



JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue · San Francisco, California 94102-3688

www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

For business meeting on: September 24, 2019

Title

Alternative Dispute Resolution (ADR):
Mediation Confidentiality Disclosures Under
Senate Bill 954

Rules, Forms, Standards, or Statutes Affected

Approve form ADR-200

Recommended by

Civil and Small Claims Advisory Committee
Hon. Ann I. Jones, Chair

Agenda Item Type

Action Required

Effective Date

January 1, 2020

Date of Report

August 19, 2019

Contact

Kristi Morioka, Attorney,
916-643-7056
kristi.morioka@jud.ca.gov

Executive Summary

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 implements 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.

Recommendation

The Civil and Small Claims Advisory Committee recommends that the Judicial Council approve *Mediation Disclosure Notification and Acknowledgment* (form ADR-200), effective January 1, 2020.

The new form is attached at page 6.

Relevant Previous Council Action

This is a new legislative requirement and as such, the Judicial Council has not taken any previous action on this matter.

Analysis/Rationale

In 2017, the California Law Revision Commission made a recommendation to the Legislature that the statutes regarding mediation confidentiality be amended 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 often unaware 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 increase 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 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 Evidence Code reflects 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 and 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 the 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 amended 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.

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. The statute also requires that the form be presented in the preferred language of the client. Attorneys may provide translated forms in the languages needed by their clients.

Form ADR-200 informs the client that anything said at a mediation not only cannot be used against the client, but also cannot be used against the client's attorney. Without this form, 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 of the proceeding. 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 statements. The committee concluded that the form would provide uniformity and consistency.

Policy implications

The policy implications of informing consumers of legal mediation services arise from the legislation and not this proposal.

Comments

This proposal was circulated for public comment from April 11 to June 10, 2019, as part of the regular spring rules cycle. The committee received comments from 10 entities including two courts, the Superior Courts of San Diego and Los Angeles Counties, four mediators/ADR administrators, a legislative director for the California Senate, the California Lawyers Association (Committee on Administration of Justice of the Litigation Section and the Executive Committee of the Family Law Section), and the Orange County Bar Association. The commenters that answered the questions posed in the proposal all indicated that the proposal appropriately addressed the stated purpose. The committee considered all comments; discussed below are the primary issues raised by the comments.

Signature blocks

Although the model disclosure language provided in Evidence code section 1129(d) provides one signature line for an attorney and one signature line for a client, nothing in the remainder of the section specifies the number of signature lines for either the attorney or the client. The committee recognized that there may be instances when there would be more than one client or more than one attorney participating in mediation, and that it could be helpful for the form to allow multiple signature lines for each. The committee circulated a draft form that had one signature line for the client, (consistent with subdivision (d)), but two signature lines for the attorneys (a departure from subdivision(d)). The proposal requested specific comments on whether there should be multiple signature lines for attorneys and clients.

Overwhelmingly, the commenters all wanted each client to receive, acknowledge, and sign their own form to create a better record that each client received a copy of the form and independently reviewed it. The proposed form therefore includes only one signature line for the client.

Although there were commenters that agreed with the proposal to include two attorney signature lines, the committee was ultimately persuaded by the two commenters that advocated for including only one attorney signature line per form because, like the reasoning above, it would create a better record if there were a separate form for each attorney that made the disclosure. The committee revised the form to provide one attorney signature line.

Other comments

The committee was of the view that it could provide additional clarification to the language of the statute. As circulated, therefore, the form included the word “Acknowledgement” in boldface in the middle of the page, to delineate one section from another. One commenter suggested that this should be deleted because it changes the meaning of the form by stressing some parts and not others. The committee agreed with this reasoning and removed “Acknowledgment” from the form.

Two commenters suggested adding language to the form to provide more specific information to the client. The first suggestion was to provide a more specific introduction to the Mediation Disclosure Notification and Acknowledgment: “Given that the preservation of confidentiality is considered essential to the proper functioning of mediation for parties to speak with candidness, California law generally makes mediation a confidential process.” The committee considered this proposed language but decided it was sufficient to use the language in Evidence Code section 1129(d). This form is optional; attorneys can prepare their own forms if they want to use different language.

The second suggestion was to add language to the form to clarify that it is not intended for court use or is not to be filed with the court or similar words to that effect. The commenter suggested that neither the court, the mediator, nor its ADR program should be responsible for monitoring the compliance or failure of the attorney to meet this requirement. It is clear from the absence of a space for a case number or a file endorsement stamp that this form is not to be filed. Also, the statute requires 12-point font and a single page document. Given these space limitations these requirements impose, the committee did not choose to adopt this suggestion.

