Rande S. Sotomayor
SOTOMAYOR LAW

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The best worst thing to happen to California lawyers in 2019

DISCLOSURE TO CLIENTS OF MEDIATION CONFIDENTIALITY UNDER EVIDENCE CODE SECTION 1129 REQUIRES A WRITTEN DISCLOSURE TO CLIENTS BEFORE MEDIATION

Ever since January 1, 2019, you've probably been swearing at the California Legislature for once again sticking it to the lawyers in the form of more rules and requirements, this time in the context of mediation.

I can hear it now: "Let me get this straight. That new Evidence Code section 1129 requires me to tell my clients right up front that if they sue me for malpractice relating to a mediation, nothing that is said or written in connection with that mediation can be used to prove that claim."

Indeed, Evidence Code section 1129 makes you do that, and more. (I know you're cringing.)

Picture this: Your new client Maria and her husband George are coming in at 1:30. Maria was walking along the sidewalk with her 8-year-old daughter, Ana, when she heard a loud crash, looked up, and saw a car hurtling toward her. The next moments were a blur of smashing, stinking, barely breathing, and frantic searching for Ana. Pinned by the car, Maria had suffered many injuries that kept her in the hospital for weeks. Ana was unharmed, except for the trauma from watching her mom go under that car and screaming for what seemed like forever. George had received multiple referrals to you, but he and Maria wanted to meet you personally to sign the paperwork.

This is the case you've been waiting for. However, George and Maria have told you quite clearly that their goal is to settle for as much as possible and to avoid the horror of reliving the case through trial. Of course you know, and you may even have told them, that most of these cases will settle sooner or later anyway.

Among the papers to be signed, you have a new one, the Mediation Disclosure Notification and Acknowledgment form required by Evidence Code section 1129. It is only one page.

What you need to do

As Sargent Joe Friday famously said, "Just the facts, ma'am. Just the facts." So I'll get right to them, and then explain.

Who is subject to section 1129? The new law applies to every "attorney representing a client participating in a mediation or a mediation consultation" "[e]xcept in the case of a class or representative action." (§ 1129(a).) (Code sections cited in this article refer to the California Evidence Code.)

What must you do? The attorney must "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." (§ 1129(a).)

When must you comply? The disclosure must be made and the signed acknowledgement must be obtained "as soon as reasonably possible before the client agrees to participate in the mediation or mediation consultation." (§ 1129(a).)

"An attorney who is retained after an individual agrees to participate in the mediation or mediation consultation shall, as soon as reasonably possible after being retained, comply with the printed disclosure and acknowledgment requirements described in subdivision (a)." (§ 1129(b).)

How exactly do you comply? Section 1129(c) states that the required printed disclosure must:

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

Fortunately, section 1129, subdivision (d) provides the exact wording, at least the exact *English* wording for clients whose "*preferred language*" is English, that "will be deemed to comply" with the printed disclosure requirement. (An example of the "safe harbor" form appears at the end of this article.) The required disclosure drills down into a controversial aspect of California's confidentiality restrictions, specifically, that even if a client sues the attorney for malpractice in connection with a mediation, the confidentiality provisions still apply, even to preclude evidence of any private communication between client and counsel before or during a mediation. (See also, §§ 1119, 1122; *Cassel v. Superior Court* (2011) 51 Cal.4th 113.)

What happens if an attorney fails to comply? Section 1129, subdivision (e) states that "[f]ailure of an attorney to comply with this section is not a basis to set aside an agreement prepared in the course of, or pursuant to, a mediation." However, the concurrent amendment of section 1122 contemplates an attorney disciplinary proceeding for failure to comply with section 1129. Section 1122 permits use of a communication or writing relating to an attorney's compliance with section 1129 in such a disciplinary proceeding as long as it does not disclose anything said or done or any admission made in mediation.

Why is the mediation disclosure and acknowledgment the attorney's responsibility?

Maria and George will be arriving in a few hours. You know *what* you have to do, but this is really uncomfortable. You have to make sure the clients *understand* the mediation confidentiality restrictions *and* specifically that they would be precluded from using anything said or done in connection with the mediation against you if they sued you for malpractice. How can you have this difficult conversation and have the clients leave your office as confident in

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your legal prowess as they were when they arrived?

Of course, you typically explain to clients how mediation helps parties settle cases. You probably also generally explain how the confidentiality of the process promotes candid communication, which in turn leads to successful mediations, i.e., settlements.

You are no doubt wondering how this became *your statutory* responsibility because the mediator typically supplies and explains the confidentiality restrictions of mediation. The answer is that the California Legislature passed this new law in response to the California Supreme Court's recognition in *Cassel v. Superior Court* (2011) 51 Cal.4th 113, 122, that the strong public policy favoring mediation confidentiality sometimes prevents clients from bringing malpractice actions against their attorneys in connection with mediation. The Court stated:

> Applying the mediation confidentiality statutes in accordance with their plain meaning to protect private mediation-related discussions between a mediation disputant and the disputant's attorneys may indeed hinder the client's ability to prove a legal malpractice claim against the lawyers. However, it is for the Legislature, not the courts, to balance the competing policy concerns.

