

Protecting Mediation Confidentiality

On January 1, 2019, California Evidence Code Section 1129 became effective. Section 1129 requires an attorney to provide clients with a written disclosure containing confidentiality restrictions and obtain a client's signature confirming the client has read and understands the confidentiality restrictions. California attorneys must make take these precautions as soon as reasonably possible *before* the client agrees to participate in mediation. Accordingly, attorneys cannot wait until the mediation or pre-mediation meeting to comply with the code. While attorneys may view this requirement as an annoying unnecessary hurdle, Section 1129 protects both counsel and their client.

In 1998, mediation confidentiality was codified. The Legislature enacted Evidence Code Sections 1115-1128 recognizing the need for confidentiality and understanding the unlikely chance a case will go to trial. The California Supreme Court unanimously upheld the exclusion of confidential mediation evidence.

In 2012, the Legislature created a Law Revision Commission to examine how mediation confidentiality affects attorney accountability. In 2017, the Commission issued a final recommendation and proposed legislation to allow evidence of mediation communications in cases involving lawyer misconduct and billing disputes. The public, including the plaintiffs' bar, defense bar and courts, overwhelmingly opposed the Commission's recommendation to partially remove mediation confidentiality.

Evidence Code Section 1129 was created as a compromise. Mediation confidentiality still exists, even in a subsequent legal malpractice action. However, counsel now have the added obligation of obtaining written informed consent from clients. This written consent includes ensuring clients understand they may not use any communications from mediation against their own counsel in a malpractice action, even if the malpractice action arises from communications during mediation. While the disclosure and signature requirement may seem like an unnecessary hassle, this requirement is beneficial to both counsel and clients. Section 1129 ensures mediation confidentiality is maintained and safeguards clients with knowledge before they agree to pay or attend a mediation. It is important for all attorneys to put practices and procedures in place to ensure Section 1129 is obeyed to ensure counsel, client, and mediation confidentiality are all fully protected.

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