Another commenter suggested that the committee should provide an information sheet regarding mediation confidentiality. This suggestion may be considered by the committee as a proposal in the next rule-making cycle.

Finally, one commenter suggested that the form be translated into several different languages including Spanish, Chinese, Korean, Vietnamese, and Tagalog. Requests for translation of Judicial Council forms and other documents are referred to the Court Language Access Services

Program for consideration under the priorities set forth in the Judicial Council’s [Translation Protocol](#)¹ and [Translation Action Plan](#)².

Alternatives considered

The committee noted that the statute does not require the Judicial Council to adopt a form, but the committee ultimately decided that, for the sake of convenience to attorneys and to promote disclosure requirements, an optional form would be useful.

The committee also considered whether any changes to rules were needed—considering the new mediation disclosure requirements—but concluded that none were necessary.

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, no training needs are anticipated.

Attachments and Links

1. Form ADR-200, at page 6
2. Chart of comments, at pages 7–15
3. Link A: Evidence Code section 1129,
https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1129.&lawCode=EVID
4. Link B: Senate Bill 954 (Stats. 2018, ch. 350),
https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB954

¹ See Translation Protocol at <https://www.courts.ca.gov/documents/lap-Translation-Protocol.pdf>

² See Translation Action Plan at <https://www.courts.ca.gov/documents/lap-Translation-Action-Plan.pdf>

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

DRAFT

**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.

Date:

(TYPE OR PRINT CLIENT NAME)

 _____
(SIGNATURE OF CLIENT)

Date:

(TYPE OR PRINT ATTORNEY NAME)

 _____
(SIGNATURE OF ATTORNEY)

SPR19-09

Alternative Dispute Resolution: Mediation Confidentiality Disclosures Under Senate Bill 954 (Approve form ADR-200)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Responses
1.	Alcantara, Jennifer B. Senior Managing Attorney Superior Court of California, County of San Mateo	NI	<p>1. Does the proposal appropriately address the stated purpose? Yes</p> <p>2. Should there be multiple signature lines for multiple clients or should each client sign a separate acknowledgment? Each client should sign a separate acknowledgement form to account for the “preferred language” requirement (i.e. 2 or more clients with different preferred languages) and to recognize the separate/distinct malpractice claims multiple clients may have.</p> <p>3. Should there be signature lines for more than one attorney? Neutral - I think 2 lines is enough but I am not in private practice.</p> <p>4. Clarify the form use by adding language that the form is not intended for court use or is not to be filed with the court or words to that effect. Neither the court, the mediator, nor its ADR program should be responsible for monitoring the compliance or failure of the attorney to meet this requirement in the underlying case that is before the court.</p>	<p>The committee appreciates the comments.</p> <p>The proposed form will provide only one client signature line.</p> <p>No response needed.</p> <p>It’s clear from the absence of a space for a case number or a file endorsement stamp that this form is not to be filed. Also, the statute requires 12-point font and a single page document. Given these space limitations the committee does not choose to adopt this suggestion.</p>
2.	California Lawyers Association, Executive Committee of the Family Law Section	A	In response to the request for specific comments about the number of signature lines on the form, FLEXCOM suggests one signature line for each client and one for the attorney. This might	The committee appreciates the comments. The committee agrees with this comment. The proposed form will provide only one client signature line. The proposed form has

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

SPR19-09**Alternative Dispute Resolution: Mediation Confidentiality Disclosures Under Senate Bill 954
(Approve form ADR-200)**

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Responses
	By Saul Bercovitch, Director of Governmental Affairs California Lawyers Association		create a better record that each client received a copy of the form and independently reviewed it.	also been revised to include a single line for one attorney.
3.	Durazo, Yvette, MA ACC ADR Program Administrator	A	<p>Put also emphasize on the benefit for the parties, and not just only that this form is a protection for the attorneys in case of a malpractice legal action against the attorney.</p> <p>Thank you for taking into consideration my comment. What I was thinking is along the lines as to the 'why' this new Bill is of value to the parties.</p> <p>Here is a more specific introduction to the Mediation Disclosure Notification and Acknowledgment, I may suggest.</p> <p>Given that the preservation of confidentiality is considered essential to the proper functioning of mediation for parties to speak with candidness, California law generally makes mediation a confidential process.</p> <p>Clients will rarely go to read Section 703.5, 1115 through 1129 of Evidence Code, therefore I think it is important to write Mediation Disclosure Notification and Acknowledgment form in such a way that demonstrates the Ca law wants to protect our confidentiality, and at the same time protect attorneys for malpractice.</p>	<p>The committee appreciates the comments.</p> <p>The committee considered the proposal but decided it was sufficient to use the language in Evidence Code 1129(d). This form is optional; attorneys can prepare their own forms if they want to use different language.</p>

