

The Mediation Process and Confidentiality



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Mediation is a process consisting of various stages. First in the mediation process is preparation. Agreed upon dates, times, fees, number of participants, and ground rules must be decided and set. A letter to all parties confirming these aspects should be sent, accompanied by an invitation to submit a written brief. The next stage in the mediation process consists of the opening. The opening allows for introductions between all parties as well as introduction of the mediator. As the mediator, I ask the parties to recognize me as their mediator in the dispute. Then I invite consent from them. I also ask for agreement on the ground rules, especially as such rules regard civil behavior. I explain the key elements of the California Evidence Code Sections 1115-1128 that lay out the specifics of confidentiality as it applies to mediation in the State of California.

Section 1115 defines a mediator as a neutral person who conducts a mediation. It extends the definition to any assistants or co-mediators. Section 1120 states evidence otherwise admissible or discoverable will not become protected merely because it was presented during the mediation process. Section 1121 states no documents of the mediation may be submitted to the court or other adjudicative body unless expressly agreed to by all parties in the mediation. The exception is a report stating whether an agreement was reached. Section 1123 states a written settlement agreement prepared in mediation is admissible to the court and not protected by confidentiality if any of the following conditions is satisfied:

1. The agreement provides that it is admissible or subject to disclosure;
2. The agreement provides that it is enforceable, or binding, or words to that effect;
3. All parties expressly agree in writing (or orally if in accordance with Section 1118);
4. The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

Section 1125 states confidentiality remains in effect until the mediation ends, and Section 1128 states any reference to a mediation during any other subsequent non-criminal proceeding is grounds for vacating or modifying the decision in that proceeding. Finally, Section 703.5 states no mediator shall be competent to testify in any subsequent civil proceeding as to any statement, conduct, decision, or ruling occurring at the mediation with the exception of a statement or conduct that could give rise to civil or criminal contempt; constitute a crime; be the subject of investigation by the State Bar or Commission on Judicial Performance, or give rise to disqualification proceedings.

In sum, these Code Sections mean mediators must establish a clear understanding regarding the confidentiality of each document presented or created in the mediation. Settlement agreements should specifically state they are admissible, enforceable, and binding if that is the intent of the parties. And any oral agreements made during the mediation must be reduced to writing if they are to be enforceable. The mediator must be clear with the parties on the issue of confidentiality. In order for the parties to mediate in good faith, they have to trust the process. Without confidentiality, the mediation falls apart.

Essentially the process of mediation necessitates resolving interpersonal disputes. To do this requires the mediator to educate the parties about the process itself and to explain the benefits of coming to an agreement. Parties want to be heard, so the mediator's job is to listen. Often the mediation can be the first opportunity parties have for someone to fully listen to their story. But the mediator must remain impartial; especially because parties will be anxious to convince the mediator they are right.

However, the mediator's job is to remind the parties that mediation is not a place to determine right and wrong. Instead, mediation is a process to assist with moving the dispute forward towards agreement with the parties taking ownership of the agreement process themselves. The mediator is there to help the parties look to the future rather than to the past.