(*Cassel v. Superior Court*, 51 Cal.4th at 122.)

In *Cassel*, plaintiff agreed to a settlement in mediation. He then sued his attorneys for malpractice, breach of fiduciary duty, fraud, and breach of contract. He alleged that "by bad advice, deception, and coercion, the attorneys, who had a conflict of interest, induced him to settle for a lower amount than he had told them he would accept, and for less than the case was worth." (*Cassel v. Superior Court* (2011) 51 Cal.4th at 118.) The Court held that the mediation confidentiality statutes precluded evidence of private discussions between the client and the attorney who represented him in the mediation. The Court stated:

> We express no view about whether the statutory language, thus applied, ideally balances the competing concerns or represents the soundest public policy. Such is not our responsibility or our province. We simply conclude, as a matter of statutory construction, that application of the statutes' plain terms to the circumstances of this case does not produce absurd results that are clearly contrary to the Legislature's intent. Of course, the Legislature is free to reconsider whether the mediation confidentiality statutes should preclude the use of mediation-related attorney-client discussions to support a client's civil claims of malpractice against his or her attorneys.

(*Cassel*, 51 Cal.4th at 136.)

The Legislature took the Supreme Court up on its suggestion and in 2012 directed the California Law Revision Commission ("CLRC") to analyze "the relationship under current law between mediation confidentiality and attorney malpractice and other misconduct." The CLRC was authorized to "make any recommendations that it deems appropriate for the revision of California law to balance the competing public interests between confidentiality and accountability." (California Law Revision Commission, *Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct*, Summary of Recommendation (Dec. 2017).)

The CLRC recommended an exception to the statutory mediation confidentiality scheme in order to legislatively overrule *Cassel* and permit otherwise confidential information to be used in disciplinary proceedings or a malpractice action, despite overwhelming objection from a wide range of interested parties, including judges, mediators, and the plaintiff and defense bars, which took the unusual step of sending a joint letter of opposition. Because the recommendation was almost universally opposed, the recommendation was never even introduced in the Legislature.

Consequently, the Legislature took a different approach – one that preserved the existing mediation confidentiality scheme but undertook to ensure that clients are fully informed of the disclosure limitations in mediation. This informed consent is to be obtained by the attorney after the attorney ensures that the client understands the limitations, specifically including the inability to use any confidential communications or writings in any non-criminal action for malpractice or an ethical violation.

The real value of the attorney-client disclosure and acknowledgment

In a considerable number of mediations conducted since the new law took effect on January 1, 2019, I have discovered that many attorneys are not even aware of the mandates of Evidence Code section 1129. Many do not seem to understand that this is now a responsibility of counsel; they think that the mediators' own mediation confidentiality agreements cover the obligation.

That is wrong. Evidence Code section 1129 imposes a new duty on *attorneys*. In my view, this new law requires a level of qualitative communication that will:

- Thoroughly inform the client about the process, value, and confidentiality restrictions in mediation;
- Lead to greater client satisfaction;
- Actually *protect* attorneys from claims of malpractice or ethical violations in connection with mediation; and
- Support the California policy of maintaining strict confidentiality of everything said and done in mediation.

Evidence Code Section 1129 protects your clients

Mediators frequently observe plaintiffs' attorneys apparently meeting their clients to discuss mediation for the first time in a conference room just moments before the mediation is set to begin. In light of section 1129, this approach would be *risky* because counsel must make the disclosure and obtain the written acknowledgement "as soon as reasonably possible *before* the client agrees to participate in the mediation or mediation consultation." (Emphasis added.)

The initial meeting with the clients provides a perfect opportunity for the attorney to explain in detail the options

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that are available to resolve the clients' claims and help them reach their goals. This forces counsel to have substantive and solution-oriented conversations with potential clients at the very outset of the relationship. Clarity is the key to providing value.

Most attorneys want to keep things simple for their clients, but also shy away from difficult conversations with them. For example, many attorneys are uncomfortable talking with clients about money. Many attorneys also fail to communicate with their clients about case progress. And, of course, it may be tremendously difficult to explain shifts in the case value based on facts that may develop in the course of discovery, or if the attorney discovers information that impairs the likelihood of success on the claim, such as credibility issues. Now, the law requires you to have a talk with your clients about the possibility that they may sue you!

Consider relaxing about the idea of having this kind of conversation by putting yourself in the shoes of a client depending on you to have "justice" done and getting them the best settlement possible. Consider how delivering "bad" information in a "difficult" conversation may well paint you as a more understanding and compassionate lawyer. It will. And your clients will feel cared for and protected.

I constantly read complaints from clients who claim their attorneys bullied them into settling, whose attorneys threatened to withdraw if they didn't settle, or who developed a change of heart after signing a settlement agreement. Mediation has become so commonplace that clients deserve to know how the process works as early as possible. If the section 1129 conversation is held at the time the attorney-client relationship is established, then this conversation develops the clients' perception that their attorneys care about them and will suggest pragmatic approaches to resolving their claim.

