

## **A Best Practices Tip: Memorialize Decisions Made at Mediation**

**By**

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As you may have heard, the legislature is considering modifications to the current “what happens in mediation, stays in mediation” rule. Evidence Code section 1119 and Cassel v. Superior Court of Los Angeles County (2011) 51 Cal4th 113. As that issue is examined by committees and recommendations are made to the legislature, here are the questions:

- If mediation confidentiality is compromised by later legislation, what should lawyers do to account for that new legislation?
- Even before any legislation is passed, is there any change in practice that a careful lawyer should implement now?

**Background:** Evidence Code section 1119 is, as noted by the Supreme Court in Cassel, “clear and absolute.” Subsection (a) renders inadmissible anything that is said at mediation, and subsection (b) bars the admissibility of any writings prepared for purposes of mediation. Of perhaps the greatest significance within this confidentiality statute, subsection (c) provides that “All communications, negotiations, or settlement discussions by and between the participants in the course of a mediation...shall remain confidential.”

In Cassel, a mediation party sought to sue his lawyer for malpractice based upon advice and other representations allegedly made during a mediation (though out of the hearing of the mediator and the other party). The party’s allegations against his lawyer, if true and if believed by a jury, would have resulted in a finding of malpractice against the lawyer. However, in reliance on the plain language of Section 1119, the California Supreme Court held that, in his claim against his lawyer, the party could not admit any evidence of anything said to him by his lawyer during the mediation, even if such communications were private as between the lawyer and the party/client. The Court went on to explain that it was merely applying the law as promulgated by the legislature, and that any changes in that law should happen within the legislative branch and not within the California courts. Hence, the designation of committees to study possible modifications of Section 1119.

If the legislature chooses to erode Section 1119, it seems likely that the first modification would pertain to advice given by a lawyer to his/her client.

Reflecting on Cassel, the legislature may wonder, “If advice that falls below the standard of care is given by a lawyer to his/her client *outside* a mediation is actionable, why should lawyers be immunized from giving such advice during a time that a mediation is in session?”

**A suggestion for best practices:** In the same way that most mediators offer to the parties/lawyers skeletal form settlement agreements to document settlements, lawyers should consider devising a form “Mediation Summary Sheet.” That form could provide blanks for entry of details about the mediation, e.g., case name and number, date, mediator, all parties present for plaintiff, all parties present for defendant, etc. Most importantly, the form would provide space for the lawyer to note issues discussed at the mediation by the other side(s), the mediator, and, perhaps most importantly, the lawyer and his/her client. Any specific advice given by the lawyer to the client should be noted. A summary of demands and offers should be shown. Finally, the client’s final decision—accept the other side’s last settlement proposal or reject it—should be recorded. The Mediation Summary Sheet should then be signed at the end of the mediation by the lawyer and client/party.

Use of a Mediation Summary Sheet should begin immediately—even before the legislature makes any changes to Section 1119—because there is risk that any change to the statute will be made retroactive.

The use of summary sheets may feel uncomfortable; as if the lawyer anticipates adversarial developments between the lawyer and his/her client. However, if the legislature chooses to eliminate any of the confidentiality protections of Section 1119, such action would probably have the principal purpose of availing clients to sue their lawyers; so preserving evidence of what really happened would be most appropriate.

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