California Mediation Privilege Remains; Mediation Disclosures To Appear In 2019

Recently, California legislators passed SB 954 creating a new pre-mediation requirement – the prospective Mediation Disclosure. "As soon as reasonably possible" before agreeing to mediate, attorneys are to present to clients a Mediation Disclosure affirmatively explaining mediation's confidentiality restrictions, execution of which acknowledges the client's understanding of the restriction's impact. Did the September signing of SB 954 settle the tension between encouraging candor in mediation and holding counsel accountable to professional and moral obligations? Not likely. In fact, SB 954 may create more uncertainty than clarity. The new law, effective January 1, 2019, applies to all matters except class or representative actions.

A little background. Parties are encouraged to engage in alternative dispute resolution ("ADR"); i.e., resolving conflicts outside of the courtroom, by many sources including the Legislature and the courts themselves. The concept is simple – more settling and fewer trials limits the strain on the finite and perpetually under-funded court resources. Mediation, a type of privately funded voluntary ADR, provides potential litigants the most flexibility to negotiate their claims. The California Evidence Code shrouds mediation discussions and documents in a cloak of privilege, blocking admissibility of mediation information later in trial should the mediation fall short of settlement. This privilege allows a free exchange of information to encourage resolution without fear of one's candor being turned against oneself in the courtroom.

Some argue the mediation privilege also protects unethical attorneys from prosecution for their wrongdoing. While examples remain rare, attorneys may, in the mediation context, present false information to induce the opposing side to settle or pressure their own clients to settle on less than ideal terms for personal gain – and the mediation privilege may keep evidence of the poor practices out of the resulting malpractice claim against the offending attorney. In 2012 the Legislature sent the California Law Revision Commission (CLRC) off on a five year journey studying malpractice and mediation. The result was the CLRC recommendation to allow disclosure of mediation privileged information in State Bar disciplinary actions or malpractice cases. Many opposed permitting disclosure arguing it would chill settlement discussions.
SB 954 was born as an intermediate approach between the status quo and permitting disclosure of mediation privileged communications. Promoting transparency, SB 954 adds Section 1129 to the California Evidence Code requiring a single-page, standalone disclosure to be provided to clients in advance of an agreement to participate in mediation (if possible) describing the confidential nature of mediation proceedings and preparatory work even if one later decides to sue their attorney for malpractice. The client must sign the disclosure, an exemplar of which is included at Section 1129(d), before agreeing to mediation.

Some interesting questions arise. Do clients involved in a pending matter need to sign a mediation disclosure before engaging in 2019 mediation even if it is already set? The language of Section 1129(b) would indicate the answer is yes. What about parties finalizing a contract that includes an ADR provision calling for mediation? While the law is clearly aimed at attorney representation, the best practice would be for contracting parties to either state their agreement to engage in mediation in compliance with Evidence Code section 1129 or include signed mediation disclosures as exhibits to the contract. Additionally, due to the voluntary nature of mediation, it’s advisable to have the contracting parties sign a second mediation disclosure should a dispute arise and mediation be contemplated in response. Are mediation disclosures required for matters removed to federal court? It is unclear, but again advisable. And just what is the consequence for failure to obtain signed mediation disclosures; perhaps a malpractice action, a loss of confidentiality? While an agreement made in or pursuant to the mediation will not be invalidated, the law provides no remedy for non-compliance, but one can speculate it will involve more litigation.

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