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

SPR19-09

**Alternative Dispute Resolution: Mediation Confidentiality Disclosures Under Senate Bill 954
(Approve form ADR-200)**

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Responses
4.	Kelly, Ron Private Mediator Berkeley, California	NI	<p>I write to you as someone who was centrally involved in the negotiations which crafted Senate Bill 954, and also served as lead expert adviser in the late 90s in drafting the chapter of the Evidence Code which this bill amended. I respectfully request that you:</p> <p>1. Provide a very short instruction/information sheet incorporating and combining the points in the excellent summaries found in the bullet points on pages 2 and 3 of the Invitation to Comment, and,</p> <p>2. Translate and publish the form in at least the four additional common California languages in which I understand the Council has often provided forms in the past. I understand these to be Spanish, Chinese, Korean, and Vietnamese. Please also consider adding Tagalog. Providing these translations would be an enormous service to both clients and their attorneys. The Council can provide these translations in a uniform and professional manner without the concern for the liability that a non-governmental party might incur.</p>	<p>The committee appreciates the comments.</p> <p>The committee may consider this proposal in the next rule making cycle.</p> <p>Requests for translation of Judicial Council forms and other documents are referred to the Court Language Access Services Program for consideration under the priorities set forth in the Judicial Council’s Translation Protocol and Translation Action Plan. See Translation Protocol at https://www.courts.ca.gov/documents/lap-Translation-Protocol.pdf and the Translation Action Plan at https://www.courts.ca.gov/documents/lap-Translation-Action-Plan.pdf</p>
5.	Orange County Bar Association By Deirdre Kelly, President	AM	1) At the third paragraph of the proposed form, in bold, “Acknowledgment:” has been inserted, contrary to the safe harbor language of Evidence Code §1129(d). This appears to be an	<p>The committee appreciates the comments. The committee agrees with the removal of the bold type word “Acknowledgment” for the reasons articulated by the commenter.</p>

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

SPR19-09

**Alternative Dispute Resolution: Mediation Confidentiality Disclosures Under Senate Bill 954
(Approve form ADR-200)**

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Responses
			<p>effort to designate the paragraph as “the” acknowledgment discussed throughout Evidence Code §1129. Accordingly, the proposed form should be modified to remove the inserted term and include only the safe harbor language as set forth in Evidence Code §1129.</p> <p>Evidence Code §1129 contemplated that the whole of the disclosure document (as the statute refers to it), when signed by the client, would constitute their acknowledging receipt and understanding of the disclosures contained therein.</p> <p>The third paragraph does not contain the language of an acknowledgment. It does not use any form of “acknowledge,” and it does not reference the “foregoing.” Rather, it continues the educative tone and function of the disclosure document, further characterizing and describing previously mentioned concepts and containing new, additional information important to the client regarding needed agreement of all participants as to the use of mediation communications Likewise, the [n]ote which follows the third paragraph contains additional clarification and information for the client.</p> <p>Finally, it is believed inserting any designation or stressing any portion of the text over another</p>	

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

SPR19-09

**Alternative Dispute Resolution: Mediation Confidentiality Disclosures Under Senate Bill 954
(Approve form ADR-200)**

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Responses
			<p>disrupts the flow of the information provided and is detrimental to the client’s understanding of the disclosures and import of the document as a whole.</p> <p>2) At the foot of the proposed form, space has been included for two attorney signatures. For the reasons stated below in response to Request for Specific Comments, the proposed form should be modified to remove the space for an additional attorney signature.</p> <p>Responses to Request for Specific Comments</p> <p>Does the proposal appropriately address the stated purpose? Yes, provided the proposal is modified as suggested above.</p> <p>Should there be multiple signature lines for multiple clients or should each client sign a separate acknowledgement? Each client should sign a separate disclosure document for the reasons stated in response to the following question.</p> <p>Should there be signature lines for more than one attorney? The [proposed] form currently has signatures for up to two attorneys.</p>	<p>The committee agrees, and the proposed form will be modified accordingly.</p> <p>No response required.</p> <p>The committee agrees, and the proposed form will include one client signature line.</p> <p>The proposed form will be modified in accordance with this suggestion. It would create a better record if there were a separate form for each attorney that made the disclosure.</p>

