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SB-954 Mediation: confidentiality: disclosure. (2017-2018)

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Senate Bill No. 954

CHAPTER 350

An act to amend Section 1122 of, and to add Section 1129 to, the Evidence Code, relating to mediation.

[Approved by Governor September 11, 2018. Filed with Secretary of State September 11, 2018.]

LEGISLATIVE COUNSEL'S DIGEST

SB 954, Wieckowski. Mediation: confidentiality: disclosure.

Under existing law, if a person consults a mediator or consulting service for the purpose of retaining mediation services, or if persons agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving a civil dispute, anything said in the course of a mediation consultation or in the course of the mediation is not admissible in evidence nor subject to discovery, and all communications, negotiations, and settlement discussions by and between participants or mediators are confidential, except as specified.

This bill would, except in the case of a class or representative action, require an attorney representing a person participating in a mediation or a mediation consultation to provide his or her client, as soon as reasonably possible before the client agrees to participate in the mediation or mediation consultation, with a printed disclosure, as specified, containing the confidentiality restrictions related to mediation, and to obtain a printed acknowledgment signed by that client stating that he or she has read and understands the confidentiality restrictions. If an attorney is retained after an individual agrees to participate in a mediation or mediation consultation, the bill would require the attorney to comply with the printed disclosure and acknowledgment requirements as soon as reasonably possible after being retained. The bill would specify language that would be deemed compliant with the aforementioned printed disclosure and acknowledgment requirements. The bill would also provide that the failure of an attorney to comply with these disclosure requirements does not invalidate an agreement prepared in the course of, or pursuant to, a mediation. The bill would further provide that a communication, document, or writing related to an attorney's compliance with the disclosure requirements is not confidential and may be used in an attorney disciplinary proceeding if the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation.

Vote: majority Appropriation: no Fiscal Committee: no Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 1122 of the Evidence Code is amended to read:

1122. (a) A communication or a writing, as defined in Section 250, that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if any of the following conditions are satisfied:

(1) All persons who conduct or otherwise participate in the mediation expressly agree in writing, or orally in accordance with Section 1118, to disclosure of the communication, document, or writing.

(2) The communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree in writing, or orally in accordance with Section 1118, to its disclosure, and the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation.

(3) The communication, document, or writing is related to an attorney's compliance with the requirements described in Section 1129 and does not disclose anything said or done or any admission made in the course of the mediation, in which case the communication, document, or writing may be used in an attorney disciplinary proceeding to determine whether the attorney has complied with Section 1129.

(b) For purposes of subdivision (a), if the neutral person who conducts a mediation expressly agrees to disclosure, that agreement also binds any other person described in subdivision (b) of Section 1115.

SEC. 2. Section 1129 is added to the Evidence Code, to read:

1129. (a) Except in the case of a class or representative action, an attorney representing a client participating in a mediation or a mediation consultation shall, as soon as reasonably possible before the client agrees to participate in the mediation or mediation consultation, 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.

(b) 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).

(c) The printed disclosure required by subdivision (a) 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.

(3) Include the names of the attorney and the client and be signed and dated by the attorney and the client.

(d) If the requirements in subdivision (c) are met, the following disclosure shall be deemed to comply with the requirements of subdivision (a):

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]

(e) Failure 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.