Consider the case of Maria and George, for example. Perhaps you determined their "preferred language" before they even made the appointment to meet with you. You know that they speak both English and Spanish. Maybe you have a regular spiel that never even includes a discussion of mediation. You should confirm the clients' preferred language, both spoken and written, in order to print the Mediation Disclosure Notification and Acknowledgement form in advance and be prepared to explain it. Court-qualified translation and interpretation services may be required.

The "preferred language" requirement may have wider implications than just the issue of informed consent about mediation. For example, if the mediation disclosure document must be in the clients' "preferred language," does that suggest that the language of your retainer agreement and any other agreements or communications with your office should be in the same language? After all, the clients need to be clear on their obligations as well as yours, and may well ignore important communications if they are not in their "preferred language."

Under Evidence Code section 1129, you cannot avoid talking about the fact that mediation confidentiality means that if Maria and George decided to sue you for malpractice based on your conduct in connection with the mediation, they would not be able to use any mediation-related communications or writings between you to support their case.

The transparency required by this new law directly protects clients through the mechanism of informed consent. The fact that the attorney delivers a full explanation, in writing, in the clients' preferred language, boosts trust in the process and the attorney. Clients who understand the voluntariness of settlement, and the fact that any mediation communications – either before or during a mediation session – could not be used to prove a malpractice claim, will necessarily be more invested in the mediation process. Consequently, with the protection of "informed consent," clients can be empowered to participate meaningfully in determining the outcome of their case with counsel's guidance and recommendations.

Having discussed the case in detail, having heard your initial thoughts on how to proceed, and having executed the Mediation Disclosure Notification and Acknowledgement that is printed in their preferred language, Maria and George are fully informed and involved.

Evidence Code section 1129 protects attorneys too

Perhaps you are thinking that this new law is likely to affect your entire intake and communication processes and cost more money on interpretation and translation services. Perhaps you worry that this much information about only one part of the litigation process requires more time spent with the client on all the other possible proceedings in litigation.

Chances are that you are already covering the other bases in your intake process, especially in your retainer agreement. Taking more time to explain your retainer agreement and having it translated into the clients' "preferred language" may cost more but would be helpful to you in ensuring that the clients truly understand the terms of the agreement. Identifying and *talking about* clients' concerns, especially money, attorney compensation, *and* settlement, builds more transparency and comfort in the attorney-client relationship.

The value to the attorney of the clients truly understanding the mediation confidentiality restrictions, particularly in any potential malpractice action, cannot be overstated. The most likely result will be *preventing* malpractice actions based on mediation-related conduct.

A signed "informed consent" form in language provided by statute would be compelling evidence against claims that the client never understood the confidentiality of the mediation proceeding. The disclosure document is expressly admissible under Evidence Code section 1122(a)(3) to determine whether an attorney has complied with section 1129.

More importantly, the likelihood of an action for mediation-related malpractice or ethical violation would be reduced because you have taken the time to

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explain the mediation process and confidentiality restrictions, and obtained the signed disclosure and acknowledgment using the statutory "safe harbor" language. In short, this approach:

- Is a good way to manage client expectations,
- Is more likely to lead to sustainable settlements,
- Reduces the risk that the clients will experience settlers' remorse,
- Reduces the risk that the clients might be unhappy with your services and sue you for mediation-related malpractice, and
- Increases the likelihood that the clients not only will be satisfied with your services but will also refer others to you in the future.

Time and again, I have found that the clients who are well informed about the negotiation process in mediation, the need to try to understand all sides' positions in the case, the facts and law that strengthen or weaken their own position, and the risks and delays inherent in moving forward without settling, are the best prepared and work most cooperatively with their attorneys – and the opposition – in mediation. While this approach empowers the clients, it also elevates the clients' view of how prepared their attorneys are, and generates greater confidence and trust in their attorneys' advice.

Evidence Code section 1129 protects clients and lawyers

Mandatory "informed consent" about mediation confidentiality protects clients *and* lawyers. Those of us who champion the mediation process as a first-choice method of resolving legal disputes know that the best solutions emerge not only from the mediators' work, but also from the work of fully prepared clients and lawyers. So the mediation process benefits as well. Evidence Code Section 1129 may be a "win-win-win" proposition.

And Maria and George? Well, they couldn't tell me about their conversation with you due to the attorney-client privilege, but they were very happy with the meeting. And with you.

See Disclosure Form below

Rande S. Sotomayor is a Los Angeles-based mediator with 35 years of commercial litigation and dispute resolution experience, now specializing in business, real property, employment, personal injury, insurance bad faith, and ERISA benefits disputes. Rande is a Fellow in the International Academy of Mediators and has been named a Top Attorney by Pasadena Magazine from 2016 through 2019. Rande also was selected to serve as a professional mediator, judge, and trainer for the ICC International Commercial Mediation Competition in Paris, France, 2016-2019.

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 Client]

_____
[Date signed]