purpose of, in the course of, or pursuant to a mediation.

11. ***True or false?*** The evidentiary protections of section 1119 do not apply to a court settlement conference.

12. ***True or false?*** The statutory purpose of the mediation confidentiality rules is to reduce litigation over the admissibility and disclosure of evidence regarding settlements and communications that occur during the mediation.

13. ***True or false?*** Materials unilaterally prepared by one party during the mediation may be disclosed as long as they don't reveal anything about what was discussed by all the participants and an express waiver by those participants is provided.

14. ***True or false?*** A written agreement reached in mediation is admissible as evidence, if the agreement is signed by the settling parties and provides it is enforceable or binding or words to that effect.

15. ***True or false?*** Section 1119 protects mediation communications and conduct at mediation.

16. ***True or false?*** After the parties execute a written settlement agreement that fully resolves the dispute in mediation, the mediation ends and their communications are no longer protected under the confidentiality statutes.

17. ***True or false?*** The Supreme Court decision in *Cassel v. Superior Court* held that there is an exception to the confidentiality of mediation communications in connection with alleged attorney malpractice.

18. ***True or false?*** Except for attorneys representing mediation participants in a class or representative action, an attorney representing a client participating in a mediation or a mediation consultation must comply with the new disclosure requirements imposed by SB 954.

19. ***True or false?*** The only requirement imposed by SB 954 is that an attorney must provide the client with a printed disclosure explaining the confidentiality restrictions described in section 1119 of the Evidence Code stating that mediation communications are inadmissible in any noncriminal legal action, including an attorney malpractice action.

20. ***True or false?*** Attorneys representing clients in mediation are required to comply with the SB 954 disclosure requirements as soon as reasonably possible before the client agrees to participate in the mediation or mediation consultation. Failure of an attorney to comply with these new requirements will subject him or her to state bar disciplinary proceedings.