

# JUDICIAL COUNCIL OF CALIFORNIA

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## INVITATION TO COMMENT

### SP19-09

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<b>Title</b>	<b>Action Requested</b>
Alternative Dispute Resolution: Mediation Confidentiality Disclosures Under Senate Bill 954	Review and submit comments by June 10, 2019.
<b>Proposed Rules, Forms, Standards, or Statutes</b>	<b>Proposed Effective Date</b>
Approve form ADR-200	January 1, 2020
<b>Proposed by</b>	<b>Contact</b>
Civil and Small Claims Advisory Committee Hon. Ann I. Jones, Chair	Kristi Morioka, Attorney, Legal Services 916-643-7056 phone <a href="mailto:kristi.morioka@jud.ca.gov">kristi.morioka@jud.ca.gov</a>

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### Executive Summary and Origin

The Civil and Small Claims Advisory Committee proposes a new form for Judicial Council approval, *Mediation Disclosure Notification and Acknowledgment* (form ADR-200). This optional form serves to facilitate parties in implementing the requirements of Senate Bill 954 (Stats. 2018, ch. 350), which requires attorneys to provide their clients with specific written mediation confidentiality disclosures when they are representing clients in connection with mediation.

### Background

In 2017, the California Law Revision Commission made a recommendation to the Legislature that the statutes regarding confidentiality of mediation be revised to permit disclosure of otherwise confidential communications in a State Bar disciplinary proceeding or a cause of action for damages based on a claim of malpractice. This recommendation was vehemently opposed by many and was not enacted. However, the Legislature decided to address some of the concerns reflected in that recommendation—concerns that consumers were not always aware that they would not be able to use the communications in a mediation in a later challenge to that attorney’s actions. SB 954 was enacted to create a way to improve consumer awareness regarding the confidentiality of the mediation process.

On September 11, 2018, Governor Brown signed SB 954 into law, requiring attorneys to provide their clients with specific written mediation confidentiality disclosures when they are

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representing clients in mediation.. The law, which went into effect January 1, 2019, amends Evidence Code section 1122 and adds section 1129 requiring printed disclosures to mediation participants concerning mediation confidentiality.

## **The Proposal**

The Evidence Code carries the strong legislative sentiment that what happens in mediation should remain confidential. The rationale is that to encourage honest communication in furtherance of settling a case, the parties should feel free to express themselves without risk that the settlement discussions will prejudice them if the negotiations fail. Because this confidentiality also means that the communications cannot be used in any civil actions against the attorney, SB 954 requires an attorney representing a client participating in mediation to provide a disclosure informing the client of those restrictions, warning that the communications cannot be used even if the client later seeks to sue the attorney in a malpractice action. SB 954 provides the following in new Evidence Code section 1129:

- An attorney must provide the disclosures to the client before the client agrees to participate in mediation if the attorney represents the client at the time;
- An attorney must provide the disclosures after being retained if the attorney is retained after the client agrees to participate in mediation;
- The disclosure requirement does not apply in class or representative actions;
- The printed disclosure must meet specified format requirements (12-point font; be in the preferred language of the client; be on a single, discrete page; and include the names and signatures of attorney and client); and
- A disclosure that uses the text set out in the statute and meets the specified format requirements is deemed to comply with the statute.

The bill also amends Evidence Code section 1122(a) to allow a further exception to the confidentiality provisions for evidence relating to the attorney's compliance with new section 1129.<sup>1</sup>

The point of the form and notice is to inform the client that anything said at a mediation not only cannot be used against the client, but also cannot be used against the attorney. The concern is that parties may not realize that the communications can never be used against an attorney even if the attorney commits malpractice and the party is willing to waive the confidentiality. The goal is to give the information to the client as early as possible, so the client can decide whether he or she wants to engage in mediation.

The proposed optional form would provide attorneys with a uniform document to provide to their clients that complies with the Evidence Code eliminating the need to create their own disclosure statement. This would also eliminate the need for courts to develop local forms, if they chose to

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<sup>1</sup> SB 954 may be viewed at [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201720180SB954](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB954).

do so voluntarily. The committee concluded that the form would provide uniformity and consistency.

Evidence Code section 1129 requires that an attorney representing a client who is participating in mediation must provide the client with a printed disclosure with the confidentiality provisions described in this code section and obtain a signed acknowledgment that the client has read and understands the restrictions. The proposed form contains the text that the statute provides as a safe harbor, and conforms to the layout requirements of the statute that the disclosure and acknowledgment must:

- Be printed 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;
- Be signed and dated by the attorney and the client; and
- Contain text substantially similar to the text stated in the disclosure form set out in the statute.

The form complies with the above requirements in that it is a simple one-page document in 12-point font, not attached to another document. It includes the name of the attorney and client and a place for the client to sign and a place for the attorney to sign. The form also contains a heading for the attorney to complete. There is a section for the information regarding the confidentiality restrictions and a section for the client to acknowledge he or she has received and understands the information. There are signature lines for the client and the attorney. Two signature lines are provided for attorneys in the event that more than one attorney represents the client in the matter. The committee is seeking input on whether there should be lines for multiple clients or whether each client should sign a separate acknowledgment.

The statute also requires that the form be presented in the preferred language of the client; under the current proposal, it will be up to each attorney to determine if the form should be translated and in what language to provide it.

### **Alternatives Considered**

The committee noted that the statute does not require action on the part of the Judicial Council but ultimately decided that, for the sake of consistency and uniformity and to promote disclosure requirements, an optional form provided the best solution for the legal community as a whole.

The committee also considered whether any changes to rules or ethical standards were appropriate considering the new mediation disclosure requirements, but ultimately decided that the statute did not require any changes to be implemented.

## **Fiscal and Operational Impacts**

The committee does not foresee any fiscal impacts to the courts because the form is optional and not for court use. For that same reason, limited training needs are anticipated.

### **Request for Specific Comments**

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Should there be multiple signature lines for multiple clients or should each client sign a separate acknowledgment?
- Should there be signature lines for more than one attorney? The form currently has signature space for up to two attorneys.

## **Attachments and Links**

1. Form ADR-200, at page 5
2. Senate Bill 954,  
[https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201720180SB954](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB954)

**DRAFT**  
**03-28-19**

ATTORNEY NAME:	STATE BAR NO.:
FIRM NAME:	
STREET ADDRESS:	
CITY:	STATE:      ZIP CODE:
TELEPHONE NO.:	E-MAIL ADDRESS:

**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.

**Acknowledgment:** 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.

Date: \_\_\_\_\_

\_\_\_\_\_ (TYPE OR PRINT CLIENT NAME)      ► \_\_\_\_\_ (SIGNATURE OF CLIENT)

Date: \_\_\_\_\_

\_\_\_\_\_ (TYPE OR PRINT ATTORNEY NAME)      ► \_\_\_\_\_ (SIGNATURE OF ATTORNEY)

Date: \_\_\_\_\_

\_\_\_\_\_ (TYPE OR PRINT ATTORNEY NAME)      ► \_\_\_\_\_ (SIGNATURE OF ATTORNEY)