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

SPR19-09

**Alternative Dispute Resolution: Mediation Confidentiality Disclosures Under Senate Bill 954
(Approve form ADR-200)**

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Responses
			<p>The wording throughout Evidence Code §1129 contemplates a single attorney providing the disclosure document to a single client. If multiple attorneys or clients were contemplated, this would have been simple to indicate.</p> <p>What was contemplated by the statute is an educative interaction between an attorney and a client, resulting in that client’s understanding and an executed form evidencing this. This process was not meant to be a pro forma activity where shortcuts for purposes of efficiency are appropriate or wise.</p> <p>To fulfill the purpose of Evidence Code §1129 and afford the level of consumer protection believed due the client, each client should review and sign their own disclosure document. This would stress the importance of the disclosures set forth and provide space in what may be a multi-party conversation for contemplation of the ramifications and implications of those disclosures, while affirming the individual’s understanding and avoiding cavalier response, groupthink, or peer pressure. As to the attorney who wishes to avail himself or herself of the strong protections afforded by the statute, each should want to make certain that it irrefutably may be said he or she actually and individually provided the required disclosure document to a particular</p>	

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

SPR19-09**Alternative Dispute Resolution: Mediation Confidentiality Disclosures Under Senate Bill 954
(Approve form ADR-200)**

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Responses
			client who then actively affirmed their understanding. To do otherwise is contrary to the language of Evidence Code §1129 and invites confusion, mischief, and challenge.	
6.	Powers, Nancy L. Trust Mediator & Trust/Estate Attorney POWERS LAW	NI	As an estate/trust lawyer for just about 4 decades, a trust dispute mediator for many years, and a past member of the Board of the Contra Costa County Bar Association ADR Section, I have been centrally involved for several years with the issues surrounding what has been crafted as Senate Bill 954. I agree with and support Ron Kelly's requests outlined below [above].	The committee appreciates the comments.
7.	Resetarits, Heather Legislative Director Sacramento, California	A	Each client should sign a separate acknowledgment document: One document per client. The rest looks good.	The committee appreciates the comments. The committee agrees with this comment and the proposed form will provide only one client signature line per form.
8.	Superior Court of California, County of Los Angeles	A	Request for Specific Comments: Does the proposal appropriately address the stated purpose? Yes, the proposal addresses the stated purpose. Should there be multiple signature lines for multiple clients or should each client sign a separate acknowledgment?	The committee appreciates the comments. No response required. The committee thanks the commenter. The proposed form will include only one client signature line.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

SPR19-09

**Alternative Dispute Resolution: Mediation Confidentiality Disclosures Under Senate Bill 954
(Approve form ADR-200)**

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Responses
			<p>Each client should sign a separate acknowledgment. A civil matter may have a large amount of parties.</p> <p>Should there be signature lines for more than one attorney? The form currently has signature space for up to two attorneys. The proposed form with space for up to two attorneys is appropriate.</p>	<p>The committee has discussed this item and the proposed form will be revised to have a signature line for one attorney. The committee agrees with an earlier commenter that it will create a better record if there were a separate form for each attorney that made the disclosure.</p>
9.	<p>Superior Court of California, County of San Diego By: Mike Roddy, Executive Officer</p>	A	<p>Q: Does the proposal appropriately address the stated purpose? Yes.</p> <p>Q: Should there be multiple signature lines for multiple clients or should each client sign a separate acknowledgment? Each client should sign a separate acknowledgment.</p> <p>Q: Should there be signature lines for more than one attorney? The form currently has signature space for up to two attorneys. The proposed form is sufficient.</p>	<p>The committee appreciates the comments. No response required.</p> <p>The proposed form will provide only one client signature line.</p> <p>The committee has discussed this item the form will be revised to have space for one attorney.</p>
10.	<p>The Committee on Administration of Justice (CAJ) of the California Lawyers Association’s Litigation Section</p>	A	<p>CAJ agrees with this proposal.</p> <p>Proposed Form ADR-200 will create a standard document that lawyers may use to comply with the Evidence Code’s new disclosure</p>	<p>The committee appreciates the comments. No response required.</p>

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

SPR19-09

**Alternative Dispute Resolution: Mediation Confidentiality Disclosures Under Senate Bill 954
(Approve form ADR-200)**

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Responses
			<p>requirements. It simply sets forth, verbatim, the statutory safe harbor language with signature lines for counsel and client. It will promote uniform practice at mediations, consistent with the statutory provisions, with the salutary benefit of increasing awareness in the bar of the new disclosure requirements.</p> <p>The Invitation to Comment contains a request for specific comments on the following question: “Should there be multiple signature lines for multiple clients or should each client sign a separate acknowledgment?” Although the statute is silent on this point, to further its consumer protection purpose, CAJ believes that each client should be required to sign a separate disclosure document. If done on one form, one client signing could potentially influence subsequent clients who must decide independently whether to sign.</p>	<p>The committee agrees with the comment and the reasoning to have one client signature line per form.</p>